IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 TRUST	*	**CASE NO. 2014-0485**
Appellee	*	**On Appeal from the Butler County Court of Appeals, 12th District Case Nos. CA 2012-11-0239 and CA 2013-05-0068**
-vs-	*	
SHARI LEWIS, et al.	*	
Appellant.	*	

REPLY BRIEF OF APPELLANT SHARI LEWIS

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

Cases Cited **Page**

Statutes, Treatises, and Other Sources

"Pay no attention to the man behind the curtain."

- L. Frank Baum, *The Wonderful Wizard of Oz*

REPLY ARGUMENT

SRMOF offers the Court three different propositions of law which it believes will validate the Court of Appeals's decision and lead to a conclusion that it had standing to sue because of its acquisition of an interest in the mortgage. Some of the arguments are premised on the "complexity" of modern mortgage financing. Others are based on a limited reading of the Mortgage itself. Still others find life in circumstances not before the Court. What it does not do, however, is examine the actual verbiage of the mortgage. Neither does it explore the underpinnings of the general rules on which its arguments are based. Once that is done, once the curtain is pulled back, the issues before the Court become much simpler to resolve.

FACTS REDUX:

Much of SRMOF's argument relates to the rights it claims it acquired under the Assignment of Mortgage from Selene Finance, LP in August 2011. Because so much of SRMOF's argument revolves around the contractual language of the Mortgage and the path of the Note, Lewis asks the Court to carefully review the record. Doing so will outline why the rights that were transferred by and to the various parties involved in Lewis's loan did not confer standing on SRMOF until long after suit was filed.

Where's The Note?

The complete path of the Note is not shown by the record. The record reveals that at only two points of time was the location of the note positively known.

Lewis issued the Note to First Union Mortgage Corporation on November 21, 2001. *Appellee Supp. S-4.* First Union apparently endorsed the Note in blank, making it bearer paper

(the date of the endorsement is unknown). There is nothing in the record to indicate where the Note went after the endorsement.

SRMOF came into possession of the original Note sometime between August 14, 2012 and August 24, 2012. *Notice To Withdrawal of Amended Motion for Summary Judgment Appellee Supp. S-66.*

The lack of a Note did not, however, slow the wheels of the secondary mortgage market. On December 10, 2010, Wells Fargo Bank, N.A. executed a *Lost Note Affidavit And Indemnification Agreement* "in favor of Selene Finance." *Appellee Supp. S-50.* Contrary to SRMOF's contention, the *Lost Note Affidavit And Indemnification Agreement* did not provide any information about the location of the Note since Lewis issued it. Neither was the document sufficient to grant to any person the right to enforce the Note.

The Mortgage Moves – A Lot.

Lewis executed the Mortgage on November 21, 2001. *Appellee Supp. S-7.* The Mortgage was granted to Mortgage Electronic Registration Systems, Inc., (MERS) "solely as nominee for Lender and Lender's successors and assigns." *Id.* "Lender" is defined as First Union Mortgage Corporation. *Appellee Supp. S-8.* The Mortgage was then assigned thrice.

A. Assignment No. 1 – from MERS, "acting solely as nominee for First Union Mortgage Corporation" to "Wells Fargo." (June 9, 2011). *Appellee Supp. S-23.* This assignment was executed more than six months after Wells Fargo Bank, N.A. executed the *Lost Note Affidavit And Indemnification Agreement.*

B. Assignment No. 2 – from Wells Fargo Bank, N.A. to Selene Finance, LP (August 8, 2011) *Appellee Supp. S-26*

C. Assignment No. 3 – Selene Finance, LP to SRMOF 2009-1 Trust (August 24, 2011). *Appellee Supp. S-29.*

I. AN INTEREST IN THE MORTGAGE IS NOT ENOUGH TO CONFER STANDING.

Lewis does not contest the general proposition that a mortgagee to whom specific rights are granted can sue for breach of the mortgage's terms. This general principal, however, presumes two important facts. First, the mortgage must indeed grant rights to the mortgagee. In other words, the mortgagor's duties must flow to the mortgagee, not to a third party for whom the mortgagee is acting. Second, the mortgagee whose rights have been violated must actually sue for a breach of its rights. Neither of those facts is present in this case.

