IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2006-40T1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-40T1,	:	APPEAL NO. C-090251 TRIAL NO. A-0710723
	:	*D E C I S I O N.*
Plaintiff-Appellee,	:	
vs.	:	
JAMIE L. GINDELE		
and		
GARY GINDELE,		
Defendants-Appellants.		

Civil Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: February 19, 2010

James S. Wertheim, *Rose Marie L. Fiore*, and *McGlinchey Stafford, PLLC*, for Plaintiff-Appellee,

James J. Slattery, Jr., for Defendants-Appellants.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY, Judge.

{¶1} Defendants-appellants Jamie and Gary Gindele appeal the summary judgment entered for plaintiff-appellee Bank of New York on its foreclosure complaint. On appeal, the Gindeles argue that Bank of New York did not acquire its interest until after the foreclosure complaint had been filed, and that under our holding in *Wells Fargo Bank, N.A. v. Byrd*,[1] Bank of New York's complaint should have been dismissed without prejudice. We agree.

{¶2} In *Byrd*, we held that "in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage."[2] At oral argument in this case, Bank of New York has repeated its assertion that it had an existing interest in the property at issue when it filed suit, but the record does not support this assertion.

{¶3} A thorough review of the record reveals that the sole indication of its interest as mortgagee is an after-acquired assignment; and the bank failed to produce any evidence in the trial court affirmatively establishing a preexisting interest. Bank of New York has also asserted both that it had acted as an agent, and that its predecessor in interest had later ratified its foreclosure complaint. But because at the time of filing neither agency nor ratification had been alleged or documented, we will not entertain this argument on appeal.

{¶4} We likewise reject Bank of New York's argument that the real party in interest when the lawsuit was filed was later joined by the Gindeles. We are convinced that the later joinder of the real party in interest could not have cured the

[1] 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.
[2] Id. at ¶16.

Bank of New York's lack of standing when it filed its foreclosure complaint. This narrow reading of Civ.R. 17 comports with the intent of the rule. As other state and federal courts have noted, Civ.R. 17 generally allows ratification, joinder, and substitution of parties "to avoid forfeiture and injustice when an understandable mistake has been made in selecting the parties in whose name the action should be brought."[3] "While a literal interpretation of * * * Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff was named, the Advisory Committee's Notes make it clear that this provision is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed."[4]

{¶5} In this case, the record does not reflect any understandable mistake by Bank of New York; there is no indication that the identity of the proper party was difficult to ascertain; and there is no documentary proof that Bank of New York owned an enforceable interest when it filed its foreclosure complaint.

{¶6} In a foreclosure action, absent understandable mistake or circumstances where the identity of a party is difficult or impossible to ascertain, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage. Bank of New York failed to establish an enforceable interest that existed at the time it filed suit, and it has not alleged or proved understandable mistake or that the identity of the proper party was

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[3] *Ohio Central RR. Sys. v. Mason Law Firm Co., LPA*, 182 Ohio App.3d 814, 2009-Ohio-3238, 915 N.E.2d 397, quoting *Agri-Mark, Inc. v. Niro, Inc.* (D.Mass.2000), 190 F.R.D. 293; see, also, Fed.R.Civ.P. 17 Advisory Committee Note.
[4] Id.

not readily ascertainable. Bank of New York's complaint in foreclosure should have been dismissed without prejudice under *Byrd*.

{¶7} The Gindeles' assignment of error is sustained, the judgment favoring Bank of New York is reversed, and this cause is remanded for further proceedings in accordance with this decision.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., and **DINKELACKER J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.