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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2100245

Bessie T. Sturdivant

v.

BAC Home Loans Servicing, LP

Appeal from Jefferson Circuit Court
(CV-09-904181)

THOMPSON, Presiding Judge.

On December 31, 2009, BAC Home Loans Servicing, LP (hereinafter "BAC"),[1] filed a complaint in ejectment against

[1]On July 1, 2011, BAC merged into Bank of America, N.A., and Bank of America became a successor by merger to BAC. Because BAC was the name used by the entity involved in the

Bessie T. Sturdivant. Specifically, BAC alleged that it had sold at foreclosure certain property pursuant to the terms of a mortgage executed by Sturdivant, that it had purchased the property at the foreclosure sale, and that Sturdivant had failed to surrender possession of the property. Sturdivant answered and denied the material allegations of the complaint.

BAC moved for a summary judgment, and Sturdivant opposed that motion. After conducting a hearing, the trial court, on October 29, 2010, entered a summary judgment in favor of BAC. The trial court also ordered that a writ of possession in favor of BAC be issued. Sturdivant filed a postjudgment motion, which the trial court denied. Sturdivant timely appealed to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

The record indicates the following relevant facts. In December 2007, Sturdivant obtained a loan from Security Atlantic Mortgage Co., Inc. ("Security Atlantic"), to purchase a home. To secure the loan, Sturdivant executed a mortgage with Mortgage Electronic Registration System, Inc. ("MERS")

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transactions at issue in this case, we will continue to use "BAC," rather than "Bank of America," throughout this opinion.

"solely as nominee" for Security Atlantic.[2] The record indicates that the loan was insured by the Federal Housing Administration ("FHA"). A portion of the security agreement for the mortgage reads:

> "This security instrument is given to Mortgage Electronic Registration Systems, Inc. ('MERS'), solely as nominee for lender, as hereinafter defined, and lender's successors and assigns, as beneficiary. ... For this purpose, borrower does hereby mortgage, grant and convey to MERS (solely as nominee for lender and lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in Jefferson County, Alabama ....
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> "... Borrower understands and agrees that MERS holds only legal title to the interest granted by borrower and the security instrument; but, if necessary to comply with law or custom, MERS (as nominee for lender and lender's successors and assigns) has the right to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the property; and to take any action required of lender...."

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[2]The definition of "nominee" includes:

> "2. A person designated to act in place of another, usu. in a very limited way. 3. A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others."

Black's Law Dictionary, 1149 (9th ed. 2009).

Sturdivant stated in an affidavit that in March 2009 several of her family members died, that she herself became ill, and that she suffered a decrease in her income. Sturdivant testified that in March 2009 she began contacting BAC about the possibility of modifying her loan payments.

The record indicates that when Sturdivant did not make the loan payments due in April 2009 or May 2009, BAC sent a letter on June 8, 2009, in which it identified itself as the "servicer" of her loan. In that letter, BAC notified Sturdivant that if her default on the terms of the mortgage was not cured, the loan payments would be accelerated and the balance of the loan would be due.

BAC presented evidence indicating that in September 2009 it referred the matter to an attorney to begin the foreclosure process. The record contains two letters, each dated September 20, 2009, sent by BAC's attorney to Sturdivant. One of the September 20, 2009, letters identified BAC as the "holder of [Sturdivant's] mortgage," informed Sturdivant of the total amount due under the terms of the mortgage-loan contract, and notified her of the procedures for disputing the debt. The other September 20, 2009, letter from BAC's

attorney to Sturdivant notified Sturdivant that BAC, identified as the holder of the mortgage, had instructed the attorney to proceed with the foreclosure of the mortgage and that a foreclosure sale was scheduled for October 28, 2009.

BAC also submitted into evidence two communication logs generated by Neighborhood Housing Services of Birmingham, Inc. ("NHSB"), an organization that Sturdivant authorized to negotiate on her behalf with "the lender" in connection with the mortgage loan. The NHSB communication logs indicate that in late April or early May 2009 Sturdivant began the process of applying for a "work out" of her mortgage, i.e., applying for assistance regarding, a modification of, or a restructuring of the mortgage loan. The communication logs indicate that in mid September 2009 Sturdivant was informed that BAC was seeking to foreclose on the property and that Sturdivant was continuing her efforts to obtain a modification of the mortgage loan.

The foreclosure sale scheduled for October 28, 2009, was postponed until December 1, 2009, while BAC continued to review Sturdivant's request for a modification of her loan. A November 13, 2009, entry on one of the NHSB communication

logs indicates that NHSB was informed on that date that Sturdivant's request was still under review but that the foreclosure sale remained scheduled for December 1, 2009. On December 1, 2009, NHSB entered a notation that it had been informed that Sturdivant "did not qualify for a loan mod on 11-7-2009." An assistant vice president for BAC, Ken Satsky, stated in an affidavit that, "based upon a review of the financial information provided by Ms. Sturdivant, she did not meet the applicable guidelines" for a modification of the mortgage loan.

In his affidavit, which was submitted in support of BAC's summary-judgment motion, Satsky said that, "[i]n my employment capacity, I am personally familiar" with Sturdivant's mortgage account. Satsky's affidavit stated that Sturdivant's mortgage had originated with MERS, on behalf of Security Atlantic or its successors and assigns, and that foreclosure proceedings had been initiated. Satsky's affidavit does not reference an assignment of the mortgage to BAC, and it does not indicate the identity of the entity that initiated the foreclosure proceedings. Satsky testified that Sturdivant defaulted on the note secured by the mortgage and that BAC "provided her

with Notice of Default and acceleration of the debt due under said note by letter dated January 6, 2009." The record on appeal does not contain a letter dated January 6, 2009, and Satsky's affidavit does not refer to the September 20, 2009, letters BAC submitted to the trial court in support of its summary-judgment motion.[3]

Also in support of its summary-judgment motion, BAC submitted into evidence a statement that a notice of foreclosure had been published on November 7, 2009, in the Alabama Messenger, a "weekly newspaper of general circulation." See § 35-10-8, Ala. Code 1975 (governing the notice required for a foreclosure sale). In that notice, BAC stated that it was the "holder of [Sturdivant's] mortgage," which contained a power of sale, and that BAC would sell the property on December 1, 2009, at public auction. BAC also represented in its published notice of the proposed December 1, 2009, foreclosure sale that Sturdivant had mortgaged the property to MERS, as nominee for Security Atlantic or its

[3]There is no evidence in the record on appeal pertaining to a default occurring in or before January 2009. The documents submitted by BAC indicate that Sturdivant failed to make mortgage payments in April and May 2009.

successors and assigns, and that "said mortgage was subsequently assigned to BAC Home Loans Servicing, LP, by instrument recorded in [the probate court]."

