UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Ann Sexton, f/k/a Ann Casler debtor	Chapter 13 Case No. 14-11647-JMD Hearing: April 21, 2015 at 9:00 am
Ann Sexton v. National Collegiate Student Loan Trusts 2006-3, 2005-2, 2005-1, 2007-3, 2006-2, 2007-1, 2006-1, 2006-4, 2005-2, 2004-2, 2005-3	

OMNIBUS OBJECTION TO CLAIMS NUMBERED 6 THROUGH 16
FOR LACK OF STANDING

Ann Sexton (f/k/a Ann Casler), debtor in the above case, through her attorney, Richard Gaudreau, pursuant to 11 USC 502(a), (b)(1), FRBP 3001, FRBP 3007(a) and FRBP 3007(d) objects to Second Amended Proof of Claims No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 filed by various National Collegiate Student Loan Trusts ("NCT"), stating as follows:

1. Debtor believes a summary of this dispute may be helpful. On November 6, 2014, debtor filed an objection to NCT's Proof of Claims based on lack of standing. That objection raised two issues:

(a) National Collegiate Trust was nothing more than a service mark of First Marblehead Bank and did not own or have the right to collect on debtor's student loans;

(b) claimant's documents did not demonstrate that debtor's student loans were transferred from Charter One Bank, to National Collegiate Funding, LLC to the various NCT trusts.

Attached as Exhibit A is a document describing the assignments which occur in the securitization process.

2. NCT's response on January 9, 2015 conceded that National Collegiate Trust was never an entity entitled to payment from debtor and promised to change the name of the claimant. That amendment did not occur until February 12, 2015, several weeks after the court order issued at the January 20th hearing. The Court sustained the objection "without prejudice."

3. The February 12th amendments, other than changing the claimant's name and attaching a copy of the Note Purchase Agreement, do not address other substantive issues raised at the hearing.

4. Debtor is refiling the earlier objection to make sure the record is clear given the ambiguity created by the timing of the latest amendment.

5. Each amended Proof of Claim attaches a document entitled "Pool Supplement." The Pool Supplement and Note Purchase Agreements transfer any loans attached to the Pool Supplement via a schedule identified as "Schedule 2."

6. Only the loans listed in Schedule 2 are transferred to National Collegiate Funding, LLC, and thereafter to a particular NCT trust. The page at the end of the Pool Supplement entitled Schedule 2 is without exception either blank or missing.

7. Debtor incorporates by reference the previous objection, the supplement to that objection, and positions taken at the January 20th hearing.

8. Debtor filed a chapter 13 bankruptcy on August 27, 2014. The plan at the date of the filing of this objection has not been confirmed.

9. NCT has not proven that they own the student loan notes so as to have standing to demand payment from the Chapter 13 estate.

10. Debtor signed various student loan contracts with Charter One Bank, NA as lender, a fact verified by the Credit Agreements attached to each Proof of Claim. On information and belief, Charter One was taken over by RBS Citizens. Mrs. Sexton has never received any proof that National Collegiate Student Loan Trusts now owns her student loans. These loans are listed as disputed in her bankruptcy petition.

11. Each Proof of Claim now alleges various National Collegiate Student Loan Trusts own debtor's student loans which can be summarized as follows:

Cl. No. 6: Creditor on POC -- National Collegiate Student Loan Trust 2006-3
Lender: Charter One Bank
Note signed 7/31/06 for $3,500
Schedule 2 of Pool Supp.-- list of loans transferred to NCT 2006-3 is blank.

Cl. No. 7: Creditor on POC– National Collegiate Student Loan Trust 2005-2
Lender: Charter One Bank
Note signed 5/23/05 for $9,500
Schedule 2 to Pool Supp. -- list of loans transferred to NCT 2005-2 is missing.

Cl. No. 8: Creditor on POC – National Collegiate Student Loan Trust 2005-1
Lender: Charter One Bank
Note signed 10/29/04 for $9,500
Schedule 2 of Pool Supp -list of loans transferred to NCT 2005-1 is missing.

Cl. No. 9: Creditor on POC – National Collegiate Student Loan Trust 2007-3
Lender: Charter One Bank
Note signed 7/21/07 for $14,000
Pool Supplement, Art. 1 – no trust entity alleged other than an unnamed "purchaser trust."
Schedule 2 to Pool Supp.- list of loans transferred to unnamed trust is missing.

Cl. No. 10: Creditor on POC – National Collegiate Student Loan Trust 2006-2
Lender: Charter One Bank
Note signed 4/9/06 for $9,500
Schedule 2 to Pool Supp. - list of loans transferred to NCT 2006-2 is blank.

Cl. No. 11: Creditor on POC – National Collegiate Student Loan Trust 2007-1
Lender: Charter One Bank
Note signed 4/9/06 for $9,500
Schedule 2 to Pool Supp.- list of loans transferred to NCT 2006-2 is blank.

Cl. No. 12: Creditor on POC – National Collegiate Student Loan Trust 2006-1
Lender: Charter One Bank
Note signed 11/30/05 for $11,000
Schedule 2 of Pool Supp. - list of loans transferred to NCT 2006-1 is missing.

Cl. No. 13: Creditor on POC – National Collegiate Student Loan Trust 2006-4
Lender: Charter One Bank
Note signed 9/13/06 for $3,000
Schedule 2 of Pool Supp. - list of loans transferred to NCT 2006-4 is blank.

Cl. No. 14: Creditor on POC – National Collegiate Student Loan Trust 2005-2
Lender: Charter One Bank
Note signed 2/7/05 for $6,000
Schedule 2 of Pool Supp.- list of loans transferred to NCT 2005-2 is missing.

Cl. No. 15: Creditor on POC – National Collegiate Student Loan Trust 2004-2
Lender: Charter One Bank
Note signed 9/8/04 for $2,800
Schedule 2 of Pool Supp. -list of loans transferred to NCT 2004-2 is missing.

Cl. No. 16: Creditor on POC – National Collegiate Student Loan Trust 2005-3
Lender: Charter One Bank
Note signed 8/26/05 for $8,000
Schedule 2 of Pool Supp. -list of loans transferred to NCT 2005-3 is blank.

12. U.S. Bankruptcy Rule 3007(d) provides that more than one objection may be joined in an omnibus objection to multiple claims in certain circumstances. Transworld Systems is the same servicer for each Proof of Claim. The same documentation issue exists with respect to each Proof of Claim. Rule 3001(c) requires claims based on a writing to be filed with the Proof of Claims. If such documents are missing, the claim is unenforceable against the debtor. 11 USC 502. Failing to comply with applicable rules is one basis for filing an omnibus objection.

13. This is a core proceeding as that term is defined by Section 157(b)(2) of Title 28 of the United States Code in that it concerns claims and contested matters arising out of the administration of this bankruptcy case and rights duly established under Title 11 of the United States Code and other applicable federal law.

14. This Court has both personal and subject matter jurisdiction to hear this case pursuant to Section 1334 of Title 28 of the United States Code, and Section 157(b)(2) of Title 28 of the United States Code.

15. Debtor is a natural person residing at 16 Rocky Point Road, Barrington, NH.

16. By filing a Proof of Claim, claimants have submitted to the jurisdiction of the New Hampshire Bankruptcy Court. Langenkamp v. Culp, 111 S.Ct. 330 (1990) to resolve this objection.

17. As statutorily required and per instructions on the Proof of Claim form, a creditor is defined as "a person, corporation or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing." 11 USC 101(10) and Official Form 10. "Debt" is defined as "liability on a claim" and a "claim" is defined as the "right to payment." 11 USC 101((5) and (12).

18. Before a claim may be allowed under 11 U.S.C. 502, it must be filed by an entity that actually holds the claim. See In re Curry, 409 B.R. 831, 842 (Bankr.N.D.Tex. 2009) ("While the account summaries state from whom [the creditor] purchased the claims, they are not documents evidencing the assignment."); In re Doherty, 400 B.R. 382, 3830384 (Bankr.W.D.N.Y. 2009). "In the absence of sufficient proof of the ownership of a claim, whether it be by a purchaser, transferee or successor-in-interest, that proof of claim can and must be disallowed." In re Melillo, 392 B.R. 1 (1st Cir. BAP 2008).

