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**IT IS SO ORDERED.**



**Dated: April 8, 2024**

*Beth A. Buchanan*

**Beth A. Buchanan**  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>In re:</b>	)
	)
<b>JONATHAN KILLINGS</b>	) Case No. 23-11349
	) Chapter 7
	) Judge Buchanan
<b>Debtor</b>	)
	)
	)
	)
<b>JONATHAN KILLINGS</b>	) Adv. No. 23-1028
	)
<b>Plaintiff</b>	)
	)
<b>v.</b>	)
	)
<b>HUNTINGTON NATIONAL BANK</b>	)
	)
<b>Defendant</b>	)
	)
	)

**MEMORANDUM OPINION GRANTING MOTION OF THE HUNTINGTON NATIONAL BANK TO DISMISS COMPLAINT [Docket Number 7]**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is before this Court on the

*Motion of The Huntington National Bank to Dismiss Complaint* [Docket Number 7] (“Motion to Dismiss”) filed by The Huntington National Bank (“Huntington”); the *Response of Jonathan Killings to Motion to Dismiss filed by Huntington Bank* [Docket Number 9] (“Response”) filed by Plaintiff-Debtor Jonathan Killings (“Debtor”); and the *Reply of The Huntington National Bank to Jonathan Killings Response to Motion to Dismiss* [Docket Number 10] (“Reply”) filed by Huntington. The matter is now ripe for determination.

## **I. BACKGROUND**

The Debtor commenced this adversary proceeding by filing his *Complaint to Determine Priority and Extent of Liens* (“Complaint”) on September 15, 2023 [Docket Number 1], which contains the following allegations. The Debtor is the owner of the residential real property located at 1120 Dayton St., Cincinnati, OH 45214 (the “Property”) [*Id.* at ¶ 4]. Huntington holds a mortgage lien against the Property [*Id.* at ¶ 5]. The open-end mortgage was executed on August 24, 2007 and recorded in the Hamilton County Recorder’s Office on September 13, 2007 [*Id.*, attached Ex. 1]. The Debtor alleges that his name was spelled incorrectly on the mortgage documents as “Johnathan Killings” when his real name is “Jonathan Killings” thus preventing third parties from conducting accurate record searches and leading to a lack of proper notice. [*Id.*, ¶¶ 6-8 and attached Ex. 1]. As a result, the Debtor claims that the mortgage is defective, and that the court should avoid Huntington’s lien and reclassify Huntington’s claim as unsecured [*Id.* at ¶¶ 9, 10-12].

In its Motion to Dismiss and Reply to the Debtor’s Response, Huntington first argues that the Debtor’s Complaint must be dismissed due to a lack of direct standing pursuant to 11 U.S.C. § 544. Huntington claims that although the Debtor may have been able to use the powers extended to the Chapter 7 trustee pursuant to § 544(a) to avoid a transfer under 11 U.S.C. § 522(h), he can

only do so in limited circumstances under 11 U.S.C. § 522(g), which do not exist here. Huntington alleges that because the Debtor has voluntarily entered into and executed the mortgage at issue, he cannot rely on § 522(h) to avoid Huntington's lien. In addition, Huntington argues that even if the Debtor could obtain derivative standing, the Debtor has failed to state a claim as Ohio's legislature has barred the recovery he is seeking under Ohio Revised Code §§ 1301.41 and 5301.07.

In his Response, the Debtor explains that the mortgage affects the Debtor's rights to an exemption on the Property, and if the mortgage is avoided, then the Debtor may claim his exemption over Huntington's unsecured claim, thus providing the Debtor with "skin in the game." Essentially, the Debtor suggests that he has standing to pursue the avoidance of Huntington's lien because the Chapter 7 trustee abandoned any interest in the Property. The Debtor also claims an evidentiary hearing is necessary for the court to determine whether an incorrect spelling of the Debtor's name on the recorded mortgage results in an avoidance of Huntington's lien.

Following a thorough review of the Complaint and its attached exhibit, as well as the parties' filings related to Huntington's Motion to Dismiss, this Court finds Huntington's arguments to be meritorious. Although Huntington has also alleged that the Debtor has failed to state a claim, the threshold issue before this Court is whether the Debtor possesses standing. Because the Debtor lacks the requisite standing, this Court lacks subject matter jurisdiction for the Debtor to bring a claim seeking the avoidance of Huntington's lien.