On December 1, 2009, the property was sold at the foreclosure sale that BAC had scheduled. BAC was the purchaser of the property at that sale. Also on December 1, 2009, MERS assigned Sturdivant's mortgage to BAC.

In support of its motion for a summary judgment, BAC submitted to the trial court a copy of its auctioneer's foreclosure deed, also dated December 1, 2009, which states, among other things, that MERS had assigned the mortgage to BAC, that BAC had recorded that assignment of the mortgage, and that BAC had completed other steps necessary to obtain a deed by virtue of its purchase of the property at the foreclosure sale. With regard to the assignment of the mortgage, the December 1, 2009, auctioneer's foreclosure deed specifically states:

> "WHEREAS, BESSIE T. STURDIVANT, unmarried, executed a mortgage to Mortgage Electronic Registration Systems, Inc. [MERS], acting solely as nominee for Lender and Lender's Successors and Assigns on the 18th day of December 2007, on that certain real property hereinafter described, which mortgage is recorded in Book LR200801, Page 21971, of the records in the Office of the Judge of

> Probate, Jefferson County, Alabama; which said mortgage was subsequently assigned to BAC Home Loans Servicing LP by instrument recorded in Book 200912 Page 14464 of said Probate Court records ...."

(Emphasis added.) The "book" and "page" numbers identified in the above-quoted portion of the December 1, 2009, auctioneer's foreclosure deed are not printed in typeface, as is the remainder of the deed. Rather, those numbers are handwritten insertions into the auctioneer's foreclosure deed. The evidence submitted by BAC in support of its summary-judgment motion indicates that the December 1, 2009, assignment of Sturdivant's mortgage from MERS to BAC and the December 1, 2009, auctioneer's foreclosure deed were each first recorded in the office of the Jefferson Probate Court ("the probate court") on December 23, 2009, and the time stamps on those documents indicate that the auctioneer's foreclosure deed was recorded one second after the assignment.[4]

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[4]We note that there is no statutory requirement in Alabama that an assignment of a mortgage be recorded in a probate office before an assignee may institute foreclosure proceedings. Regardless, BAC did not submit to the trial court evidence, nor has it asserted an argument to this court, explaining why the December 1, 2009, auctioneer's foreclosure deed awards it title to the property based, in part, upon an assignment "recorded" in the probate court on December 23, 2009, more than three weeks after the execution of the December 1, 2009, auctioneer's foreclosure deed. Similarly,

On December 4, 2009, BAC sent a letter to Sturdivant notifying her of its purchase of the property at the December 1, 2009, foreclosure sale and demanding possession of the property pursuant to § 6-5-251, Ala. Code 1975.

On appeal of the trial court's summary judgment in favor of BAC, Sturdivant raises a number of issues; however, we find one issue to be dispositive. Sturdivant contends that the summary judgment in favor of BAC was improper because, she says, BAC failed to make a prima facie showing that it had the authority to, and did, validly foreclose on the property. In its brief on appeal, BAC counters that Sturdivant did not raise before the trial court her argument that it did not validly foreclose. Therefore, it contends, Sturdivant cannot now assert that the deed it obtained through the foreclosure sale was invalid for that reason.

However, Sturdivant's argument implicates the issue of standing, which involves whether the court had subject-matter jurisdiction to consider BAC's ejectment action. See Cadle

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BAC represented in its November 2009 published notice in the Alabama Messenger that it had the authority to foreclose on Sturdivant's mortgage because it had been assigned Sturdivant's mortgage and had recorded that assignment in the probate court.

Co. v. Shabani, 950 So. 2d 277, 279 (Ala. 2006) (When the plaintiff "lacked standing to maintain the ejectment action, the trial court lacked subject-matter jurisdiction over th[e] case, and its resulting judgment [was] therefore void."). Appellate courts are "'"duty bound to notice ex mero motu the absence of subject-matter jurisdiction."'" Riley v. Hughes, 17 So. 3d 643, 648 (Ala. 2009) (emphasis added) (quoting Baldwin Cnty. v. Bay Minette, 854 So. 2d 42, 45 (Ala. 2003), quoting in turn Stamps v. Jefferson Cnty. Bd. of Educ., 642 So. 2d 941, 945 n. 2 (Ala. 1994)). "When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction." State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999). The issue of a lack of standing may not be waived, and an argument concerning standing may be asserted for the first time on appeal. RLI Ins. Co. v. MLK Ave. Redev. Corp., 925 So. 2d 914, 918 (Ala. 2005). In fact, in an appeal from a judgment in an ejectment action, our supreme court, on its own motion, has vacated the judgment ejecting the mortgagor when the evidence demonstrated that the plaintiff did not have legal title to the property at issue and, therefore, lacked standing

to bring the action. See Cadle Co. v. Shabani, supra. Accordingly, we address the issue whether BAC had standing to bring the ejectment action.

BAC's claim for ejectment is one arising under § 6-6-280(b), Ala. Code 1975. See EB Invs., L.L.C. v. Atlantis Dev., Inc., 930 So. 2d 502 (Ala. 2005) (the claim was one in ejectment under § 6-6-280(b), Ala. Code 1975, when the complainant alleged that it was entitled to possession of land because of its purchase of the land at a foreclosure sale and that the defendant was unlawfully detaining same); Muller v. Seeds, 919 So. 2d 1174 (Ala. 2005), overruled on other grounds, Steele v. Federal Nat'l Mortg. Ass'n, 69 So. 3d 89 (Ala. 2010) (same); and Earnest v. First Fed. Sav. & Loan Ass'n of Alabama, 494 So. 2d 80 (Ala. Civ. App. 1986) (same).