19. There is no proof the underlying trusts own the student loans at issue in this case.

20. In a document entitled "Pool Supplement," NCT alleges debtor's loans were transferred from Charter One Bank to National Collegiate Funding, LLC and then to one of the following National Collegiate Student Loan Trusts:

National Collegiate Student Loan Trust 2006-3 – Claim 6
National Collegiate Student Loan Trust 2005-2 – Claim 7
National Collegiate Student Loan Trust 2005-1 – Claim 8
Unnamed "purchaser trust" – Claim 9
National Collegiate Student Loan Trust 2006-2 – Claim 10
National Collegiate Student Loan Trust 2007-1 – Claim 11
National Collegiate Student Loan Trust 2006-1 – Claim 12
National Collegiate Student Loan Trust 2006-4 – Claim 13
National Collegiate Student Loan Trust 2005-2 – Claim 14
National Collegiate Student Loan Trust 2004-2 – Claim 15
National Collegiate Student Loan Trust 2005-3 – Claim 16

21. Each Proof of Claim attaches a Pool Supplement disclosing the name of the underlying trust involved in each claim.

22. Claim No. 9 illustrates the problem with the documentation in this case. The Pool Supplement indicates as follows:

> ..the Program Lender [Charter One] hereby transfers, sells, sets over and assigns to The National Collegiate Funding LLC (the "Depositor") ... each student loan set forth on the attached Schedule 2 (the "Transferred Loans") ... The Depositor in turn will sell the Transferred Loans to a Purchaser Trust.

Proof of Claim 9, Pool Supplement, Article 1, The Schedule 2 loans were to be transferred on September 20, 2007 from Charter One Bank to National Collegiate Funding and then on to an unnamed "purchaser trust" apparently unnamed as of this date. Despite this uncertainty, the student loan attached to Claim No. 9 purports to have been transferred to National Collegiate Student Loan Trust 2007-3 on the same day the Pool Supplement was executed -- September 20, 2007.

23. Schedule 2 at the end of this and other Pool Supplements is missing.

24. Without Schedule 2, there is no proof the multiple transfers of debtor's student loans actually occurred.

25. NCT's Response to the previous Objection attaches documents identified an attachment it referred to as Exhibit A. Exhibit A is an 11- page document purporting to be the missing Schedule 2 for each of the 11 Proof of Claims.

26. None of the documents in Exhibit A contains any reference to the words "Schedule 2." There is no information on Exhibit A to indicate it was intended to be part of a Pool Supplement.

27. In addition, Exhibit A appears to be a modifiable Excel document, existing in an electronic format on a computer. Since this document predates NCT's acquisition of any of the loans, it is not a NCT business record, nor is it a Transworld business record.

28. The Pool Supplement clearly states Schedule 2 was "attached" to that document, however, there is nothing demonstrating Exhibit A was physically attached to any of the Pool Supplements at the time they were executed. Indeed, at the time the Pool Supplement to Claim 9-3 was executed, the name of the exact trust was unknown.

29. The promissory notes indicate they are governed by Article IX of Ohio state law. If Exhibit A is a modifiable Excel electronic document, there is some question whether this complies with Article IX in that state. Ohio St. 1309.105 – UCC 9-105.

30. The bottom line is there is nothing to corroborate Exhibit A was attached to a Pool Supplement in any way. Schedule 2 would certainly contain more than one student loan.

31. The inability to produce Schedule 2 has been a recurring issue when NCT has been challenged to prove its standing to collect the debt.

32. The Court in an Ohio case in vacating a default, stated:

> The Schedule 2 document, however, was not included in the documents filed by appellees with the trial court in either case. Without the schedule, we cannot determine whether the assignments applied to these specific loans.

NCT 2003-1 v. Beverly, 2014 Ohio 4346 (Ohio App. Ct. Sept. 30, 2014).

33. Similarly, a Florida appellate court found National Collegiate Student Loan Trust 2004-1 had not proven it owned the student loan. Lovett v. National Collegiate Student Loan Trust 2004-1, No. 5D13-3943 (Fl. 5th Cir. Oct. 31, 2014).

34. Finally, a court in Kentucky also found a National Collegiate Student Loan Trust could not prove it was the real party in interest entitled to collect the debt. National Collegiate Loan Trust 2007-3 v. Lafavers, Case No. 12-C!-629 (Ky. 10/1/13).

Attached as Exhibit B is a copy of each of these three decisions.

35. Without Schedule 2, there is nothing to indicate whether Ms. Sexton's student loans were transferred to National Collegiate Funding, LLC.

36. Likewise, there is no evidence debtor's student loans were transferred from National Collegiate Funding, LLC to any of the various National Collegiate Student Loan Trusts.

37. Each Proof of Claim contains the same deficiencies.

38. NCT has not demonstrated ownership of the student loans so as to make it a creditor for Proof of Claim purposes.

39. These Proof of Claims do not contain the supporting documentation necessary to create prima facie proof of ownership of the student loans. NCT is not a real party in interest. See generally In re Dove-Nation, 318 B.R. 147, 152 (8th Cir.BAP 2004).

WHEREFORE debtor, Ann Sexton, through her attorney, Richard Gaudreau, requests the Court:

A. Sustain the objection to Claim No. 6 of National Collegiate Student Loan Trust 2006-3 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

B. Sustain the objection to Claim No. 7 of National Collegiate Student Loan Trust 2005-2 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

C. Sustain the objection to Claim No. 8 of National Collegiate Student Loan Trust 2005-1 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

D. Sustain the objection to Claim No. 9 of National Collegiate Student Loan Trust 2007-3 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt

E. Sustain the objection to Claim No. 10 of National Collegiate Student Loan Trust 2006-2 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

F. Sustain the objection to Claim No. 11 of National Collegiate Student Loan Trust 2007-1 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

G. Sustain the objection to Claim No. 12 of National Collegiate Student Loan Trust 2006-1 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

H. Sustain the objection to Claim No. 13 of National Collegiate Student Loan Trust 2006-4 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

I. Sustain the objection to Claim No. 14 of National Collegiate Student Loan Trust 2005-2 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

J. Sustain the objection to Claim No. 15 of National Collegiate Student Loan Trust 2004-2 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

K. Sustain the objection to Claim No. 16 of National Collegiate Student Loan Trust 2005-3 finding it is entitled to $0.00 from the bankruptcy estate because it has no standing to collect this debt.

L. Issue a final order with respect to each claim objection.

M. If contested, award debtor attorney's fees pursuant to the right to reciprocal attorney's fees under RSA 361-C:2 if debtor prevails.

