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(Don't) Stand By Me: NY Court of Appeals Judge Unravels Confusion Surrounding Doctrine of Standing in Residential Foreclosure Actions


By **Steven M. Herman**
Partner | Real Estate


By **Parker Ihrie**
Associate | Real Estate

In a recent concurring opinion, Judge Rowan D. Wilson sifts through and attempts to clear up some confusion in New York case law surrounding the doctrine of standing in foreclosure actions. The question at issue involves the difference between the doctrine of standing, on the one hand, and whether a plaintiff is a party to contract – an essential element of a foreclosure action – on the other.

The case at issue, *U.S. Bank N.A. v Nelson*, involves a foreclosure action instituted by U.S. Bank, N.A. of a residence owned by the defendants, the Nelsons. In the lower court, the plaintiff provided evidence that it was the holder of the debt at issue, and the defendants offered no argument that such evidence was deficient. The defendants challenged plaintiff's ownership of the debt for the first time upon appeal. The New York Court of Appeals affirmed the lower court's grant of summary judgment in favor of plaintiff, arguing that because the defendants failed to challenge plaintiff's ownership of the debt as an affirmative defense in their answer or pre-answer motions, such defense was unpreserved for the Court of Appeals' review.

Judge Wilson issued a concurring opinion, but his conclusion was based upon an analysis which differed from that of the majority. His opinion was simply that the plaintiff provided evidence that it was the holder of the note, and the defendants did not offer any contrary proof or argument that such evidence was deficient. Judge Wilson explained that this case has nothing to do with the doctrine of standing and at the same time brings to the forefront the conflation of the doctrine of standing. Standing is a requirement that must be satisfied before a court can even hear certain cases, while the failure to state a claim for relief goes to the merits of the case. The opinion goes on to explain in detail that while the decision of the majority is correct, it is correct for the wrong reasons. Judge Wilson explains that the majority's decision is rooted in this misunderstanding of the doctrine of standing – a misunderstanding that has affected New York courts for at least the past decade.

In order to bring a residential foreclosure action in New York, the lender must provide, as an essential element of its claim, evidence that it is the holder of the debt secured by the mortgage at issue. Specifically, under NY CPLR § 3012-B, the legislature requires that the lender produce "the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any." This requirement mirrors the doctrine of presentment required in connection with the payment of negotiable instruments. A lender will have failed to establish a claim without the foregoing. Alternatively, the production of such evidence will constitute *prima facie* evidence that such element has been satisfied, subject to challenge by the defendant borrower.

The doctrine of standing, however, is a prerequisite of justiciability, which refers to the types of matters a court can adjudicate. As Judge Wilson explains, there are two types of standing: constitutional and prudential. Constitutional standing is based, as one might presume, in the U.S. Constitution. Specifically, case law has evolved to provide that the Case or Controversy Clause of the U.S. Constitution requires satisfaction of three elements in order to show standing: injury in fact, causation and redressability. Judge Wilson states that because the New York Constitution does not have a case or controversy requirement, "the federal constitutional standing doctrine is of little or no relevance."

The Court of Appeals has adopted the rule that prudential standing requires a party to show that its injury falls within the "zone of interests" or concerns that the applicable statute aims to protect against. Judge Wilson explains that standing generally comes into play when parties attempt to enforce public – not private – rights. The U.S. Supreme Court has stated that "[s]tanding is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." It has also warned that "[t]he distinct concepts [of standing and cause of action] can be difficult to keep separate" and that "the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." Judge Wilson proffers that standing has been "increasingly misapplied in cases where private rather than public rights are at issue" and that this is such a case that "confuses the legal principle at issue."

Here, the defendants' failure to argue "lack of standing," albeit a misnomer, in the lower court should not have been the basis for the Court of Appeals to affirm the lower court's grant of summary judgment in favor of the plaintiff. True lack of standing would in fact have to be raised as an affirmative defense in the lower court; however, because this argument goes to the merits of the case by attacking an essential element of a breach of contract action, this argument should have been permitted to be raised at any point. The issue for the Nelsons, however, is that U.S. Bank, N.A. was able to provide sufficient evidence that it was the noteholder and the Nelsons were unable to refute it.

Judge Wilson puts it concisely: "Needless to say, when someone purporting to be a party to a contract sues to enforce that contract, no issue of standing is involved. You're either a party to the contract or not."