Section 6-6-280(b) provides as follows:

> "(b) An action for the recovery of land or the possession thereof in the nature of an action in ejectment may be maintained without a statement of any lease or demise to the plaintiff or ouster by a casual or nominal ejector, and the complaint is sufficient if it alleges that the plaintiff was possessed of the premises or has the legal title thereto, properly designating or describing them, and that the defendant entered thereupon and unlawfully withholds and detains the same. This

> action must be commenced in the name of the real owner of the land or in the name of the person entitled to the possession thereof, though the plaintiff may have obtained his title thereto by a conveyance made by a grantor who was not in possession of the land at the time of the execution of the conveyance thereof. The plaintiff may recover in this action mesne profits and damages for waste or any other injury to the lands, as the plaintiff's interests in the lands entitled him to recover, to be computed up to the time of the verdict."

(Emphasis added.) Therefore, as part of its initial burden for seeking a summary judgment in its action seeking possession of the property, BAC was required to present evidence constituting a prima facie case that it had legal title or a right to possess the property.[5] See § 6-6-280(b); Cadle Co. v. Shabani, 950 So. 2d at 279 ("In order to maintain an action for ejectment, a plaintiff must allege either possession or legal title, and the 'action must be commenced in the name of the real owner of the land or in the name of

[5]Recently, in Steele v. Federal National Mortgage Association, 69 So. 3d 89, 93-94 (Ala. 2010), our supreme court held that § 6-6-280 does not require that a plaintiff in an ejectment action make a demand for possession of the property before filing an action under that section. In so holding, the court in Steele overruled Muller v. Seeds, 919 So. 2d 1174 (Ala. 2005), and several other cases to the extent that those cases held that a demand for possession was required to maintain an ejectment action under § 6-6-280.

the person entitled to possession thereof....' § 6-6-280, Ala. Code 1975."); and MacMillan Bloedell, Inc. v. Ezell, 475 So. 2d 493, 496-97 (Ala. 1985). See also Woodland Grove Baptist Church v. Woodland Grove Cmty. Cemetery Ass'n, 947 So. 2d 1031, 1041 n.10 (Ala. 2006) ("'Legal title' is defined as '[a] title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest.' Black's Law Dictionary 1523 (8th ed. 2004).").

In explaining the nature of a claim in ejectment asserted under § 6-6-280(b), our supreme court has explained:

> "The ... form of action prescribed in subsection (b) [of § 6-6-280] is, in effect, an action of ejectment as at common law, only stripped of the cumbersome forms and fictions which are characteristic of that form of action. Lomb v. Pioneer Savings & Loan Co., 106 Ala. 671, 17 So. 670 (1895). It is possessory in nature, as is its common law counterpart. Therefore, it remains incumbent upon the plaintiff to prove a right to possession at the time of the commencement of the action. State v. Broos, 257 Ala. 690, 60 So. 2d 843 (1952); Betz v. Mullin, 62 Ala. 365 (1878); Salter v. Fox, 191 Ala. 34, 67 So. 1006 (1915). The plaintiff may allege and prove that he either has the legal title to, or was possessed of, the land and that the defendant entered thereupon and unlawfully withholds and detains it. Atlas Subsidiaries of Florida, Inc. v. Kornegay, 288 Ala. 599, 264 So. 2d 158 (1972).
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> "As at common law, the plaintiff must prevail on the strength of his own legal title or claim to

> possession and not on the weakness of the defendant's. Miller v. Jones, 280 Ala. 612, 196 So. 2d 866 (1967). Although he may, the defendant is not required to show legal title or a right to possession in himself. Therefore, even against one with no title or right to possession, the plaintiff cannot prevail unless he meets his burden of proof. 25 Am. Jur. 2d Ejectment § 19 (1966)."

MacMillan Bloedell, Inc. v. Ezell, 475 So. 2d at 496-97 (emphasis added).

In this case, BAC based its claim that it had legal title to the property on the auctioneer's foreclosure deed it received after it purchased the property at the December 1, 2009, foreclosure sale. Sturdivant challenges BAC's assertion that it held legal title and a right to possession sufficient to support an action in ejectment; she argues that BAC lacked the authority to foreclose on her property because, at the time it initiated the foreclosure proceedings, it did not hold the mortgage and, thus, had no valid right to sell the property at foreclosure. Therefore, Sturdivant contends, the deed BAC purported to receive as a result of that foreclosure is not valid.

The mortgage Sturdivant executed contains a provision affording the holder of the mortgage a power of sale upon the mortgagor's default. With regard to the authority to sell

mortgaged property at foreclosure, § 35-10-1, Ala. Code 1975, provides:

> "Where a power to sell lands is given to the grantee in any mortgage, or other conveyance intended to secure the payment of money, the power is part of the security, and may be executed by any person, or the personal representative of any person, who, by assignment or otherwise, becomes entitled to the money thus secured; and a conveyance of the lands sold under such power of sale to the purchaser at the sale, executed by the mortgagee, any assignee or other person entitled to the money thus secured, his agent or attorney, or the auctioneer making the sale, vests the legal title thereto in such purchaser. ..."

(Emphasis added.) Furthermore, § 35-10-9, Ala. Code 1975, provides that "[a]ll sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of [statutory law governing the power of sale pursuant to the terms of a mortgage], shall be null and void, notwithstanding any agreement or stipulation to the contrary." (Emphasis added.)

In interpreting the predecessor to § 6-6-280(b), our supreme court explained:

> "The mortgagor, or those standing in his shoes, to whom the equity of redemption has been conveyed by the mortgagor, has the undoubted right to pay the mortgage debt and lawful charges incurred incident to a proceeding to foreclose at any time before the foreclosure is perfected, and this right would be

> greatly embarrassed, if not entirely destroyed, if one who has a mere contingent interest in the debt, and who has not a present right to receive the payment and discharge the mortgage, can exercise the power of foreclosure, and this is especially true where the mortgage and the debt thereby secured has been pledged to some person unknown to the mortgagor.
>
> "The clear test of the right of an assignee of the mortgage to exercise the power of sale under the statute is that such assignee is entitled to receive the money secured by the mortgage. Wildsmith v. Tracy et al., 80 Ala. 258 [(1885)]; Harton v. Little et al., 176 Ala. 267, 57 So. 851 [(1911)]; Johnson v. Beard, 93 Ala. 96, 9 So. 535 [(1981)]."

Kelly v. Carmichael, 217 Ala. 534, 537, 117 So. 67, 70 (1928) (emphasis added).