N. Award such other relief as is just and equitable.

DATED: 3/12/2015

Respectfully Submitted,
Ann Sexton, f/k/a Ann Casler,
Through her attorney

/s/ Richard D. Gaudreau

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Chain of Assignment – NCSLT Case

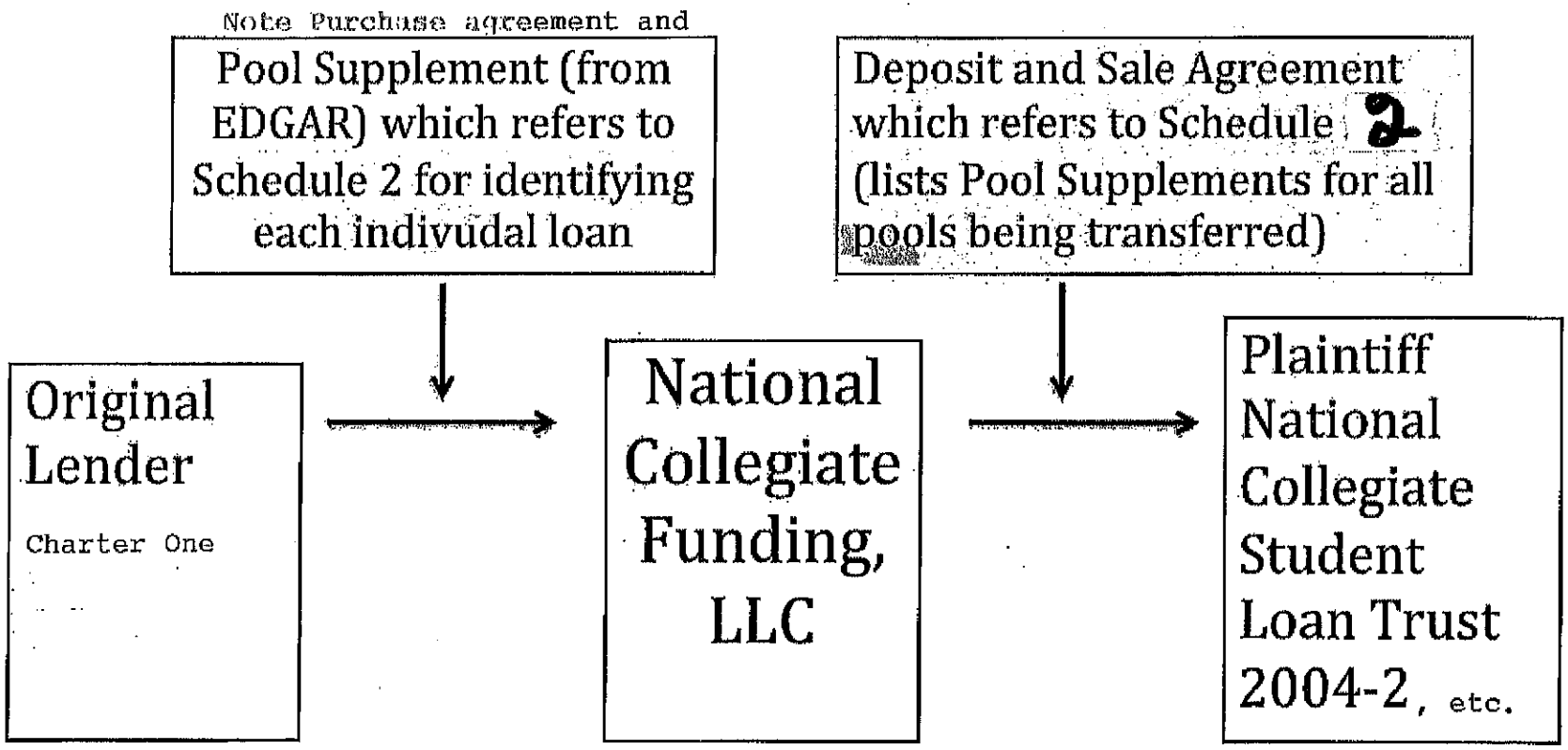

EXHIBIT A

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[Cite as *Natl. Collegiate Student Loan Trust 2003-1 v. Beverly*, 2014-Ohio-4346.]

EXHIBIT B

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

National Collegiate Student Loan Trust 2003-1, et al.

Appellees

v.

Adam Beverly, et al.

Appellants

Court of Appeals No. H-13-010
H-13-011

Trial Court No. CVH 20120334
CVH 20120918

DECISION AND JUDGMENT

Decided: September 30, 2014

* * * * *

Eric Wasserman, for appellees.

Gregory S. Reichenbach, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} We consider two appeals brought by Adam and Linda Beverly that are consolidated for proceedings in this court, appellate case Nos. H-13-010 and H-13-011. Appellants appeal April 22, 2013 judgments of the Huron County Court of Common

Pleas that denied, in both cases, their Civ.R. 60(B) motions to vacate default judgments against them. The National Collegiate Student Loan Trust 2003-1 ("2003 Trust") is appellee in appeal No. H-13-010 (common pleas case No. CvH 2012 0334). The National Collegiate Student Loan Trust 2006-1 ("2006 Trust") is appellee in appeal No. H-13-011 (common pleas case No. CvH 2012 0918). Both cases concern student loans.

Appeal H-13-010

{¶ 2} Appeal H-13-010 concerns a student loan made by Bank One, N.A. to Adam Beverly in September 2003. Adam's mother, Linda Beverly, acted as cosigner on the loan. On April 16, 2012, the 2003 Trust filed a complaint in the trial court alleging that appellants failed to pay the promissory note on the loan according to the terms and conditions of the loan. The complaint does not allege that the 2003 Trust has any interest in the loan, whether by assignment or any other means. The 2003 loan promissory note is attached as an exhibit to the complaint. The note makes no reference to the 2003 Trust and identifies Bank One N.A. as the lender.

Appeal H-13-011

{¶ 3} Appeal H-13-011 concerns a student loan made by JPMorgan Chase Bank, N.A. to Adam Beverly in December 2005. Linda Beverly also cosigned this loan. On October 18, 2012, the 2006 Trust filed a complaint alleging that appellants failed to pay the promissory note on the loan according to the terms and conditions of the loan. The complaint did not allege that the 2006 Trust held any interest in the loan whether by

assignment or any other means. The 2005 loan promissory note is attached as an exhibit to the complaint. The note makes no reference to the 2006 Trust and identifies JPMorgan Chase Bank, N.A. as the lender.

Default Judgments

{¶ 4} Appellants did not file answers to either complaint. The Trusts filed motions for default judgment in both cases. The trial court granted the 2003 Trust default judgment against appellants in the H-13-010 case on June 25, 2012. In the judgment the court awarded the trust damages of $43,713.22, accrued interest of $5,017.42 through April 4, 2012, and interest at a variable interest rate from April 5, 2012.

{¶ 5} The trial court granted the 2006 Trust default judgment against appellants in the H-13-011case on January 11, 2013. In the judgment, the court awarded damages of $16,165.21, plus accrued interest of $1,964.41, and interest at the rate of 3 percent on $16,165.21 from the date of judgment.

{¶ 6} Appellants filed Civ.R. 60(B) motions for relief from judgment in both cases on March 28, 2013, and submitted affidavits of both appellants in support of the motions. Appellees opposed both motions and submitted additional documents with their opposition briefs. Appellees claim that the documents establish that the promissory notes on the loans were assigned to the respective trusts prior to the filing of the complaints in both cases.

{¶ 7} On April 22, 2013, the trial court, without opinion, denied both motions for relief from judgment. Appellants timely appealed the trial court judgments to this court. We ordered the two case consolidated for proceedings before this court on June 4, 2013.

{¶ 8} Appellants assert one assignment of error, applicable to both appeals:

Assignment of Error

1. The trial court erred by denying Defendant-Appellants' motions for relief from judgment.

{¶ 9} Under assignment of error No. 1, appellants argue that the trial court erred in denying the motions for relief from judgment on two grounds. First, appellants argue that appellees lacked standing to assert the claims for breach of the student loans and that the trial court lacked subject matter jurisdiction over the claims. Second, appellants argue that they are entitled to relief from the judgments pursuant to Civ.R. 60(B) and that the trial court abused its discretion in overruling the motions.

{¶ 10} We consider the issues of subject matter jurisdiction and standing first. Review on appeal of a challenge to the subject matter jurisdiction of a trial court is conducted de novo. *Biro v. Biro*, 6th Dist. Ottawa No. OT-10-017, 2010-Ohio-5169, ¶ 7. "Whether established facts confer standing to assert a claim is a matter of law. We review questions of law de novo." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 90; *see Bank of Am., N.A. v. Pasqualone*, 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, ¶ *15*

Schwartzwald

{¶ 11} Appellants base their arguments of lack of subject matter jurisdiction and lack of standing to bring suit for non-payment of the student loans on the Ohio Supreme Court's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In *Schwarzwald*, the plaintiff filed a foreclosure action while lacking an interest in the note or mortgage at the time it filed suit. *Id.* at ¶ 2.