A. Lewis Owed No Substantive Duties To The Mortgagee.

So what rights did MERS obtain when Lewis executed the Mortgage, and what rights did MERS convey down the chain of title that ended at SRMOF? SRMOF refers the Court to several provisions of the Mortgage which it claims grants to the MERS rights as mortgagee. But a closer examination of those provisions reveals that Lewis owed no duty whatsoever to MERS.

SRMOF refers to provisions in the Mortgage that relate to the right to proceeds of insurance claims or eminent domain proceedings. It refers to the right to advance monies on behalf of the Borrower for taxes and insurance and the right to take action to preserve the property. It argues that these duties are found only in the Mortgage and not in the Note. But a review of the Mortgage shows that SRMOF's assertion is only partially true.

The language of the Mortgage itself tells the story as to whom Lewis's duties under the mortgage were owed.

> "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note."

Appellee Supp. S-9. Thus, Lewis owes all duties under the Mortgage to the Lender. And the specific provisions that SRMOF directs the Court support this assertion. Only the Lender has the right to advance money for insurance and taxes. *Appellee Supp. S-12, S-19.* Only the Lender has the right to take action to preserve the mortgage property. *Appellee Supp S-15.*

Thus, the language of the mortgage does not support SRMOF's contention that it has standing to sue for breaches of the Mortgage's provisions.

Moreover, because its claim to title of the Mortgage arises with MERS, SRMOF can claim only that interest which MERS had to assign. And that interest was naked legal title. Its only protected legal right in the Mortgage was legal title. No breach of the Note or the Mortgage injured its legal title to the Mortgage. That title remained undamaged. Again, the only conclusion the Court can reach is that no breach of the Mortgage injured SRMOF.

B. SRMOF Did Not Sue For Any Breach Of The Mortgage Other Than A Default Of Payment Under The Note.

"The foreclosure proceeding is the enforcement of a debt obligation . . ." *Wilborn v. Bank One Corp.*, 906 N.E.2d 396, 121 Ohio St.3d 546, 2009-Ohio-306, ¶17 (2009). The judicial sale of real estate and the confirmation of that sale are actions taken in execution of a money judgment. *Countrywide Home Loans Servicing, L.P. v. Nichpor*, 990 N.E.2d 565, 136 Ohio St.3d 55, 2013-Ohio-2083, ¶6 (2013). And in this case, SRMOF did, in fact, premise its suit on a default for nonpayment:

> 2. The Note is in default because installment payments due on the Note have not been paid. As a result, covenants in the Mortgage have not been performed.

Complaint, Appellee Supp. S-2.

The question arises then: How can a non-existent breach of the Mortgage, which, had it occurred would have injured only the Lender, be the basis for standing? Is it enough that the

plaintiff claims an adverse interest to the defendant? Or must the adverse interest actually be at issue in the case? That is, must the adverse interest be relevant to the claims dispute?

The United States Supreme Court has stated that an inquiry into a plaintiff's standing asks "whether the dispute touches upon the legal relations of parties having adverse legal interests." *Flast v. Cohen*, 392 U.S. 83, 88 (1968) (*quoting Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)); *see also, Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "To be justiciable, a controversy must be grounded on a present dispute, not on a possible future dispute." *Kincaid v. Erie Insurance Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, at ¶17. "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary,* 501 U.S. 312, 320 (1991). Thus, the concepts of ripeness and mootness are also part of justiciability. *Id.*; *See alsoKincaid, supra*, at ¶17. But of all of the elements of justiciability, standing is the most important. "The touchstone to justiciability is injury to a legally protected right . . .." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 141 (1951).

The dispute, as pled by SRMOF in its Complaint, does not implicate a breach of the Mortgage other than non-payment of the Note. Thus, the presence of the Note, and the person entitled to enforce the Note, is needed to determine the dispute presented in the Complaint. Any claim relating to the Mortgage is secondary and incident to the breach of the Note. Thus, SRMOF cannot base its standing on rights that are not at issue in the case.

As a result, SRMOF's reliance on the assignment of the Mortgage to it is misplaced.

