

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

WATERFALL VICTORIA MASTER FUND LIMITED,	:	OPINION
	:	
Plaintiff-Appellee,	:	CASE NO. 2011-L-025
	:	
- vs -	:	
	:	
LAURA M. YEAGER, et al.,	:	
	:	
Defendants-Appellants.		

Civil Appeal from the Court of Common Pleas, Case No. 10 CF 001450.

Judgment: Affirmed.

F. Peter Costello and Kristi L. Pallen, Reimer, Arnovitz, Cherneski & Jeffrey Co., L.P.A., 2450 Edison Boulevard, P.O. Box 968, Twinsburg, OH 44087 (For Plaintiff-Appellee).

James R. Douglass, James R. Douglass Co., L.P.A., and *Marc E. Dann*, Law Offices of Marc Dann, 20521 Chagrin Boulevard, Suite D, Shaker Heights, OH 44122-9736 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Laura M. Yeager and Michael W. Yeager, appeal the default judgment of the Lake County Court of Common Pleas resulting in foreclosure of their real property. Appellants argue the trial court erred by not dismissing appellee’s complaint for failure to prosecute under Civ.R. 41(B). Appellants also contend the trial court lacked subject matter jurisdiction to grant a default judgment because appellee lacked standing. For the reasons that follow, we affirm.

{¶2} On May 14, 2010, appellee, Waterfall Victoria Master Fund Limited, filed a complaint for foreclosure, alleging appellants' default on a note in the sum of \$164,839.88, plus interest. The trial court's docket entry of June 3, 2010, indicates that appellants were personally served on May 26, 2010. No answer to the complaint was filed by appellants.

{¶3} A preliminary judicial report ("PJR"), dated September 18, 2009, was also filed on May 14, 2010. Loc.R. VII(A)(1) of the Lake County Court of Common Pleas requires the PJR to be dated not over 30 days prior to filing of the complaint. Further, the report was inconsistent with the complaint in that appellee was not listed as an assignee of the mortgage. In response to a court order, an updated PJR was filed on June 16, 2010. This updated PJR amended the prior version to reflect appellee as the mortgage holder by way of assignment.

{¶4} On September 10, 2010, the trial court filed an order demanding that appellee take affirmative action to prosecute its cause within 45 days or the action would be dismissed pursuant to Civ.R. 41(B)(1). Six days later, appellee responded by filing a Notice of Status updating the trial court on the status of the case.

{¶5} On January 4, 2011, appellee filed a motion for default judgment, which the trial court granted. In the trial court's judgment entry, it found that all necessary parties had been served with summons and were properly before the court. It found appellee to be entitled to the sum set forth in the complaint.

{¶6} Appellants now appeal the judgment and assert two assignments of error for review. Appellants' first assignment of error is:

{¶7} “The trial court erred by not dismissing the complaint for failure to prosecute under Civ.R. 41(B) because plaintiff failed to take affirmative action as ordered by the court on September 10, 2010.”

{¶8} Appellants argue that the trial court lost jurisdiction over the claim on October 25, 2010, when appellee failed to abide by the court order threatening dismissal for failure to prosecute. Appellants essentially contend that the trial court erred by failing to follow its own order. However, this is not a legal error; the decision to dismiss a case for failure to prosecute is entrusted to the sole discretion of the trial court. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371 (1997). It is equally in the court’s discretion to *not* dismiss a case for failure to prosecute when it is satisfied by a party’s subsequent action with regard to the case. Here, appellee filed a Notice of Status on September 16, 2010, six days after the court’s order. Appellee’s Notice of Status explicitly stated that, in response to the trial court’s entry, more time would be needed to consider a repayment plan which could potentially end the litigation. This notice filed by appellee was, in the trial court’s judgment, sufficient to satisfy its concerns about the status of the case. Therefore, the trial court acted properly in its discretion by not dismissing appellee’s complaint. Appellants’ first assignment of error is without merit.

{¶9} Appellants’ second assignment of error is:

{¶10} “The trial court lacked subject matter jurisdiction to grant a default judgment because plaintiff-appellee did not own the note, suffered no injury, did not have a justiciable controversy with the Yeagers, and lacked standing so the judgment is *void ab initio*.”

{¶11} “Subject matter jurisdiction is the power conferred upon a court, either by constitutional provisions or by statute, to decide a particular matter or issue on its merits.” *In re B.P.*, 11th Dist. No. 2011-T-0032, 2011-Ohio-2334, ¶30, citing *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998). A claim that the trial court lacks subject matter jurisdiction, which can be raised at any time, is reviewed de novo. *State v. Jones*, 11th Dist. Nos. 2010-P-0051 and 2010-P-0055, 2011-Ohio-5109, ¶23, citing *Byard v. Byler*, 74 Ohio St.3d 294, 296 (1996), and *Swift v. Gray*, 11th Dist. No. 2007-T-0096, 2008-Ohio-2321, ¶38. See also *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11 (“[b]ecause 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”).

{¶12} Appellants contend that the original mortgagee did not have authority to assign the mortgage because the right to enforce a note cannot be assigned; instead, it must be negotiated in accord with Ohio’s version of the Uniform Commercial Code. Thus, appellants argue, the subsequent assignment of the mortgage to appellee was invalid—meaning appellee was not the real party in interest and lacked standing to invoke the trial court’s jurisdiction.

{¶13} However, lack of standing is an affirmative defense which challenges the capacity of a party to bring an action—it does not challenge a trial court’s subject matter jurisdiction. *Suster* at 77, citing *State ex rel. Smith v. Smith*, 75 Ohio St.3d 418, 420 (1996), and *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 251 (1992). Consequently, the failure to raise a standing objection or a “real party in interest” defense at the trial court level constitutes waiver of the claim. *Aurora Loan Servs., LLC*

v. Cart, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157, ¶18, citing *Washington Mut. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, ¶16.

{¶14} The case sub judice is directly on point with our decision in *Aurora Loan Servs., LLC v. Cart*, *supra*. In *Aurora Loan*, just as in this case, the appellant claimed the underlying judgment was invalid for lack of subject matter jurisdiction on the grounds that the mortgagee was not the real party in interest and, thus, lacked standing to initiate the foreclosure action. Relying on overwhelming authority, we concluded that the issue of standing is not jurisdictional and therefore cannot void the default judgment of foreclosure. *Aurora Loan* at ¶18, citing *Freedom Mtge. Corp. v. Groom*, 10th Dist. Nos. 08AP-761 and 09AP-162, 2009-Ohio-4482, ¶21; *Portfolio Recovery Assoc., LLC v. Thacker*, 2d Dist. No. 2008 CA 119, 2009-Ohio-4406, ¶14; and *First Union Natl. Bank v. Hufford*, 146 Ohio App.3d 673, 677 (3d Dist. 2001).

{¶15} Here, because the matter fell squarely within the class of cases over which the Lake County Court of Pleas has subject matter jurisdiction, it was properly before the trial court. Thus, the default judgment is not void. Appellants' second assignment of error is without merit.

{¶16} The judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., and

MARY JANE TRAPP, J., concur.