{¶ 12} In *Schwartzwald*, the Ohio Supreme Court held that where a plaintiff who has filed a foreclosure action "fails to establish 'an interest in the note or mortgage at the time it filed suit, it [has] no standing to invoke the jurisdiction of the common pleas court.'" *Sovereign Bank v. Flood*, 6th Dist. Erie No. E-11-072, 2013-Ohio-725, ¶ 12, quoting *Schwartzwald* at ¶ 28. The court held that lack of standing at the commencement of a foreclosure action cannot be cured by subsequently obtaining an interest in the note or mortgage. *Schwartzwald* at ¶ 39. Under the decision, "lack of standing at the commencement of a foreclosure action requires dismissal of the complaint * * * without prejudice." *Id.* at ¶ 40.

{¶ 13} The decision in *Schwartzwald* is based upon the proposition that "'[i]t is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.'" *Id.* at ¶ 22, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973).

Standing

{¶ 14} Appellants contend, under *Schwarzwald*, appellees lack standing to assert claims arising from the student loans. Both Trusts opposed the motions for relief from judgment and claimed that the notes had in fact been assigned to them before the complaints were filed. Appellees submitted with their opposition briefs additional documents they claim show the assignments.

{¶ 15} We agree with appellants' contention that the complaints were deficient and under *Schwarzwald* failed to state a claim upon which relief could be granted. However, the failure to allege an interest in a loan in a complaint does not in itself establish lack of standing in an action:

> A plain reading of *Schwartzwald* reveals that the focus of the decision centered on *what* needed to be proven, not *when*. The question presented was "whether a lack of standing at the commencement of a foreclosure action filed in a common pleas court may be cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment." *Schwartzwald,* 134 Ohio St.3d 13, 2012–Ohio–5017, 979 N.E.2d 1214 at ¶ 19. In resolving this question, *Schwartzwald* held that a plaintiff in a foreclosure action must in fact possess standing at the time the complaint is filed, and cannot later gain standing through a subsequent assignment of the note and mortgage. *Id.* at ¶ 41–42, 979 N.E.2d 1214.

> Notably, while a foreclosure plaintiff must allege sufficient facts in its complaint to demonstrate that it has standing, *Schwartzwald* does not stand for the proposition that a foreclosure plaintiff must definitively prove in its complaint that it has standing. (Emphasis in the orignal.) *Bank of Am., N.A. v. Hafford*, 6th Dist. Sandusky No. S-13-021, 2014-Ohio-739, ¶ 13-14.

{¶ 16} Stated differently, "[a]lthough a party must prove that it had standing when the foreclosure complaint was filed, such proof may be provided after the filing of the complaint." *Wells Fargo Bank, N.A. v. Odita*, 10th Dist. Franklin No. 13AP-663, 2014-Ohio-2540, ¶ 9, citing *Bank of New York Mellon v. Watkins*, 10th Dist. Franklin No. 11AP-539, 2012-Ohio-4410, ¶ 18.

{¶ 17} These cases demonstrate that appellees' failure to allege standing in the complaints alone does not establish lack of standing on the merits.

Claimed Assignments

{¶ 18} Appellants argue that the documents were unauthenticated and inadmissible as evidence on the issue. They argue further that the documents do not establish assignment of the loans to the Trusts.

{¶ 19} Appellants did not raise any objection to the admissibility of the claimed assignment documents in the trial court. Generally a failure to object in the trial court to the admission of evidence in a civil case waives the right to raise the issue on appeal.

Jacobsen v. Jacobsen, 7th Dist. Mahoning No. 03 MA 3, 2004-Ohio-3045, ¶ 11; *see Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶ 20} The documents submitted by appellees, however, do not establish assignment of the loans to appellees. The documents in both cases refer to the assignment of "each student loan set forth on the attached Schedule 2." The Schedule 2 document, however, was not included in the documents filed by appellees with the trial court in either case. Without the schedule, we cannot determine whether the assignments applied to these specific loans.

{¶ 21} The purported assignment of the September 2005 loan to the 2006 Trust is in fact an assignment to another entity—The National Collegiate Funding LLC. According to the document, the other entity agreed that it "in turn *will* sell the Transferred Bank One Loans to" the 2006 Trust. (Emphasis added.) Appellees submitted no affidavit or other evidence showing that the contemplated assignment of the loan note to the 2006 Trust occurred.

{¶ 22} Accordingly, although the pleadings fail to allege facts demonstrating standing and a right to relief against appellants on either loan, the record is insufficient to determine standing on the merits. Resolution of the standing issue, however, is unnecessary to establish subject matter jurisdiction in these cases.

Subject Matter Jurisdiction

{¶ 23} Appellants argue that the default judgments in both cases are void for lack of subject matter jurisdiction and that the trial court erred in failing to grant relief from

the judgments on that basis. Appellants assert that the trial court held inherent authority to vacate void judgments and that the requirements of Civ.R. 60(B) do not apply for relief from judgment on subject matter jurisdiction grounds.

{¶ 24} The Tenth and Eleventh District Courts of Appeals have both addressed the issue of whether lack of standing under *Schwartzwald* analysis establishes a lack of subject matter jurisdiction for a trial court to proceed in a case. Both courts held that although the Ohio Supreme Court discussed lack of standing in *Schwartzwald* in jurisdictional terms, lack of standing under *Schwartzwald* does not deprive a trial court of subject matter jurisdiction. *Bank of New York Mellon v. Williams*, 10th Dist. Franklin No. 13AP-499, 2014-Ohio-3737, ¶ 9; *HSBC Bank USA, Natl. Assn. v. Bailey*, 11th Dist. Trumbull No. 2012-T-0086, 2014-Ohio-246, ¶ 25. Both courts ruled that lack of standing under *Schwartzwald* for a plaintiff to seek relief in a case renders a judgment awarding relief voidable, not void. *Williams* at ¶ 9; *HSBC Bank USA* at ¶ 25.

{¶ 25} The decisions rely on the analysis of subject matter jurisdiction provided by the Ohio Supreme Court in *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992. In the case, the Ohio Supreme Court recognized "[t]here is a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it." *Id.* at ¶ 10.

{¶ 26} The *Pratts* court explained the distinction:

> "Jurisdiction" means "the courts' statutory or constitutional power to adjudicate the case." (Emphasis omitted.) *Steel Co. v. Citizens for a Better*

Environment (1998), 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210; *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 61 O.O.2d 335, 290 N.E.2d 841, paragraph one of the syllabus. The term encompasses jurisdiction over the subject matter and over the person. *State v. Parker,* 95 Ohio St.3d 524, 2002–Ohio–2833, 769 N.E.2d 846, ¶ 22 (Cook, J., dissenting). Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002. It is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." Id.; *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

The term "jurisdiction" is also used when referring to a court's exercise of its jurisdiction over a particular case. See *State v. Parker,* 95 Ohio St.3d 524, 2002–Ohio–2833, 769 N.E.2d 846, ¶ 20 (Cook, J., dissenting); *State v. Swiger* (1998), 125 Ohio App.3d 456, 462, 708 N.E.2d 1033. "'The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction

that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.'" *Parker* at ¶ 22 (Cook, J., dissenting), quoting *Swiger,* 125 Ohio App.3d at 462, 708 N.E.2d 1033. "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, '* * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *.'" *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St.3d 382, 384, 582 N.E.2d 992, quoting *Sheldon's Lessee v. Newton* (1854), 3 Ohio St. 494, 499. *Id.* at ¶ 11-12.

{¶ 27} We find the analysis of the issue by the Tenth and Eleventh Districts persuasive and adopt it. We conclude that the trial court held subject matter jurisdiction in both actions regardless of whether appellees lacked standing under *Schwartzwald* to assert claims for breach of the student loans.