Consistent with the foregoing, the security agreement for Sturdivant's mortgage provides that, upon default by Sturdivant, MERS or Security Atlantic, or any successors or assigns of Security Atlantic, had the right under that agreement to foreclose on the property and seek its sale. Sturdivant points out that MERS had not assigned the mortgage to BAC at the time BAC initiated the foreclosure proceedings. Therefore, she asserts, BAC lacked the authority to foreclose under either the terms of the security agreement for the mortgage or under § 35-10-1.

In support of its motion for a summary judgment in the ejectment action, BAC presented evidence indicating that it was assigned the mortgage on December 1, 2009, the same date it obtained the deed to the property as a result of the foreclosure sale it had initiated.[6] The evidence is undisputed, however, that when BAC demanded payment from Sturdivant for the mortgage in June 2009, when it asked its attorney to initiate foreclosure proceedings in September 2009, and when it first published the notice of foreclosure sale on November 7, 2009, BAC did not hold the mortgage, and it was not a successor or an assignee of MERS or Security Atlantic. Thus, the evidence establishes that, at the time BAC initiated foreclosure proceedings pertaining to Sturdivant's mortgage, it was not "entitled to receive the money secured by the mortgage." Kelly v. Carmichael, 217 Ala. at 537, 117 So. at 70. In other words, BAC did not have the power of foreclosure or the authority to foreclose on the property, and, therefore, the deed it obtained after the December 1, 2009, foreclosure sale was invalid. § 35-10-9.

[6]The record on appeal does not indicate whether the mortgage was assigned to BAC before or after the foreclosure sale took place.

This case is distinguishable from recent ejectment cases in which factual questions regarding the validity of a foreclosure sale were raised. In Hawkins v. LaSalle Bank, N.A., 24 So. 3d 1143 (Ala. Civ. App. 2009), overruled, Berry v. Deutsche Bank National Trust Co., 57 So. 3d 142 (Ala. Civ. App. 2010), a mortgagee foreclosed on three parcels of property, including one on which the mortgagor lived. The mortgagor defended the mortgagee's ejectment action by contending that the foreclosure was invalid because the three parcels were sold collectively rather than separately, which, the mortgagor argued, impaired his ability to redeem the parcel on which he resided. This court agreed with the mortgagor's argument on appeal, holding that the mortgagor "presented a genuine issue of material fact [that] preclud[ed] summary judgment by presenting substantial evidence indicating that he would lose his housing and that the foreclosure sale en masse hampered his ability to redeem the subject property." 24 So. 3d at 1151. This court, citing § 6-6-280(b) and Cadle Co. v. Shabani, supra, held that if, at trial, the evidence indicated that the foreclosure sale and resulting deed were invalid, the mortgagee would not have standing to prosecute

its ejectment action. Hawkins v. LaSalle Bank, 24 So. 3d at 1151.

However, in Berry v. Deutsche Bank National Trust Co., supra, this court stated that such factual questions regarding the validity of the foreclosure sale did not implicate the plaintiff's standing to maintain an action in ejectment. In Berry, supra, the mortgagee foreclosed on the property and sought to eject the mortgagors. The mortgagors argued that the foreclosure sale upon which the mortgagee based its claim to legal title to the property was invalid because, they claimed, the amount the mortgagee paid to purchase the property at foreclosure was so inadequate as to shock the conscious. This court held that the mortgagors' defense,

> "[i]f satisfactorily proven at trial, ... [could] justify a determination that the foreclosure sale was invalid on the ground that the price realized at the foreclosure sale was so low in relation to the market value of the property as to shock the conscience, which would constitute an affirmative defense to [the mortgagee's] ejectment claim."

Berry v. Deutsche Bank Nat'l Trust Co., 57 So. 3d at 149 (emphasis added). In Berry, supra, this court clarified that evidentiary proof of irregularities in foreclosure proceedings or a foreclosure sale that calls into question the validity of

the deed based on that sale constitutes an affirmative defense to the ejectment action and that such factual questions do not invalidate the standing of the plaintiff to prosecute the ejectment action. Thus, Berry overruled Hawkins v. LaSalle Bank, supra, to the extent that Hawkins held that such evidence could deprive the ejectment plaintiff of standing. Berry v. Deutsche Bank Nat'l Trust Co., 24 So. 3d at 149-50.

We conclude that Berry, supra, is consistent with Cadle Co. v. Shabani, supra, on which this court relied in Hawkins, supra. In Cadle Co. v. Shabani, supra, American Express Travel Related Services Co., Inc. ("AMEX"), had obtained a judgment against Shabani that it later assigned to the Cadle Company. The 10-year statutorily prescribed period in which to enforce the judgment expired and The Cadle Company did not seek to revive the original judgment. Shabani purchased property and executed a mortgage in favor of AmSouth Bank. After The Cadle Company's judgment lien had expired, Shabani's property was sold at a sheriff's sale, and AMEX purchased the property at that sale. The Cadle Company sought to eject Shabani. The trial court entered a judgment determining that Shabani owned the property subject to the AmSouth mortgage and

that The Cadle Company and AMEX had no interest in the property by virtue of the invalidity of the sheriff's sale. Our supreme court, on its own motion, vacated the trial court's judgment after determining that because The Cadle Company lacked legal title to the property, it also lacked standing to bring the ejectment action. In determining that The Cadle Company lacked standing, the court stated that the sheriff's deed had been in favor of AMEX and there was no evidence of a transfer or assignment of the sheriff's deed from AMEX to The Cadle Company. The court determined that, "[b]ecause The Cadle Company lacked standing to maintain the ejectment action, the trial court lacked subject-matter jurisdiction over th[e] case, and its resulting judgment [was] therefore void." Cadle Co. v. Shabani, 950 So. 2d at 279. See also Ex parte McKinney, [Ms. 1090904, May 27, 2011] ___ So. 3d ___, ___ (Ala. 2011) (our supreme court again concluded that, because the plaintiff in the ejectment action could not demonstrate legal title to the property at issue, "under the

authority of Cadle, he lacks the standing necessary to prosecute his ejectment claim").[7]

We find the issue in this case to be distinguishable from the issue in Berry, supra. In this case, the issue is not whether there has been some irregularity that creates a factual question involving the propriety or fairness of the foreclosure proceedings or the foreclosure sale, as was the issue in Berry. Rather, this case is similar to Cadle Co. v. Shabani, supra. In that case, The Cadle Company claimed it held title to and a right to possession of the property, but the evidence indicated that The Cadle Company did not have

[7]We note that, in a footnote in Ex parte McKinney, supra, our supreme court indicated that the concepts of standing and real party in interest might have been blurred in the precedent holding that the failure to hold legal title may implicate standing in an ejectment action. Ex parte McKinney, ___ So. 3d at ___ n.7. However, in that case, our supreme court continued to adhere to the precedent established in Cadle Co. v. Shabani, supra, that the failure to demonstrate legal title to property divests a plaintiff in an ejectment action of standing to assert its claim. Accordingly, this court must follow that precedent. § 12-3-16, Ala. Code 1975 ("The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals ...."); Farmers Ins. Exch. v. Raine, 905 So. 2d 832, 835 (Ala. Civ. App. 2004) ("Although the supreme court might choose to revisit this issue, this court is bound by precedent....").

title to the property through which it could also claim a right to possession of the property.

