70140-1

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No. 70140-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION ONE

◆

BLAIR LA MOTHE,
Appellant,

vs.

US BANK NATIONAL ASSOCIATION, AS TRUSTEE OF THE BANC OF AMERICA FUNDING 2007-D, ITS SUCCESSORS IN INTEREST AND/OR ASSIGNS,

Respondent.

◆

ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON, THE HONORABLE JOAN DUBUQUE

◆

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL AND OTHER JURISDICTION CASES

STATUTES

I. ARGUMENT

A. The standing of a plaintiff and the subject matter jurisdiction of a court may be disputed at any stage of the proceedings, even on appeal; and the doctrine of res judicata may not function as a waiver of the requirements of standing and subject matter jurisdiction.

Respondent U.S. Bank National Association, as Trustee of the Banc of America Funding 2007-D, its successors in interest and/or assigns ("Respondent") somehow argues that Appellant Blair La Mothe's ("Appellant") appeal is time barred, even though Appellant timely appealed from the King County Superior Court's formal findings, conclusion, judgment, order and decree of foreclosure and attorney fee and cost award. CP 341-53; RP (March 1, 2013) 1-11; CP 355-75; Brief of Respondent at 14-23.. Apparently, Respondent, relying upon *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.,* 176 Wn. App. 185, 312 P.3d 976, 984 (2013), contends that because Appellant did not raise the lack of standing as an affirmative defense below, that he cannot subsequently dispute the standing of Respondent on appeal because he waived it. Similarly, Respondent appears to maintain that the doctrine of res judicata functions as a waiver of the requirements of standing and subject matter jurisdiction. Brief of Respondent at 14-23. Respondent is clearly mistaken.

As this Court explained in *International Ass'n of Firefighters, Local 1789 v. Spokane Airports,* 103 Wash.App. 764, 768, 14 P.3d 193, 195, (Wash. Ct. App. 2000), aff'd, (2002) 146 Wash.2d 207, 45 P.3d 186, *amended on denial of reconsideration*, (Wash. 2002) 50 P.3d 618, "[b]ecause standing is a jurisdictional issue, however, it may be raised for the first time in appellate court. RAP 2.5(a)." Further this Court explained in *Mitchell v. Doe,* 41 Wash.App. 846, 847-48, 706 P.2d 1100, 1102 (Wash. Ct. App. 1985):

> Jurisdiction—the power of the court to entertain a proceeding—can be raised for the first time on appeal. RAP 2.5(a)(1); *Williams v. Poulsbo Rural Tel. Ass'n,* 87 Wash.2d 636, 555 P.2d 1173 (1976). The rationale for this is self-evident. It would be pointless to consider claimed errors where the proceeding itself was incurably defective for lack of jurisdiction. The same rationale applies to standing, the right of a person to press a claim. *Washington Educ. Ass'n v. Shelton School Dist. No. 309,* 93 Wash.2d 783, 790, 613 P.2d 769 (1980).

Standing is a jurisdictional requirement that must be conclusively established by every plaintiff in every case before the Court is vested with jurisdiction to adjudicate the merits of the case. *State ex rel. Gunning v. Odell,* 58 Wash.2d 275, 277, 362 P.2d 254, 256, (1961) *modified on other grounds,* 60 Wash.2d 895, 371 P.2d 632 (1962) (generally, an appellate court will not consider an argument on appeal that was not raised below;

however, arguments relating to the jurisdiction of the trial court will be considered for the first time on appeal). Regardless of whether or not standing is raised below, an appellate court may consider standing issues since it concerns the lower court's jurisdiction. *Id.*

A plaintiff's lack of standing may be disputed at any stage of a proceeding, even on appeal. "Whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are issues that may be raised for the first time on appeal. RAP 2.5(a)(1), (3)." *Spokane Airports v. RMA, Inc.,* 149 Wash.App. 930, 939, 206 P.3d 364, 369 (Wash. Ct. App. 2009). Thus, regardless of whether Appellant raised his standing argument below, he properly raised the argument on appeal in his Opening Brief. For those same reasons, Respondent's additional argument that the doctrine of res judicata functions as a waiver of the requirement that a plaintiff have standing, must similarly fail.