{¶ 28} We also agree with the Tenth and Eleventh Districts that lack of standing under *Schwartzwald* for a plaintiff to seek relief in a case renders a judgment awarding relief voidable, not void. We conclude that appellants' claims that the trial court judgments are void for lack of subject matter jurisdiction on *Schwartzwald* grounds are without merit.

Denial of Motions for Civ.R. 60(B) Relief

{¶ 29} We review trial court judgments granting or denying relief from judgments under Civ.R. 60(B) on an abuse of discretion standard. *Griffey v. Rajan,* 33 Ohio St.3d

75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 30} Civ.R. 60(B) provides for relief from a judgment or order:

> (B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 31} The Ohio Supreme Court has identified what is required to prevail on a Civ.R. 60(B) motion for relief from judgment. The movant must demonstrate:

> (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 32} Civ.R. 60(B) relief will be denied where the movant fails to satisfy any of the requirements under the GTE standard. *Argo Plastic Products. Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984).

Meritorious Defense

{¶ 33} Civ.R. 8(D) provides that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." The complaints in both cases, however, did not allege that respective Trust had a right to relief against appellants based upon breach of the student loan contracts.

{¶ 34} Appellants contend that the default judgments were contrary to law because the complaints failed to state a claim upon which relief could be granted. We agree. Here the failure to respond to the complaint created no admission upon which a judgment

granting affirmative relief could be based. Furthermore, under *Schwartzwald*, the complaints failed to set forth facts upon which appellees had standing to assert claims under either loan.

{¶ 35} The grant of default judgment against a defendant where the complaint fails to state a claim upon which relief can be granted is contrary to law and presents a meritorious defense to the judgment for purposes of Civ.R. 60(B) relief. *See Mercy Franciscan Hosp. v. Willis*, 1st. Dist. Hamilton No. C-030914, 2004-Ohio-5058, ¶ 6; *Michael D. Tully Co., L.P.A. v. Dollney*, 42 Ohio App.3d 138, 140-141, 537 N.E.2d 242 (9th Dist.1987).

Entitlement to Relief Under Civ.R. 60(B)

{¶ 36} The next element under *GTE* for relief from judgment under Civ.R. 60(B) is demonstration of a right to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). We consider first appellants' contention that their affidavits demonstrate an entitlement to relief under Civ.R. 60(B)(1) due to excusable neglect.

{¶ 37} According to the affidavits, appellants hired a debt negotiation company, Student Loan Relief Organization ("SLRO") to negotiate payment arrangements for both student loans, prior to being served in either case. Linda Beverly states by affidavit that she called SLRO contact person at SLRO immediately upon receipt of the summons and complaint in the first case (case No. H-13-010) on April 20, 2012. The contact person told her to fax him a copy of the complaint and the he would "take care of it." In their affidavits, both appellants state that they initially thought SLRO would handle to lawsuit.

{¶ 38} Linda Beverly also stated in her affidavit that after reporting the lawsuit she had not heard from SLRO for several weeks. She contacted them again. Her contact person informed her that he had attempted to reach the plaintiff's attorney but was unsuccessful. In the conversation, the contact stated that it appeared that SLRO would be unable to accomplish anything on the 2003 loan.

{¶ 39} Less than a week later, Ms. Beverly made the first of a series of calls herself to the law firm representing appellees. Her requests to speak to speak to the attorney representing appellees were refused. Adam Beverly also attempted to speak to the appellees' attorney with the same result.

{¶ 40} Both were instructed to speak to a person at the firm named Cathy, who handled garnishments at the firm. Initially, Cathy refused to speak to either Adam or Linda Beverly, stating that she could not speak with them because of a power of attorney they had signed for SLRO to act on their behalf. According to the affidavits, appellees stopped working with SLRO to get Cathy to speak with them. Even then, their discussions with Cathy reached no agreement.

{¶ 41} The lawsuit on the 2005 loan was filed on October 18, 2012. Ms. Beverly admitted in her affidavit that when she was served with the second lawsuit "I thought there was nothing I could do, based on everything that happened in the first case." Her son continued to make phone calls to appellees' attorney's office on both their behalves concerning both loan accounts.

{¶ 42} Ms. Beverly stated in her affidavit that after she was served with the complaint in the second case, she also attempted to speak directly to individuals at the National Collegiate Student Loan Trust. According to her affidavit, Ms. Beverly spoke to several people who could not find any record of the loans. Those persons provided other phone numbers to call. Ms. Beverly states in her affidavit that she was unable to find someone from National Collegiate Student Loan Trust who could help.

{¶ 43} Appellees did not file any affidavits or other evidentiary material in the trial court disputing facts asserted by appellants.

{¶ 44} In *Hai v. Flower Hosp.*, 6th Dist. Lucas No. L-07-1423, 2008-Ohio-5295, ¶ 21, we considered a definition for the term excusable neglect:

> The general definition of excusable neglect is some action "'not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident.'" *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 536 fn. 8, 706 N.E.2d 825, quoting Black's Law Dictionary (6 Ed.1990) 566. Courts generally find excusable neglect in those instances where there are "unusual or special circumstances" that justify the neglect of a party or her attorney. *Id.* at 536, 706 N.E.2d 825 (citations omitted).

{¶ 45} In *Colley v. Bazell*, 64 Ohio St.2d 243, 416 N.E.2d 605 (1980), the Ohio Supreme Court, reviewing case law from other jurisdictions, recognized that "[g]enerally,

a default judgment is vacated upon motion where a defaulting party has notified his insurer of the commencement of the suit and has relied, to his detriment, on its undertaking to defend." *Id.* at 247. The court outlined its inquiry in determining excusable neglect where the defendant notified his insurer of suit and relied on the carrier to defend:

> Assuming, arguendo, that the defendant's failure to check, by the date the default judgment was granted, on the question of whether his carrier had filed an answer or a similar responsive pleading constituted neglect, the next inquiry is whether that neglect was excusable or inexcusable. That inquiry must of necessity take into consideration all the surrounding facts and circumstances. Among such circumstances is whether the defendant promptly notified his carrier of the litigation. A second circumstance is the lapse of time between the last day for the filing of a timely answer and the granting of the default judgment. A third circumstance is the amount of the judgment granted. A fourth, but not decisive, circumstance is the experience and understanding of the defendant with respect to litigation matters. (Footnotes omitted.) *Id.* at 248.

{¶ 46} Such an analysis has been applied in other contexts not involving insurance. The Tenth District Court of Appeals upheld a finding of excusable neglect in circumstances not involving reliance on an insurer to provide a legal defense. In the case *Estate of Orth v. Inman*, 10th Dist. Franklin No. 99AP-504, 2002-Ohio-3728, ¶ 5, two

defendants mistakenly believed an attorney, who had been attempting to negotiate a settlement on behalf of all the defendants, was representing their interests in the case. The court of appeals affirmed a trial court's grant of Civ.R. 60(B)(1) relief finding that the failure to respond to the complaint was not willful and did not demonstrate a total disregard for the judicial system. *Id.* at ¶ 28-30.

{¶ 47} The record shows that service of the complaint in the 2003 student loan case occurred by certified mail on both appellants on April 20, 2012. Under Civ.R. 12(A), appellants were required to serve their answers to the complaint by May 18, 2012. The trial court granted default judgment against appellants on June 25, 2012. The default judgment awarded the 2003 Trust damages of $43,713.22, accrued interest of $5,017.42 through April 4, 2012, and interest at a variable interest rate from April 5, 2012. The defendants are inexperienced and unknowledgeable as to litigation matters.

{¶ 48} "[T]he inaction of a defendant is not 'excusable neglect' if it can be labeled as a "complete disregard for the judicial system.'" *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), quoting, *GTE Automatic*, 47 Ohio St.2d at 153, 351 N.E.2d 113.

{¶ 49} Although SLRO is not an insurer, the reliance by appellants on SLRO was not willful or undertaken in a complete disregard for the judicial system or appellee's rights. *See Estate of Orth v. Inman*, 10th Dist. Franklin No. 99AP-504, 2002-Ohio-3728, ¶ 28. In *Colley*, the Ohio Supreme Court recognized that Civ.R. 60(B)(1) is a "remedial rule to be liberally construed." *Colley*, 64 Ohio St.2d at 248, 416 N.E.2d 605.