As previously discussed, because the record demonstrates that BAC did not have legal title to the property at the time it initiated its foreclosure action, it cannot claim legal title to the property through the December 1, 2009, foreclosure sale and the resulting deed. Therefore, BAC did not have standing to bring the ejectment action. § 6-6-280(b); and Cadle Co. v. Shabani, 950 So. 2d at 279.

A judgment entered in an action commenced by a party lacking standing is a nullity. Vance v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008); see also Blevins v. Hillwood Office Ctr. Owners' Ass'n, 51 So. 3d 317, 321 (Ala. 2010) (same). Because BAC lacked standing to bring the ejectment action, the trial court never acquired subject-matter jurisdiction over this dispute. Accordingly, the summary judgment is void and is hereby vacated. Blevins, 51 So. 3d at 321; and Cadle Co., 950 So. 2d at 280. Additionally, because a void judgment will not support an appeal, Gallagher Bassett Servs., Inc. v. Phillips, 991 So. 2d 697, 701 (Ala. 2008), this appeal must be

dismissed for lack of subject-matter jurisdiction. Blevins, 51 So. 3d at 323.

For the reasons set forth above, the trial court's summary judgment is vacated and the appeal is dismissed

JUDGMENT VACATED; APPEAL DISMISSED.

Moore, J., concurs specially, which Thomas, J., joins.

Pittman and Bryan, JJ., dissent, with writings.

MOORE, Judge, concurring specially.

The record before this court indicates, without dispute, that BAC Home Loans Servicing, LP ("BAC"), did not have the authority to sell Bessie Sturdivant's property ("the property") through a nonjudicial foreclosure proceeding before December 1, 2009. Section 35-10-12, Ala. Code 1975, bestows that authority only to: (1) a person or entity owning a mortgage containing a specific grant of the power to sell; (2) a person or entity who has been conveyed, by assignment or otherwise, the right to the money secured by a mortgage containing a specific grant of the power to sell; or (3) the personal representative of either (1) or (2). Before December 1, 2009, Mortgage Electronic Registration Systems, Inc. ("MERS"), not BAC, owned the mortgage specifically granting the power of sale; MERS did not assign the mortgage to BAC until December 1, 2009, and BAC was not acting as MERS's personal representative before December 1, 2009.

Despite the fact that BAC did not own the mortgage, BAC held itself out to Sturdivant as the "holder of the mortgage" with the power to conduct nonjudicial foreclosure proceedings. Thereafter, BAC, in the manner prescribed by § 35-10-13, Ala.

Code 1975, published notice of the pending foreclosure sale in the Alabama Messenger. In that notice, BAC declared itself the owner of the mortgage pursuant to an assignment from MERS that had been recorded in the appropriate probate court. The record indicates that those representations were demonstrably false. In U.S. Bank National Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011), the Supreme Judicial Court of Massachusetts, under similar circumstances, held:

> "If the plaintiffs did not have their assignments to the [subject] mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under [the applicable statutes] and their published claims to be the present holders of the mortgages were false. ... Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer; it cannot become effective before the transfer."

458 Mass. at 653-54, 941 N.E.2d at 54. Ibanez supports the proposition that an assignee lacks authority to sell property through nonjudicial foreclosure proceedings if the assignment has not been completed at the time of the publication of the notice of the sale, the event that commences those proceedings.

Section 35-10-12, Ala. Code 1975, provides, in pertinent part: "A conveyance of the lands sold under such power of

sale to the purchaser at the sale may be executed by the mortgagee, their agents, attorneys or any person making the sale. Such conveyance vests the legal title of the lands sold under the power of sale ...." It follows that, when a nonjudicial foreclosure sale is conducted by a party without "such power of sale," any foreclosure deed executed by that party as a vendor does not "vest[] ... legal title of the lands sold." In Hrovat v. Bingham, 341 S.W.2d 365 (Mo. Ct. App. 1960), the Missouri Court of Appeals stated: "The general rule is that if the holder of the mortgage has no right or power to foreclose, then the sale under an attempted foreclosure is void and no title is conveyed ...." 341 S.W.2d at 368. Other jurisdictions, in somewhat different factual contexts, have also held that any deed acquired by a purchaser from an unauthorized foreclosure sale is void ab initio. See, e.g., Cary v. Guiragossian, 270 Ga. 192, 508 S.E.2d 403 (1998); Lee v. HSBC Bank USA, N.A., 121 Haw. 287, 218 P.3d 775 (2009); Brown v. General Trading Co., 310 Mass 263, 37 N.E.2d 987 (1941); and Henke v. First Southern Props., Inc., 586 S.W.2d 617 (Tex. Civ. App. 1979). In so holding, the courts have distinguished cases involving unauthorized foreclosure

sales from cases in which the seller had the power to conduct the nonjudicial foreclosure proceedings but failed to faithfully properly exercise that power in accordance with statutorily prescribed guidelines. See Hrovat, 341 S.W.2d at 368.

Applying the reasoning of those cases, BAC did not convey legal title to itself by virtue of the foreclosure deed it acquired following the December 1, 2009, nonjudicial foreclosure sale because it lacked authority to conduct that sale when it first published the notice of the sale. See generally Hess v. Hodges, 201 Ala. 309, 310, 78 So. 85, 86 (1918) ("One cannot be bona fide purchaser where his grantor did not have the legal title to convey."). Under the circumstances, the foreclosure deed was void ab initio, i.e., it was as if it had never existed. See Simmons v. Ball, 68 So. 3d 831 (Ala. 2011) (nonmanager of limited-liability company lacked authority to convey company's lands to himself, and, thus, so that deed purporting to do so was completely void).