B. Respondent confuses jurisdictional standing with prudential standing.

Appellant argued in his Opening brief that Respondent lacked jurisdictional standing to bring suit. Opening Brief at 9-36. Standing to sue and subject matter jurisdiction to hear a claim are issues that may be raised for the first time on appeal. RAP 2.5(a)(1), (3); *Spokane Airports,* 149 Wash.App. 930, 939.

Appellant argued throughout his Opening Brief that Respondent neither demonstrated its standing to sue below, nor its entitlement to initiate a judicial foreclosure. Opening Brief at 6-44. Appellant went into great detail as to why Respondent lacked jurisdictional standing to bring suit, as well as lacked contractual and legal authority to initiate a judicial foreclosure, therein arguing that Respondent lacked a complete chain of title supported by valid and enforceable transfers of the subject Note and contractual rights thereunder, and acted in contravention of its governing pooling and servicing agreement. *Id.*

As compared to jurisdictional standing, prudential standing may be waived if not raised in the trial court below. *Spokane Airports,* 149 Wash.App. 930, 939 (prudential standing refers to where a party is not the proper party or the party does not have the right to bring the suit and if not raised below may be waived).

C. Appellant need not be a third party beneficiary to argue inconsistencies in the subject assignment and Respondent's compliance with its own pooling and servicing agreement.

Furthermore, Respondent argues that Appellant lacked standing, as an alleged "third party beneficiary" to challenge the assignment of his mortgage loan relied upon by the foreclosing mortgagee to establish its authority to foreclose, and to challenge the pooling and servicing

agreement.[1] Brief of Respondent at 27. Appellant, however, did not in fact seek to "challenge" the assignment and pooling and servicing agreement in the trial court below, but instead sought to point to the inconsistencies in the assignment and pooling and servicing agreement as evidence that the subject mortgage loan was not properly negotiated as required under Article III of the Uniform Commercial Code (adopted in Washington as RCW Chapter 62A)[2], as necessary to establish the

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[1] Other states routinely allow a homeowner borrower to challenge an assignment. *See e.g., Miller v. Homecomings Fin., LLC,* 881 F.Supp.2d 825 (S.D. Tex. Aug. 8, 2012) ("[U]nder Texas law homeowners have legal standing to challenge the validity or effectiveness of any assignment or chain of assignments under which a party claims the right to foreclose on their property."); *U.S. Bank Nat'l Ass'n v. Ibanez,* 941 N.E.2d 40, 53 (Mass. 2011); *Murphy v. Aurora Loan Services, LLC,* 699 F.3d 1027 (8th Cir. Nov. 8, 2012) (home mortgagors had standing to assert quiet title claims under Minnesota law asserting that the assignments of legal title to mortgages either were unrecorded or executed by individuals lacking legal authority to do so, and that the resulting defect in chain of title for mortgages deprived assignees of authority to foreclose).

[2] Pursuant to RCW 62A.3-203 governing negotiable instruments, "unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made." espondent's relied upon Assignment of Mortgage alone, however, is insufficient to establish standing, as no interest in the debt is assigned without proper negotiation and transfer of the note. This is because a mortgage is but an incident to the debt which it is intended to secure and cannot exist independently.

foreclosing mortgagee's contractual authority to conduct a foreclosure, and as required by the closing date of the trust.[3]

II. CONCLUSION

For each and all of the foregoing reasons, the Superior Court's order, judgment and decree of foreclosure, as well as order and judgment for attorneys fees and costs should be reversed and the case remanded for further proceedings on the merits.

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[3] The plain language of the Trust in the instant case, required that any mortgage backed assets be transferred and delivered as of the Cut-Off Date of the Trust May 1, 2007, and certified by the Trustee by the May 31, 2007 Closing Date, after which time the Trustee had no authority to accept or certify any additional assets on behalf of the Trust, such as the subject Note and Mortgage herein, which were only purportedly assigned to Respondent three years later in 2010.

Dated this 10th day of February, 2014.

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PROOF OF SERVICE

I, Shaina Dunn, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the18th day of February, 2014, I caused to be served a true and correct copy of Reply Brief to Respondents in the above title matter by causing it to be delivered to:

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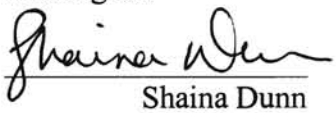
DATED 18th day of February, 2014 at Arlington, Washington.



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