{¶ 50} With respect to the 2003 student loan litigation, we conclude that under all the circumstances excusable neglect was shown by appellants by their faxing a copy of the complaint to SLRO on the day of service of the complaint upon them and their reliance on an assurance by SLRO that the company would "take care of it."

{¶ 51} With respect to the 2005 student loan case, H-13-011, the record does not demonstrate excusable neglect for the failure to file answers to the complaint. Appellants did not forward a copy of the complaint to SLRO and appellants' inaction cannot be attributed to any belief that SLRO would defend the action. By the time the second litigation was filed, appellants knew that the company would not defend the case.

{¶ 52} We conclude that appellants have not established grounds for relief due to excusable neglect with respect to the 2005 student loan case. However, we also conclude that grounds for relief under Civ.R. 60(B)(5) does exist.

{¶ 53} Both the Eleventh and Ninth District Courts of Appeals have held that grant of a default judgment on a complaint that fails to state a claim upon which relief can be granted presents a basis for relief under Civ.R. 60(B)(5). *Student Loan Marketing Assn. v. Karnavas*, 11th Dist. Trumbull No. 92-T-4718, 1993 WL 164709, *2 (May 14, 1993); *Michael D. Tully Co., L.P.A*, 42 Ohio App.3d at 141, 537 N.E.2d 242.

{¶ 54} In *Student Loan Marketing Assn. v. Karnavas*, the Eleventh District Court of Appeals considered very similar facts to those presented in these cases:

> There are substantial grounds for invoking Civ.R. 60(B)(5) in this case. As previously discussed, appellee filed the complaint in this action,

> in its own name, on notes payable to another party. No assignment of the notes was alleged or proven. Thus, appellee's complaint failed to state a cause of action against appellant. *Zwick,* 103 Ohio App. at 84. It is well established that "a default judgment on a complaint which fails to state a claim should not be upheld." *Michael D. Tully Co., L.P.A. v. Dollney* (1987), 42 Ohio App.3d 138, 141, citing *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134, *American Bankers Ins. Co. v. Leist* (1962), 117 Ohio App. 20. Thus relief pursuant to Civ.R. 60(B)(5) is appropriate. *Karnavas* at *2.

{¶ 55} In *Tully*, the plaintiff was an attorney who had represented the defendants in a personal injury action on a contingent fee basis. After rejecting a settlement offer, the defendants hired a different attorney to handle the case. The dismissed attorney filed suit against his former clients for expenses incurred in prosecuting the personal injury claim and for compensation in an amount of one-third of the rejected settlement offer. The court granted the attorney default judgment in the amount of $5,791.84 after the defendants failed to file an answer to the complaint.

{¶ 56} In *Tully*, the Ninth District Court of Appeals ruled that there were substantial grounds in the case to invoke Civ.R. 60(B)(5) relief. The court held:

> We are mindful that relief from a default judgment pursuant to Civ.R. 60(B)(5) should be granted judiciously. However, we find that in the instant case, there are substantial grounds for invoking Civ.R. 60(B)(5).

> We have determined that Tully's complaint does not state a claim upon which relief can be granted. A default judgment on a complaint which fails to state a claim should not be upheld. *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134, 24 OBR 206, 493 N.E.2d 964; *American Bankers Ins. Co. v. Leist* (1962), 117 Ohio App. 20, 22 O.O.2d 455, 189 N.E.2d 456. Moreover, it is against public policy to permit a lawyer to recover $5,333.34 on a contingent fee basis when the client may never recover any compensation at all. *Tully*, 42 Ohio App.3d at 141, 537 N.E.2d 242.

{¶ 57} The Tenth District Court of Appeals, however, has held that failure of the complaint to state a claim upon which relief can be granted alone generally does not in itself present a basis for Civ.R. 60(B)(5) grounds for relief from judgment. *Lopez v. Quezada*, 10th District Franklin Nos. 13AP-389 and 13AP-664, 2014-Ohio-367, ¶ 36, quoting *Taris v. Jordan*, 10th Dist. Franklin No. 95APE08-1075, 1996 WL 69717, *4 (Feb. 20, 1996). The court distinguished the *Tully* case on the ground that the default judgment in *Tully* was found to be against public policy as it awarded a lawyer judgment on a contingent fee contract when the client may never recover any compensation. *Taris* at *4.

{¶ 58} Unlike the decisions in *Lopez* and *Taris*, these appeals involve default judgments on complaints that not only failed to state a claim upon which relief could be granted, but also failed to allege facts sufficient under *Schwartzwald* to demonstrate

standing of the plaintiff to invoke the jurisdiction of the court to maintain suit. We concur with the Eleventh District Court of Appeals in *Student Loan Marketing Assn. v. Karnavas* that such default judgments present a substantial basis for relief under Civ.R. 60(B)(5).

{¶ 59} We conclude that appellants established an entitlement to Civ.R. 60(B)(5) relief from the default judgments with respect to both the 2003 and 2005 student loans. While excusable neglect is an element for relief under Civ.R. 60(B)(1), it is not an element for Civ.R. 60(B)(5) relief.

Timeliness

{¶ 60} The final element under *GTE* for Civ.R. 60(B)(1) relief is the requirement that the motion for relief from judgment be brought within a reasonable time and not more than one year after the trial court entered judgment. Both motions for Civ.R. 60(B) relief from judgment were filed within a year of the judgments for which relief is sought. Whether a Civ.R. 60(B) motion for relief from judgment was filed within a reasonable time is determined on a case by case basis, considering all the circumstances. *Williams v. Wilson-Walker*, 8th Dist. Cuyahoga No. 95392, 2011-Ohio-1805, ¶ 15.

{¶ 61} In the 2003 student loan case, appellants acted promptly upon filing the complaint to secure the assistance of SLRO to represent their interests. Upon SLRO's instructions, they faxed a copy of the complaint to it, under an assurance that the company would "take care of it." Appellants learned only several weeks later that SLRO would be of no assistance in defense of the case.

{¶ 62} Upon learning that SLRO would be of no assistance, appellants pursued direct contact with attorney for appellants. Contact with appellees' counsel was also delayed. Appellants were unable to speak with appellees' counsel. Because of a letter of attorney previously provided SLRO to act on appellants' behalf on the loans, discussions with the person at the law firm to whom they were directed were delayed.

{¶ 63} The motion for relief from judgment was filed in the case approximately nine months after default judgment was granted. Given these circumstances, we conclude that appellants' Civ.R. 60(B) motion for relief from judgment was filed within a reasonable time.

{¶ 64} Default judgment in the 2005 loan case was granted on January 11, 2013, and the motion for relief from the judgment was filed on March 28, 2013, within two and one half months after default judgment was entered. We conclude that the motion for default judgment in the 2005 loan case was also filed within a reasonable time.

{¶ 65} Appellants have established the elements under *GTE* for Civ.R. 60(B) relief from the default judgments. We conclude that the trial court abused its discretion in denying appellants' Civ.R. 60 (B) motions for relief from judgment in both case No. H-13-010 and case No. H-13-011.

{¶ 66} We find appellants' assignment of error well-taken.

{¶ 67} We reverse the April 22, 2013 judgment of the Huron County Court of Common Pleas in both case No. H-13-010 and case No. H-13-011 that denied appellants' Civ.R. 60(B) motions for relief from judgment.

{¶ 68} In case No. H-13-010, we grant the Civ.R. 60(B) motion for relief from the June 25, 2012 default judgment and vacate the default judgment. In case No. H-13-011, we grant appellants' Civ.R. 60(B) motion for relief from the January 11, 2013 default judgment and vacate the default judgment. We remand both cases to the Huron County Court of Common Pleas for further proceedings. We order appellees to pay the costs of their respective appeals pursuant to App.R. 24.