In order to maintain a cause of action for ejectment, a plaintiff must bring the action in the name of the "real

owner" or the person "entitled to possession" of the property. See § 6-6-280(b), Ala. Code 1975. BAC filed the ejectment action in its own name; however, the foregoing undisputed facts show that BAC never acquired any legal or equitable interest in the property that would grant it the status of a "real owner" or a party holding a right to possession. In Cadle Co. v. Shabani, 950 So. 2d 277, 279 (Ala. 2006), the Alabama Supreme Court held that a plaintiff who did not have title ownership or a right to possession of the subject property did not have standing to assert an ejectment action and that the appellate court could, ex mero motu, take notice of the plaintiff's lack of standing and dismiss the appeal because the filing of the ejectment complaint had never invoked the subject-matter jurisdiction of the trial court. Although its reasoning has been heavily criticized, see Ex parte McKinney, [Ms. 1090904, May 27, 2011] ___ So. 3d ___, ___ (Murdock, J., dissenting), Shabani has not been overruled by our supreme court, and it therefore remains binding on this court. See § 12-3-16, Ala. Code 1975.

In this case, Sturdivant argues on appeal that BAC was not authorized to conduct the foreclosure sale and that,

therefore, its foreclosure deed purporting to convey the property to itself is void and will not support an ejectment action. BAC counters primarily that Sturdivant is belatedly raising an affirmative defense to the ejectment action that was not considered by the trial court and cannot now be considered by this court as a basis for reversing the summary judgment. Shabani treated the lack of title or right to possession not as an affirmative defense that could be waived, but as an issue of standing affecting the subject-matter jurisdiction of the trial court that could be noticed even ex mero motu on appeal without any argument from the parties on that issue. Although the facts in Shabani differ in the respect that The Cadle Company, the plaintiff in that case, never held any paper title to the subject property, its principle remains controlling in this case because the paper title upon which BAC relies is absolutely void and, for all legal purposes, is to be treated as if it never existed. Hence, Sturdivant's failure to argue BAC's lack of standing to the trial court does not prevent this court from holding that BAC lacked standing.

In his dissent, Judge Pittman argues that "when BAC commenced the ejectment action, it was prima facie the legal title holder because it produced a foreclosure deed, see Muller v. Seeds, 919 So. 2d 1174, 1177 (Ala. 2005)." ___ So. 3d at ___ (Pittman, J., dissenting). In Muller v. Seeds, the supreme court noted that "Muller[, the plaintiff in the subject ejectment action,] purchased the property at the foreclosure sale; thus, legal title to Lot 3 vested in him, and he was entitled to take immediate possession." 919 So. 2d 1174, 1177 (Ala. 2005). A close review of the facts of that case shows, however, that no issue was raised as to the authorization of the party conducting the sale. The Seedses, the defendants to Muller's ejectment action, merely argued that the sale itself had been conducted irregularly. As noted above, the law recognizes a material difference between an unauthorized foreclosure sale and an authorized foreclosure sale imperfectly performed, the latter allowing for a transfer of legal title, see Hrovat, supra, that, under Alabama law, may be attacked as voidable through an affirmative defense in an ejectment action. See Berry v. Deutsche Bank Nat'l Trust Co., 57 So. 3d 142, 149-50 (Ala. Civ. App. 2010).

This court failed to perceive that crucial distinction in Hawkins v. Lasalle Bank, N.A., 24 So. 3d 1143 (Ala. Civ. App. 2009), when we held that simple defects or irregularities in the nonjudicial foreclosure-sale proceedings, as opposed to the fundamental lack of authorization to conduct the foreclosure sale, affected the standing of the holder of the foreclosure deed in an ejectment action. In Berry, supra, this court overruled Hawkins to correct that error by holding that irregularities in an authorized foreclosure proceeding do not affect standing. In his dissent, Judge Pittman misconstrues Berry as more broadly holding that any defect in a nonjudicial foreclosure proceeding, including lack of authorization to bring the proceeding, must be raised as an affirmative defense. ___ So. 3d at ___ (Pittman, J., dissenting).

Shabani was decided after Muller, and it essentially holds that an utter lack of legal title deprives a plaintiff of standing to prosecute an ejectment action. Because BAC never acquired any title to the property, much less legal title, BAC lacked standing to bring its ejectment action. As the supreme court held in Shabani, a plaintiff's lack of

standing deprives a court of subject-matter jurisdiction over the complaint and renders any action on that complaint void. The summary judgment entered by the trial court in this case must be vacated, and this appeal dismissed, because a void judgment will not support an appeal. Carey v. Howard, 950 So. 2d 1131, 1137-38 (Ala. 2006). I, therefore, concur in the main opinion.

Thomas, J., concurs.

PITTMAN, Judge, dissenting.

I.

I dissent because I do not believe this case presents an issue of standing. The main opinion correctly states that, "as part of its initial burden for seeking a summary judgment in its [ejectment] action ..., BAC [Home Loans Servicing, LP,] was required to present evidence constituting a prima facie case that it had legal title or a right to possess the property." ___ So. 3d at ___. Unlike the ejectment plaintiff in Cadle Co. v. Shabani, 950 So. 2d 277 (Ala. 2006), who had no paper title to the property, BAC Home Loans Servicing, LP ("BAC") satisfied its burden by producing the foreclosure deed. Standing is determined at the commencement of an action, see Cadle, 4 So. 3d at 463, and when BAC commenced the ejectment action, it was prima facie the legal title holder because it produced a foreclosure deed, see Muller v. Seeds, 919 So. 2d 1174, 1177 (Ala. 2005).

Although I believe that Cadle actually presented a question of the plaintiff's inability to prove the allegations of its complaint rather than a question of standing, I recognize that this court would be bound by Cadle if it were

on point. But, Cadle is not on point, nor is Ex parte McKinney, [Ms. 1090904, May 27, 2011] ___ So. 3d ___ (Ala. 2011), on point, because in neither case did the ejectment plaintiff make an initial prima facie showing of legal title. To reiterate, BAC did make such a showing by producing its foreclosure deed; therefore, Cadle and McKinney are not controlling.

