

FORECLOSURE STANDING REQUIRES RIGHTS TO NOTE AND MORTGAGE, INCLUDING POST-BANKRUPTCY DISCHARGE AND THE ACTION ON THE NOTE IS BASED IN CONTRACT

The Supreme Court of Ohio recently held that, **when debt on promissory note secured by mortgage has been discharged in bankruptcy, the holder of the note may not pursue collection against the maker of note, but the mortgagee has standing to foreclose on the collateral property, and can use the amounts due on the note as evidence to establish that it may collect from the forced sale of the property.**

The Court also held that, regardless of whether the creditor can obtain a personal judgment on the note against the borrowers, **the creditor must still prove that it is the person or entity entitled to enforce the note secured by the mortgage.**

A copy of the opinion is available at: [Link to Opinion](#).

The defendant borrowers executed a promissory note in order to refinance a mortgage loan on their home. The plaintiff mortgagee subsequently purchased the debt. The loan servicer received physical possession of the original note, indorsed in blank, on behalf of the plaintiff mortgagee.

The defendant borrowers later had trouble making their mortgage payments and after being unable to modify the loan, they filed for Chapter 7 bankruptcy. The bankruptcy court discharged their obligations on the note.

The plaintiff mortgagee later received an assignment of the mortgage, and it was recorded.

The plaintiff mortgagee then filed this foreclosure action against the defendant borrowers. A copy of the promissory note was attached to the complaint, but this copy did not show an indorsement by the lender. The defendant borrowers filed several counterclaims premised on allegations that the plaintiff mortgagee did not own the promissory note or the mortgage at the time it commenced the foreclosure action.

Both parties moved for summary judgment. The trial court granted summary judgment to the plaintiff mortgagee, finding that the plaintiff was the holder of the note and the assignee of the mortgage prior to commencement of the action, and had standing to foreclose on the mortgage.

The Appellate Court reversed the trial court's ruling, explaining that a foreclosure action can only be brought by the current holder of both the note and the mortgage, and finding that genuine issue of material fact existed regarding whether the plaintiff mortgagee owned the note as the note was indorsed in blank.

The issue presented to the Supreme Court of Ohio was whether a party filing a foreclosure action is required to establish ownership of both the note and the mortgage in order to have standing to commence the action.

As you may recall, **standing depends on whether the claimant has sufficient personal stake in the litigation to obtain a judicial resolution of the controversy. The claimant must generally show that it suffered an injury that is fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief.**

The Supreme Court of Ohio had previously recognized that, **upon a mortgagor's default in Ohio, the mortgagee may elect among separate and independent remedies to collect the debt secured by a mortgage.**

The Court noted that, in Ohio, a mortgagee may seek a personal judgment against the mortgagor to recover the amount due on the promissory note, without resort to the mortgaged property.

Alternatively, in Ohio, **the mortgagee may bring an action to enforce the mortgage, which is for the exclusive benefit of the mortgagee and those claiming under it. Upon default, legal title to the mortgaged property passes to the mortgagee and because of this superior title, the mortgagee may bring an action in ejectment to take possession of the mortgaged property, receive the income from it, and apply the proceeds to the debt, restoring the property to the mortgagor when the debt is satisfied.**

Lastly, the Court noted that, based on the property interest created by the mortgagor's default on the mortgage, the mortgagee may bring a foreclosure action to cut off the mortgagor's right of redemption, determine the existence and extent of the mortgage lien, and have the mortgaged property sold for its satisfaction.

The Supreme Court of Ohio also noted that it has long held that **an action for a personal judgment on a promissory note and an action to enforce mortgage covenants are separate and distinct remedies: THE ACTION ON THE NOTE IS BASED IN CONTRACT, and the action on the mortgage is a property interest.**

Due to this distinction, the Court explained that **a bar on enforcement of the note or other instrument secured by a mortgage does not necessarily bar an action on the mortgage.** The Court noted this was the case here, where the underlying debt the mortgage secures was discharged in a Chapter 7 bankruptcy proceeding.

However, the Court held, *the mortgage interest survives a discharge in Chapter 7 liquidation because the discharge extinguishes only the personal liability of the debtor.*

Nevertheless, the Court also held that, *in a foreclosure action, the creditor must still prove that it was the person or entity entitled to enforce the note secured by the mortgage.* Thus, in the foreclosure action here, the plaintiff mortgagee must still demonstrate that it is the person entitled to enforce the note, regardless of whether it can obtain a personal judgment on the note against the defendant borrowers.

The Supreme Court of Ohio next focused on *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, in which the Court previously determined that **a plaintiff in a foreclosure action must have standing at the time the complaint is filed, and that standing could not be established by post-filing events.**

The Court noted that *Schwartzwald* did not define what was necessary to establish standing in a foreclosure action, except that failure to establish an interest in the note or mortgage at the time a foreclosure action is filed creates a standing problem. The Court noted that *Schwartzwald* made it clear that **the party bringing the action must have a personal stake in the outcome of the controversy.**

Here, the Court found that the plaintiff mortgagee attached a valid assignment of mortgage and a copy of the note that referenced the mortgage to its complaint. Thus, the Court held, the plaintiff mortgagee alleged a personal stake in the outcome of the controversy that it is entitled to have a court hear its case.

The Court also clarified that just because the plaintiff mortgagee has standing, it is not entitled to an automatic judgment against the defendant borrowers. The Court held that **the plaintiff mortgagee would still need to prove that it was the person entitled to enforce the note and collect the amounts due from the foreclosure sale of the collateral.**

The Court found that the defendant borrowers failed to present any evidence to show that a genuine issue of material fact existed regarding any of the elements of the mortgagee's foreclosure action, and therefore that the trial court properly ordered summary judgment in favor of the plaintiff mortgagee.

Accordingly, the judgment of the Appellate Court was reversed, and the judgment of the trial court was reinstated.