Judgments reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

JUDGE

Stephen A. Yarbrough, P.J. _____

JUDGE

James D. Jensen, J. _____
CONCUR.

JUDGE

LOVETT v. NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004

District Court of Appeal of Florida, Fifth District.

Michael LOVETT and James Lovette, Appellants, v. NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004–1, Appellee.

No. 5D13–3943.

Decided: October 31, 2014

N. James Turner, of N. James Turner, Esq. P.A., Orlando, for Appellants. Dana M. Stern, of Hayt, Hayt & Landau, P.L., Miami, for Appellee.

Michael Lovett and his father, James Lovette, (collectively "the Lovettes"): appeal the summary final judgment entered in favor of Appellee, National Collegiate Student Loan Trust 2004–1 ("Loan Trust"), in an action to recover on a credit agreement/promissory note. The Lovettes argue that the trial court erred because: (1) Loan Trust never proved that it was the owner of the note sued upon, (2) Loan Trust never tendered the original promissory note, and (3) Loan Trust never alleged or provided notice of assignment pursuant to section 599.715, Florida Statutes (2013). Finding the first argument meritorious, we reverse.[2]

Michael executed a credit agreement in which he borrowed $30,000 from Bank One, N.A., as an education loan. James co-signed the loan and guaranteed payment in full. Because Michael did not pay the loan as agreed, Loan Trust filed a one-count, one-page complaint, alleging in pertinent part: (1) the Lovettes executed a promissory note, (2) Loan Trust "owns and holds the note(s)," (3) the Lovettes failed to pay the installment payments when due, (4) Loan Trust accelerated the balance upon nonpayment, and (5) all conditions precedent to the filing of the action have occurred. Michael filed a pro se response to the complaint. He did not deny the allegations of the complaint, but asserted that the cause of action was barred by the statute of limitations. He also asserted that his father was elderly and, due to his father's poor health, his father should not be required to participate in any court proceedings. Additionally, Michael claimed that his wages, earnings, or compensation as head of the household should be exempt from garnishment.[3]

Loan Trust filed a motion for summary judgment and attached to its motion an affidavit of account executed by a supervisor for its loan servicer. In response, the Lovettes filed an unsigned "motion for dismissal of summary judgment," asserting that Loan Trust lacked standing to sue them as "it was not a party to the contract and has not provided any documentation showing its relationship to the original lender, Bank One." At the conclusion of the summary judgment hearing, the trial court found in favor of Loan Trust and entered summary final judgment. The Lovettes thereafter retained counsel, who timely filed a motion for rehearing pursuant to Florida Rule of Civil Procedure 1.530. In their motion, the Lovettes argued, inter alia, that the trial court erred in entering summary judgment because Loan Trust failed to produce evidence at the hearing establishing that it owned the promissory note. The trial court denied rehearing and this appeal ensued.

Our standard of review of a trial court's entry of summary final judgment is de novo. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla.2000). "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." Albelo v. S. Bell, 682 So.2d 1126, 1129 (Fla. 4th DCA 1996). "[I]f the record raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party and summary judgment must be denied." Nard, Inc. v. DeVito Contracting & Supply, Inc., 769 So.2d 1138, 1140 (Fla. 2d DCA 2000).

On appeal, the Lovettes argue that outstanding issues of fact regarding the "ownership" of the note exist that should have prevented entry of summary judgment in favor of Loan Trust. In response, Loan Trust argues that the Lovettes waived these issues by failing to file an affidavit opposing summary judgment or otherwise raise the issue below.

"Generally, the failure to raise standing as an affirmative defense operates as a waiver." Beaumont v. Bank of New York Mellon, 81 So.3d 553, 555 (Fla. 5th DCA 2012) (citing Kissman v.. Panizzi, 891 So.2d 1147, 1150 (Fla. 4th DCA 2005)); Schuster v. Blue Cross & Blue Shield of Fla., Inc., 843 So.2d 909, 912 (Fla. 4th DCA 2003) ("There is no question that lack of standing is an affirmative defense that must be raised by the defendant and that the failure to raise it generally results in waiver." (citing Krivanek v. Take Back Tampa Political Comm., 625 So.2d 840, 842 (Fla.1993))). But see McLagan v. Fed. Home Loan Mortg. Corp., 145 So.3d 943, 945 (Fla. 2d DCA 2014) ("[T]he pertinent question is whether the issue was raised at the trial court, not how it was raised. [S]tanding may not be raised for the first time on appeal; however, it does not necessarily require that standing be raised only by means of an affirmative defense." (alterations in original) (quoting Maynard v. Fla. Bd. of Educ. ex rel. Univ. of S. Fla., 998 So.2d 1201, 1206 (Fla. 2d DCA 2009)).

To be entitled to summary final judgment, Loan Trust had the burden to "show, without genuine issue of material fact, that it was the holder of the note on the date the complaint was filed." McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So.3d 170, 175 (Fla. 4th DCA 2012); see also Taylor v. Deutsche Bank Nat'l Trust Co., 44 So.3d 618, 622 (Fla. 5th DCA 2010) (stating that "the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder" (citing BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean–Jacques, 28 So.3d 936, 938 (Fla. 2d DCA 2010))). In addition, Loan Trust had the burden to "prove its right to enforce the note as of the date of the summary judgment hearing, including how it obtained the [note]," even if the Lovettes had waived the right to challenge Loan Trust's standing as of the date suit was filed. See Boumarate v. HSBC Bank USA, N.A., 109 So.3d 1239, 1239 (Fla. 5th DCA 2013) (citing Beaumont, 81 So.3d at 554–55). Because there is no evidence in the record at the time of the hearing regarding how Loan Trust acquired the note, summary final judgment was improper.

REVERSED and REMANDED.

FOOTNOTES

1. There appears to be a discrepancy in the spelling of Michael's last name. The final judgment is entered against Michael Lovette and James Lovette, and in his pro se filings in the lower court, Michael spells his last name "Lovette." However, the notice of appeal lists Michael's last name as "Lovett."

2. Because this issue is dispositive, we do not address the Lovettes' other arguments.

3. James did not file an answer to the complaint. However, no default was ever sought against him. Michael later filed, without leave of court, an amended response to the complaint, which raised an additional issue not critical to our determination.

LAMBERT, J.

ORFINGER and WALLIS, JJ., concur.

COMMONWEALTH OF KENTUCKY
PULASKI CIRCUIT COURT
CASE NO. 12-CI-629

NATIONAL COLLEGIATE LOAN TRUST 2007-3
C/O FMD LEGAL

PLAINTIFF

VS.

DAVID LAFAVERS A/K/A
DAVID M. LAFAVERS

DAVID LAFAVERS A/K/A
DAVID H. LAFAVERS

DEFENDANTS

ORDER SUSTAINING DEFENDANTS' EVIDENTIARY OBJECTION

AND

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for an evidentiary hearing on September 16, 2013. The Plaintiff was represented by Richard P. Green of Javitch, Block and Rathbone. The Defendants were present and represented by Ms. Rebecca Babarsky of AppalReD Legal Aid.

The only evidence admitted into the record at that time was the oral testimony of the Defendants, David M. Lafavers and David H. Lafavers.

Plaintiff presented no witnesses, but attempted to enter certain documents into evidence under KRE 803 (6) and KRE 901 (11). Defendants' objected to the admission of said documents on multiple grounds. Oral argument was heard on Defendants' objections, and Plaintiff was given the opportunity to respond. Both parties were advised to submit briefs regarding the evidentiary objections within ten (10) days.

I. FINDINGS OF FACT

1. On or about August 17, 2007 Defendants David M. Lafavers and David H. Lafavers signed a "Loan Request/Credit Agreement" with Union Federal Savings Bank. This finding is supported by the testimony of David H. Lafavers and David M. Lafavers.

2. The Court finds that Plaintiff is not the holder of a promissory note executed by the Defendants, as Plaintiff has failed to produce a negotiable promissory note.