C. Without The Lender In The Case, There Can Be No Default Under The Mortgage.

Without the Lender, i.e. the person entitled to enforce the Note in the case, a condition precedent to enforcement of the either the Note or the Mortgage cannot be satisfied. In fact, the mortgage assumes that only the Lender will bring an action on the mortgage:

> Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

Appellee S-18. Thus, the intent of the parties was that only the Lender or the Borrower be permitted to institute suit because of a breach of the Mortgage and do so only after the aggrieved party provides notice of the breach to the defaulting party.

Further, "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument." *Appellee Supp. S-19.* Thus, a naked mortgagee cannot even perform the required conditions precedent to suit for foreclosure. Moreover, "[u]pon payment of all sums secured by this Security Instrument, Lender shall discharge this Security Instrument. " *Id.* These rights and duties belong to the Lender.

The Lender is the sole person who has protected rights under the Mortgage. MERS, and all claiming through it, are mere place-holders, strawmen with no dog in the fight.

D. Ohio Law Requires Judgment On The Debt Prior To Judicial Sale.

Under Ohio law, a judicial execution is not an independent action but rather is ancillary to a civil action for money. *The Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 66, 133 N.E.2d 606 (1956) And as this Court held in *Nichpor, supra*, a judicial sale of real estate and the

confirmation of that sale are actions taken in execution on a money judgment. *Nichpor* at ¶6. Thus, the common law of this state is that the judicial sale of real estate cannot occur until after a judgment is issued on the underlying debt. This common law rule is supported by Ohio's statutory framework for judicial sales, which contemplates that only a judgment creditor can request and obtain a judicial sale of mortgaged property.

Ohio's general execution statute, R.C. 2329.09, provides that only the property of a "judgment debtor" may be levied upon. Further, R.C. 2329.26, which governs judicial sales proceedings, requires that the "judgment creditor" give notice of the sale to the "judgment debtor" and files proof of such notice with "the clerk the court that rendered the judgment." R.C. 2329.26(A)(1)(a). Finally, Ohio's statutory right of redemption presumes a money judgment. The right can be exercised only by paying the amount of the judgment previously rendered by the Court. R.C. 2329.33.

Without a judgment on the debt underlying the mortgage, there can be no sale and the property owner's right of redemption cannot be foreclosed. Therefore, an entity with but naked legal title to the mortgage, but no right to enforce the associated debt cannot sue in foreclosure.

E. To Have Standing To Sue For Foreclosure, A Mortgagee Must Have The Right To Enforce The Debt.

Ohio law recognizes two independent bases for standing – a general common law basis and a specific statutory basis. SRMOF argues that it has standing under the common law "personal stake" standard that this Court addressed in *Fed. Home Loan Mtg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. But "'[s]tanding does not flow from the common-law "personal stake" doctrine alone.'" *Middletown v. Ferguson* (1986), 25 Ohio St.3d

71, 75, 25 OBR 125, 495 N.E.2d 380. It also may be conferred by a specific statutory grant of authority. *Id.*

Lewis submits that permitting a naked mortgagee to sue for foreclosure, and reduce real property to cash through the judicial sale process, is equivalent to allowing it to enforce the underlying debt. And because the underlying debt in this instance – the Note - is a negotiable instrument, only a "person entitled to enforce" the instrument under R.C. 1303.31 is permitted to sue to recover the money owed under the Note. SRMOF did not obtain any right to enforce the Note until a year after suit was filed when it finally obtained the original Note from parts unknown.

But even should the Court find that the mortgagee may sue to enforce the mortgage because of a breach of the mortgage covenants, SRMOF does not satisfy the common law "personal stake" standard. None of the duties Lewis owed under the mortgage were owed to MERS. All of the duties were owed to the Lender as defined by the Mortgage. And the Lender is clearly identified in the Mortgage as First Union Mortgage Corporation. MERS and its assigns held only legal title to the mortgage and none of Lewis's duties were to MERS.

Finally, because SRMOF did not sue for any breach of the Mortgage other than for nonpayment of the Note, it cannot be said to have suffered any injury at all. As a result, it had no standing to sue until it obtained the Note in August 2012.

II. OHIO LAW DOES NOT PRESUME THAT A NEGOTIABLE INSTRUMENT FOLLOWS ASSIGNMENT OF A RELATED MORTGAGE.

SRMOF argues that it is presumed that the parties intended to keep the Note and Mortgage together and that Ohio law supports that presumption. It also asserts that the presumption can be overcome should the parties indicate an intent to sever the Mortgage from the Note. Thus, SRMOF contends that a transfer of the Mortgage carries with it a transfer of the

Note. It relies, in part on the Restatement of Law 3d to bolster its position. But this reasoning is severely flawed.