The main opinion concludes that because of fundamental defects in the foreclosure proceeding, BAC's foreclosure deed is void and, therefore, that BAC does not have legal title to the property. In reaching that conclusion, the main opinion relies on § 35-10-9, Ala. Code 1975, and Kelly v. Carmichael, 217 Ala. 534, 117 So. 67 (1928). Section 35-10-9 provides that

> "[a]ll sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of this article [Article 1 of Chapter 10 of Title 35, entitled 'Powers Contained in Mortgages'], shall be null and void, notwithstanding any agreement or stipulation to the contrary."

(Emphasis added). Our supreme court has held that foreclosure sales made in violation of the predecessor statutes to § 35-10-1 are "voidable on direct attack," that is, in actions to set aside a mortgage foreclosure and to

redeem. Vick v. Bishop, 252 Ala. 250, 253, 40 So. 2d 845, 848 (1949); see also Appelbaum v. First Nat'l Bank of Birmingham, 235 Ala. 380, 179 So. 373 (1938); and Kelly v. Carmichael, supra.

> "While the words 'void' and 'voidable' are often used interchangeably, there is an important distinction between those terms.
>
> "When used in its correct sense, the term 'voidable,' with regard to a deed, has much the same meaning that it has in the law of contracts -- that is, as meaning a writing that is both operative to convey the property and creative of contractual obligations unless and until set aside by the court. A voidable deed is capable of being either avoided or confirmed. The word 'void,' on the other hand, implies that the deed is invalid in law for any purpose whatsoever, such as a deed to effectuate a prohibited transaction. A voidable deed must be attacked, if at all, directly, but a deed that is void may be collaterally attacked by anyone whose interest is adversely affected by it."

23 Am. Jur. 2d Deeds § 162 (2002)(emphasis added; footnotes omitted). "[T]he true distinction between void and voidable acts, orders, and judgments, is, that the former can always be assailed in any proceeding, and the latter, only in a direct proceeding." Alexander v. Nelson, 42 Ala. 462, 469 (1868).

The main opinion quotes a passage from Kelly indicating that Carmichael, the foreclosing party in that case, had no right to foreclose because, at the time of the foreclosure,

Carmichael had assigned the mortgage, the note, and the debt secured thereby to another. The main opinion, however, does not quote the following further passage from Kelly: "Such foreclosure on direct attack in a court of equity is irregular and voidable, if not void." 217 Ala. at 537, 117 So. at 71 (emphasis added). Kelly is distinguishable because it arose from a complaint "to set aside an alleged irregular foreclosure of a mortgage, and, in the alternative, for redemption." 217 Ala. at 536, 117 So. at 69. Kelly was a direct attack on a foreclosure.

To the extent that Bessie Sturdivant raised, in the ejectment action, issues regarding the invalidity of the foreclosure, Sturdivant's defense constituted a collateral attack on the foreclosure. See Dewberry v. Bank of Standing Rock, 227 Ala. 484, 493, 150 So. 463, 470 (1933) (characterizing a prior decision as "a statutory action in the nature of ejectment -- an indirect or collateral attack upon the foreclosure of real and personal property sold by a trustee, under the power [of sale in a deed of trust]" (some emphasis added)). The method of assailing a transaction, agreement, judgment, or (as here) a deed as void is to assert

an affirmative defense. See Rule 8(c), Ala. R. Civ. P. (listing specific affirmative defenses and "any other matter constituting an avoidance"). "An affirmative defense is defined as 'new matter which, assuming the complaint to be true, constitutes a defense to it.' Black's Law Dictionary (rev. 5th ed. 1979)." Bechtel v. Crown Cent. Petroleum Corp. 451 So. 2d 793, 795 (Ala. 1984). Cf. Patterson v. Liberty Nat'l Life Ins. Co., 903 So. 2d 769 (Ala. 2004) (holding that insurer had waived the affirmative defense that policy was void because of insured's misrepresentations in policy application); Palmer v. Resolution Trust Corp., 613 So. 2d 373, 374 (Ala. 1993) (raising the affirmative defense that note was void under the Alabama Mini-Code, § 15-19-1 et seq., Ala. Code 1975); Lowe v. Rogers, [Ms. 2091114, February 25, 2011] ___ So. 2d ___ (Ala. Civ. App. 2011) (holding that party had waived the affirmative defense of res judicata to assert that previous judgment was void); Nichols v. Pate, 54 So. 3d 398 Ala. Civ. App. 2010) (holding that seller had waived the affirmative defense that sale of property was void because it did not satisfy the Statute of Frauds); and Goza v. Goza, 470 So. 2d 1271 (Ala. Civ. App. 1985) (raising the affirmative

defense that settlement agreement incorporated into divorce judgment was void for lack of mental capacity of the husband).

Notably, in both Hawkins v. LaSalle Bank, N.A., 24 So. 3d 1143 (Ala. Civ. App. 2009), and Berry v. Deutsche Bank National Trust Co., 57 So. 3d 142 (Ala. Civ. App. 2010) (overruling Hawkins), the ejectment defendant raised the affirmative defense that the foreclosure sale and deed were invalid. In 2009, this court held in Hawkins that, if the foreclosure sale and deed were invalid, then the purchaser had no standing to sue in ejectment. In 2010, we concluded in Berry that an irregularity in the foreclosure proceeding, such as inadequacy of the price paid at a foreclosure sale, did not implicate the standing of the purchaser to bring an ejectment action; instead, we held, that alleged irregularity constituted an affirmative defense. Now, in 2011, the main opinion returns to the 2009 "standing" analysis that we rejected in 2010, based on the fact that the irregularity in the present case is more "fundamental" than the irregularities asserted in either Hawkins or Berry. I do not disagree that the irregularity discussed in the main opinion is "fundamental" and that, had it been properly raised as an

affirmative defense, it would have resulted in the invalidation of the foreclosure sale. But the same is true of the irregularities present in Hawkins and Berry; upon proper proof of the irregularities asserted in those cases, the foreclosure sales would also have been invalidated.

By altering its analysis twice in three years, this court is contributing to the instability of the law concerning mortgage foreclosures, an area of practice that is already fraught with too much instability. I cannot account for the difference in the way the main opinion treats the defect in the foreclosure sale that forms the basis for the ejectment action in this case from the way this court treated the defect in Berry -- both of which defects, if proved, would result in invalidation of the foreclosure sale -- other than to surmise that we have been led astray by the standing analysis in Cadle, a decision that, as I have already stated, I think is misguided and should be overruled. But even accepting that analysis, Cadle is distinguishable on the basis that, at the commencement of the ejectment proceeding in Cadle, the ejectment plaintiff, unlike the ejectment plaintiff in this case, did not have prima facie legal title.