3. Additionally, there has been no evidence presented to demonstrate that Union Federal Savings Bank has assigned their agreement with the Defendants to the Plaintiff.

II. CONCLUSIONS OF LAW

1. Plaintiff provided no witnesses at trial. Instead, Plaintiff attempted to offer a stack of documents into evidence under KRE 803 and KRE 902 (11). Mere attachment of a notarized document to records is not sufficient to allow the records to be introduced. Matthews v. Com., 163 S.W.3d 11, 24 (Ky. 2005). In relevant part, KRE 902 (11) provides that business records may be self authenticating in certain cases, "[u]nless the sources of information or other circumstances indicate a lack of trustworthiness . . ." KRE 902(11)(a). Here, the sources of information, as well as other circumstances, indicate a lack of trustworthiness: (1) Plaintiff's counsel's assertions at trial, particularly regarding the redaction of documentation in the proposed Exhibit B, conflicted with the affidavit's statement that "all documents attached are true and correct originals [sic] records or true and correct copies of the original record, being reproduced from the original records;" and (2) The FTC has recently filed a complaint against the employer of the affiant in federal court for, among other things, making made "Unsubstantiated Representations about Owing a Debt" and other "False and Misleading Representations." The

Court will therefore *sustain* Defendants' first objection to entry of Plaintiff's proposed Exhibits A and B in accordance with KRE 902(11)(a).

2. Plaintiff has plead that it is the "holder of a note," yet it has failed to produce a note endorsed either to Plaintiff or in blank. On July 26, 2012, Plaintiffs were advised by the Court that they could amend their pleading to include a contract claim. Plaintiff chose not to do so.

3. Even if Plaintiff had amended its pleading to include a contract claim, Plaintiff has still failed to provide the Court with any evidence that would serve to substantiate that Plaintiff was an assignee of the contract between Union Federal Savings Bank and the Defendants. As such, Plaintiff has failed to show that it is the real party in interest as required by CR 17.01.

4. In Bruner v. Discover Bank c/o DFS Services, LLC, 360 S.W.3d 774, 778 (Ky. App. 2012), the Court of Appeals set out three showings that a plaintiff must provide in order to succeed on a claim that it is has ownership of a debt when the plaintiff is not the original creditor. These showings are:

(1) A bill of sale listing the name and account number of the defendant;

(2) A document specifically detailing how the creditor/plaintiff reached the principal and interest amounts that it is suing for; and

(3) Documentary evidence that the defendant is in fact the person responsible for the debt.

Defendants admitted that they signed an agreement with Union Federal Savings Bank, so Plaintiff is not required to provide (3) in this case. However, Plaintiff has failed to provide either (1) or (2).

5. As such, the Court finds that neither Defendant is indebted to either Student Loan Trust 2007-3 or FMD Legal.

IT IS HEREBY ORDERED AND ADJUDGED

1. That Defendants' objection to entry into evidence of Plaintiff's proposed Exhibits A and B is SUSTAINED;

2. That Judgment be entered in favor of Defendants David M. Lafavers and David H. Lafavers; and

3. That Defendants' counsel shall be awarded reasonable attorney's fees.

This is a final and appealable order.

So Ordered this 30th day of Sept, 2013

HON. DAVID TAPP, JUDGE
PULASKI COUNTY CIRCUIT COURT

Prepared and submitted by:

HON. REBECCA BABARSKY
APPALRED LEGAL AID
COUNSEL FOR DEFENDANTS
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DISTRIBUTION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Proposed Findings of Fact and Conclusions of Law was mailed, this 26th day of September, 2013, first class, postage pre-paid, to the following parties and/or attorneys:

Hon. Richard Green
Hon. Robert K. Hogan
Javitch, Block & Rathbone, LLC
700 Walnut Street, Suite 300
Cincinnati, OH 45202
Counsel for Plaintiff, National Collegiate
Student Loan Trust 2007-3 C/O FMD Legal

Rebecca M. Babarsky

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Ann Sexton, f/k/a Ann Casler debtor	Chapter 13 Case No. 14-11647-JMD Hearing: April 21, 2015 at 9:00 am
Ann Sexton v. National Collegiate Student Loan Trusts 2006-3, 2005-2, 2005-1, 2007-3, 2006-2, 2007-1, 2006-1, 2006-4, 2005-2, 2004-2, 2005-3	

NOTICE OF HEARING ON OMNIBUS OBJECTION TO CLAIMS NUMBERED 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 AND 16

The above-cited Objection to Claims Numbered 6 through 16 for lack of standing is scheduled for a hearing before the United States Bankruptcy Court, 1000 Elm Street, 11th Floor, Courtroom 2, Manchester, New Hampshire on **April 21, 2015** at 9:00 a.m.

YOUR RIGHTS MAY BE AFFECTED. You should read the attached objection carefully and discuss it with your attorney. If you do not have an attorney, you may wish to consult one. If you have no response to the objection, no action is required by you. If you intend to respond to the objection, or if you wish to be heard on any matter regarding it, you must file a written response with the Clerk, United States Bankruptcy Court, 1000 Elm Street, Suite 1001, Manchester, NH 03101 on or before **April 14, 2015**.

A copy of your response or statement must be mailed or delivered to the undersigned debtor's attorney at the address set below, the Chapter 13 trustee, the United States Trustee, and a certificate of such action must be filed with the Clerk. If you file a response to the objection, you must also appear at the hearing on the date and time set forth above. **If no response to the objection is filed by April 14, 2015, the Court may enter an order sustaining the objection to Claim No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of National Collegiate Student Loan Trusts at the hearing.**

DATED: 3/12/2015

Respectfully Submitted,
Ann Sexton
Through her attorney
/s/ Richard D. Gaudreau
Richard D. Gaudreau, BNH 02119
P.O. Box 1359, Salem, NH 03079
(603) 893-4300
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Ann Sexton, f/k/a Ann Casler debtor	Chapter 13 Case No. 14-11647-JMD
Ann Sexton v. National Collegiate Student Loan Trusts 2006-3, 2005-2, 2005-1, 2007-3, 2006-2, 2007-1, 2006-1, 2006-4, 2005-2, 2004-2, 2005-3	

ORDER ON OBJECTION TO CLAIMS 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16

After review of the pleadings, including Debtor's Omnibus Objection to Claims 6 through 16, the Court sustains the objection to each Proof of Claim filed by National Collegiate Trust on behalf of:

Claim No. 6 -	National Collegiate Student Loan Trust 2006-3
Claim No. 7 -	National Collegiate Student Loan Trust 2005-2
Claim No. 8 -	National Collegiate Student Loan Trust 2005-1
Claim No. 9 -	National Collegiate Student Loan Trust 2007-3
Claim No. 10 -	National Collegiate Student Loan Trust 2006-2
Claim No. 11 -	National Collegiate Student Loan Trust 2007-1
Claim No. 12 -	National Collegiate Student Loan Trust 2006-1
Claim No. 13 -	National Collegiate Student Loan Trust 2006-4
Claim No. 14-	National Collegiate Student Loan Trust 2005-2
Claim No. 15-	National Collegiate Student Loan Trust 2004-2
Claim No. 16-	National Collegiate Student Loan Trust 2005-3

finding claimants are entitled to $0.00 from the bankruptcy estate because they do not have standing to collect these student loan debts.

Dated: _____

_____
J. Michael Deasy, U.S. Bankruptcy Judge

CERTIFICATE OF SERVICE

I forwarded a copy of this Omnibus Objection to Claims 6 through 16, Proposed Order and Notice of Hearing by electronic service to:

Lawrence Sumski, Chapter 13 Trustee

Office of the U.S. Trustee

Richard Mulligan, Esq., for JP Morgan Chase Bank, N.A.

Marc Van Zanten for National Collegiate Student Loan Trusts

Dated: 3/12/2015

/s/ Richard D. Gaudreau
Richard D. Gaudreau, Esq.