A. Ohio Law Does Not Presume That An Assignment Of A Mortgage Carries With It the Right To Enforce A Negotiable Instrument.

First, the Restatement does not support SRMOF's contention. Although Section 5.4(b) of the Restatement provides that a transfer of a mortgage carry with it the debt, it specifically qualifies its operation with "Except as otherwise required by the Uniform Commercial Code. . . ". Restatement of the Law 3d, Property, Mortgages, Section 5.4(b) (1997). The comment on this provision goes on to acknowledge that the entitlement to enforce a negotiable instrument is transferred by delivery of the instrument, not through assignment of ownership to the instrument or through transfer of the mortgage. Restatement of the Law 3d, Property, Mortgages, Section 5.4, Comment b (1997). *See also, Bank of America, N.A., v. Pasqualone*, 10th Dist. Franklin No. 13AP–87, 2013-Ohio-5795, ¶26 (*quoting In re Veal,* 450 B.R. 897, 910 (9th Cir.BAP 2011).

Furthermore, in this case, Lewis granted the mortgage to MERS, "solely as nominee for Lender and Lender's successors and assigns." *Appellee Supp. S-7.* And as SRMOF acknowledges, Lewis granted MERS only legal title to the mortgage. Thus, any assignment from MERS could transfer only that interest which MERS itself possessed. *W. Broad Chiropractic v. Am. Family Ins.*, 912 N.E.2d 1093, 122 Ohio St.3d 497, 2009-Ohio-3506, ¶14 (2009); *see Countrywide Home Loans Servicing, L.P. v. Shifflet*, 3rd Dist. Marion No. 9-09-31, 2010-Ohio-1266, ¶¶17-18 (J. Rogers disseting) ("While the quoted language indicates that the borrower "does hereby mortgage, grant and convey to MERS * * * the following described property", that language is limited by the words immediately following it, to wit: "solely as nominee for Lender and Lender's successors and assigns." . . . This language transfers no real interest in the real

property or the loan. Accordingly, an assignment from MERS could only convey that to which MERS actually had an interest.").

SRMOF argues that the language of the Assignment of Mortgage from Selene Finance to it conveyed some interest in the Note. But whence did Selene Finance obtain an interest in the Note? The interest could not come through the mortgage assignment chain because that chain started with MERS. And MERS never had any interest in the Note. The Note was initially payable to First Union Mortgage Corporation, and although the Note was endorsed in blank, there is no evidence in the record that Selene Finance ever had any right to enforce the Note.

Selene Finance could claim an interest in the Note through the *Lost Note Affidavit and Indemnification Agreement* executed by Wells Fargo. But That Affidavit was ineffective to prove entitlement to enforce the Note under R.C. 1303.38. And there is no provision in Ohio law that the right to enforce a lost note is transferrable. Further, the *Lost Note Affidavit* does not purport to assign ownership of the Note. It merely attempts to transfer a copy of the Note in place of the original.

Thus, neither Ohio law not the chain of mortgage assignments could have provided SRMOF with any enforceable interest in the Note.

B. The Parties Intended to Separate The Note From the Mortgage.

Second, in this instance, and in every instance in which MERS is a naked mortgagee, there was an obvious intent to separate the debt and the security. And a review of the chains of transfer for the Note and the Mortgage, show that the Note and Mortgage indeed went different directions. In fact, the entire purpose behind MERS is to separate the legal title from the equitable title to the Mortgage. *See generally*, Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U.Cin.L.Rev.1359 (2010).