II.

Sturdivant waived the argument made the basis of the main opinion's decision -- that BAC, at the time it began the foreclosure proceedings, was not the assignee of the mortgage -- by failing to present that argument to the trial court. To be sure, Sturdivant's amended answer asserted the affirmative defenses of "defective notice, defective sale, and wrongful foreclosure." But at two points in the proceeding, Sturdivant specified in what respect she claimed that the foreclosure was wrongful, and at both points she failed to argue the issue she presents for the first time on appeal -- that the foreclosure sale was invalid because BAC had not been assigned the mortgage when it initiated the foreclosure proceedings. First, in answer to BAC's interrogatory number 6, "Please state in detail the factual support for th[e] conclusion that [BAC] 'is without legal title to the property due to defective notice, defective sale, and wrongful foreclosure,'" Sturdivant stated:

> "During the course of negotiations with [BAC] for a modification of my home loan, [BAC] was simultaneously proceeding with foreclosure on the same property. Although [BAC] was in the process of foreclosing on my home, they misrepresented that they were working with me in an effort to bring my

> account current and allow me to remain in my home. The notice was defective as the first and only notice I received was dated December 4, 2009, after my home had already been sold."

Second, in her response to BAC's summary-judgment motion, Sturdivant argued that the foreclosure was wrongful because, she said, BAC had led her to believe that it was working with her, through a loss-mitigation program, to help her keep her home when, she alleged, BAC had failed to follow the federal Department of Housing and Urban Development ("HUD") regulations regarding loss mitigation.

In Cooper v. Federal National Mortgage Ass'n, [Ms. 2090983, June 30, 2011] ___ So. 3d ___ (Ala. Civ. App. 2011), this court was presented with the argument that wrongful foreclosure by the plaintiff warranted a judgment for the defendant in ejectment. The defendant specifically alleged that the foreclosure was wrongful because "(1) the lender had failed to give her the notice of default required by Paragraph 9 of the mortgage and (2) the foreclosure notice published in the newspaper stated that the foreclosure sale would be held at the Jefferson County Courthouse in Birmingham rather than the Jefferson County Courthouse in Bessemer." ___ So. 3d at ___. This court addressed those two issues and found them to

be without merit. Here, this court is being asked to address an issue, and to reverse on the basis of an argument, that was never presented to the trial court solely because the issue falls under the general rubric of "wrongful foreclosure."

In Powell v. Phenix Federal Savings & Loan Ass'n, 434 So. 2d 247 (Ala. 1983), the mortgagors filed an action to enjoin a foreclosure resulting from the enforcement of a due-on-sale clause after they sold part of their property in order to keep their house. The mortgagee argued, among other things, that it had not consented to the sale and had not waived its right to accelerate the amount due under the mortgage. The trial court agreed and refused to enjoin the foreclosure on the authority of Tierce v. APS Co., 382 So. 2d 485, 486 (Ala. 1979) (reversing the trial court's order granting an injunction against foreclosure and holding that the "determinative issue" was "whether a 'due on sale' clause is per se invalid, unless a separate consideration has been given for it, when the mortgagee's primary purpose for accelerating payment is to obtain a higher interest rate"). On appeal, the mortgagee, perhaps recognizing that Tierce allowed an inquiry into its "primary purpose for accelerating payment," id.,

argued for the first time that federal law preempted any Alabama law limiting the enforceability of due-on-sale clauses. The supreme court declined to consider that argument because it was an affirmative defense that had not been argued in the trial court. Powell, 434 So. 2d at 251.

I would affirm the judgment because the late-assignment issue was not presented to the trial court. I would also reject Sturdivant's argument that she was entitled to raise, in defense of an ejectment action, that BAC failed to follow HUD regulations regarding loss mitigation. Sturdivant cites a number of decisions from other jurisdictions indicating that the failure to explore loss-mitigation options before foreclosure is a defense to a foreclosure action. The decisions do, in fact, make that statement, but it is in the context of judicial foreclosure actions, not nonjudicial foreclosure actions. See, e.g., Federal Land Bank of St. Paul v. Overboe, 404 N.W.2d 445, 449 (N.D. 1987) (in which the Federal Land Bank appealed from a judgment denying it the right to foreclose). Cf. Ala. Code 1975, § 35-10-3, which provides:

> "If no power of sale is contained in a mortgage or deed of trust, the grantee or any assignee

> thereof, at his option, after condition broken, may foreclose same either in a court having jurisdiction of the subject matter, or by selling for cash at the courthouse door of the county where the property is situated, to the highest bidder, the lands embraced in said mortgage or deed of trust, after notice of the time, place, terms and purpose of such sale has been given by four consecutive weekly insertions of such notice in some newspaper published in the county wherein said lands, or a portion thereof are situated."

(Emphasis added.) The emphasized portion of § 35-10-3 provides for a judicial foreclosure when the mortgage instrument itself does not provide for a power of sale. An ejectment action following a foreclosure sale is not a judicial foreclosure action. In my judgment, Sturdivant waived the loss-mitigation issue by failing to seek an injunction (or other equitable relief) to halt the foreclosure sale before it occurred or to file an action to set aside the foreclosure sale after it occurred.

BRYAN, Judge, dissenting.

I respectfully dissent from the main opinion. I join in Part I of Judge Pittman's dissent except for his statement that Cadle Co. v. Shabani, 950 So. 2d 277 (Ala. 2006), is misguided and should be overruled; I express no opinion regarding whether Cadle was correctly decided or should be overruled. In addition, because, in my opinion, Cadle is distinguishable from the present case and the present case does not implicate standing, I dissent from the main opinion because it relies on an argument that Bessie T. Sturdivant did not present to the trial court, i.e., her argument that the foreclosure sale was invalid because BAC Home Loans Servicing, LP, had not been assigned the mortgage before it initiated foreclosure proceedings. See Ex parte Ryals, 773 So. 2d 1011, 1013 (Ala. 2000) ("[T]he appellate court can consider an argument against the validity of a summary judgment only to the extent that the record on appeal contains material from the trial court record presenting that argument to the trial court before or at the time of submission of the motion for summary judgment. Andrews v. Merritt Oil Co., 612 So. 2d 409 (Ala. 1992).").