Compounding the issues in this case is the inescapable conclusion that between 2001 and 2012, we do not know who was entitled to enforce the Note. There is an 11-year gap during which the whereabouts of the Note – and with it the identity of the person entitled to enforce the Note – is unknown. During this time, MERS was allegedly the "nominee" for First Union and its successors and assigns. And during this time MERS assigned the Mortgage to Wells Fargo. The question is for whom was MERS acting when it executed the assignment? The Assignment of Mortgage states that MERS was "acting solely as nominee for First Union Mortgage Corporation." *Appellee Supp, S-23-24.* The Assignment itself was executed on behalf of MERS by an employee of Selene Finance.[1] And at the time MERS executed the Assignment of Mortgage, Wells Fargo had already executed the Lost Note Affidavit and Indemnification Agreement which purported express some intent to transfer some interest in the Note to Selene Finance. From the record, it is not possible to determine who had what rights when. But it is fairly certain that the Note and mortgage were sent down different paths. That divergence was possible only because the manner in which First Union handled the loan.

The decision to use MERS to hold title to the Mortgage was not Lewis's; it was First Union's. And the decision to attempt to foreclose on a mortgage based solely on title obtained from MERS was the decision of SRMOF. Now that the consequences of its decisions are inconvenient, SRMOF wants the Court to ignore the very system that created the issue in the first place.

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[1] Carter Nicholas signed the Assignment of Mortgage as an officer of MERS. Three months later, Mr. Nicholas, as a Senior Vice President of Selene Finance, signed the Affidavit submitted in support of SRMOF's initial Motion for Summary Judgment. *Motion for Summary Judgment* (filed 10/12/11) (Docket 25).

III. SRMOF DID NOT HAVE THE POWER TO DISCHARGE THE DEBT WHEN IT FILED SUIT, SO THE COURT LACKED THE POWER TO FORECLOSE LEWIS'S RIGHT OF REDEMPTION.

Although the mortgagee might have the right to enforce provisions of the Mortgage it still does not have the right to foreclose because it cannot discharge the debt. The concept of foreclosure applies to cutting off the property owner's right to redeem the property from the debt owed. *Hembree v. Mid-America Federal Savings & Loan Assn.*, 580 N.E.2d 1103, 64 Ohio App.3d 144 (Ohio App. 2 Dist. 1989) ("An action to sell the mortgaged property is called a "foreclosure" because, through judicial process, it will foreclose or cut off the rights in the property of all parties to the action"). And in fact, that is the relief the SRMOF sought in this case. *See Complaint, Appellee Supp. S-3* (" . . .that the equity of redemption of the Defendant-Grantor, Shari Lewis, aka, Shari Frances Lewis, and all persons claiming under or through them be foreclosed. . ."). Such foreclosure of a property owner's rights pertains to the common law and statutory rights of redemption. The right of redemption, however, cannot be exercised in a vacuum.

The maker of a negotiable instrument owes the duty of payment to the person entitled to enforce the instrument. R.C. 1303.52. And to discharge and fully satisfy a negotiable instrument, payment must be to the person entitled to enforce the instrument. R.C. 1303.67. *See also, Pasqualone*, supra, at ¶24. The concept of redemption requires satisfaction of a judgment rendered on the Note. In other words, to foreclose the right of redemption, the person with the statutory power to discharge the maker's obligations under the instrument is the only possible party to bring a foreclosure action.

If the naked assignee of the Mortgage cannot discharge the debt, the property owner cannot redeem the property. If the property owner cannot redeem the property then the property

owner's right to redeem cannot be terminated by the Court. In other words, the Court cannot grant the remedy sought in a foreclosure because it can neither determine the amount owed under the debt nor order payment of the judgment amount to foreclose the property owner's rights in the property.

An agreement of parties to a contract cannot grant a Court the power to do the impossible. An integral part of the concept of standing is the power of the Court to provide a remedy. And in a foreclosure case, the equitable remedy sought is not sale of the property, it is the termination of all of the owner's rights to the property. That can happen only in the presence of the party to whom performance is owed. And in the case of a negotiable instrument, that party is the person entitled to enforce the instrument.

CONCLUSION

For the foregoing reasons, Appellants Shari Lewis requests that the Court reverse the decision of the Butler County Court of Appeals, and dismiss the action without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon John B. Kopf, III, Esq. **THOMPSON HINE LLP,** 41 South High Street, Suite 1700, Columbus, Ohio 43215 and Scott A. King, Esq. and Terry W. Posey, Esq., THOMPSON HINE LLP, **THOMPSON HINE LLP,** Austin Landing I, 10050 Innovation Drive, Suite 400, Dayton, Ohio 45342-4934 on this 6th day of October, 2014.

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