## **II. LEGAL ANALYSIS**

### **A. Standard of Review**

Through its Motion to Dismiss, Huntington seeks dismissal of Debtor's Complaint for "lack of subject matter jurisdiction," pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1), made applicable in adversary proceedings pursuant to Federal Rule of Bankruptcy

Procedure 7012(b). Huntington argues that the Debtor does not possess the necessary standing to file an adversary proceeding to avoid Huntington's lien. Bankruptcy courts "have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them." *Mich. Empl. Sec. Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co. Inc.)*, 930 F.2d 1132, 1137 (6th Cir. 1991). "A Rule 12(b)(1) motion can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." *Abbott v. Mich.*, 474 F.3d 324, 328 (6th Cir. 2007) (citation omitted).

"Standing is a component of subject-matter jurisdiction." *Harris v. Lexington-Fayette Urban Cty. Govt.*, 685 F. App'x 470, 472 (6th Cir. 2017) (citing *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 606-07 (6th Cir. 2007)); *see also Khan v. Regions Bank (In re Khan)*, Nos. 10-36155, 11-3186, 2011 Bankr. LEXIS 3786, at \*7, 2011 WL 4543962, at \*3 (Bankr. E.D. Tenn. Sept. 29, 2011) ("Standing is a prerequisite for subject matter jurisdiction, requiring a party to allege an actual case or controversy[.]" (citing *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974))). Whether an actual case or controversy is apparent from the pleadings "depends on whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Khan*, 2011 Bankr. LEXIS 3786, at \*7, 2011 WL 4543962, at \*3 (citing *Newport Acquisition Co. No. 1, LLC v. Schiro (In re C-Power Prods., Inc.)*, 230 B.R. 800, 804 (Bankr. N.D. Tex. 1998)). That is to say, in order for standing to exist, the plaintiff "must allege (1) an injury in fact (2) that's traceable to the defendant's conduct and (3) that the courts can redress." *In re Moody*, No. 19-33968, 2021 Bankr. LEXIS 2708, at \*7, 2021 WL 4483981, at \*3 (Bankr. N.D. Ohio Sep.

30, 2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)). “Generally, to have standing in a bankruptcy case, a person must have a pecuniary interest in the outcome of the bankruptcy proceedings.” *In re Dinoto*, 576 B.R. 835, 838 (Bankr. E.D. Mich. 2017) (citing *In re Moss*, 320 B.R. 143, 149 (Bankr. E.D. Mich. 2005)).

Here, Huntington has challenged the Debtor’s Complaint on its face, explaining that there is no need for any affidavits or an evidentiary hearing [Docket Number 7]. As a result, all allegations within the Complaint are deemed true. *See Richardson v. Huntington Nat'l Bank (In re CyberCo Holdings, Inc.)*, 382 B.R. 118, 126 (Bankr. W.D Mich. 2008) (internal citations omitted). Despite viewing the Complaint in a light most favorable to the Debtor, this Court finds that the Debtor lacks standing to bring the claims raised in the Complaint to avoid Huntington’s lien on the Property.

## **B. Lack of Direct Standing**

Under 11 U.S.C. § 544(a)<sup>1</sup>, a trustee may avoid a mortgage using his power as a hypothetical bona fide purchaser of real property, execution creditor, or judicial lien creditor. 11 U.S.C. § 544(a)(1) - (3). Section 544(a), however, is “unambiguous and grants the trustee, not

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<sup>1</sup> Section 544(a) provides:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

debtors, the powers and rights . . . to avoid a transfer of an interest in property or to defeat a mortgage.” *Kellner v. First Ohio Banc & Lending, Inc. (In re Geraci)*, 507 B.R. 224, 229 n.6 (Bankr. S.D. Ohio 2014) (citing *Bank of New York v. Sheeley (In re Sheeley)*, 2012 Bankr. LEXIS 1374, at \*33, 2012 WL 8969064, at \*12 (Bankr. S.D. Ohio April 2, 2012)).

Nonetheless, pursuant to 11 U.S.C. § 522(h), a debtor may use the powers under § 544 to avoid a limited subset of transfers. *Dickson v. Countrywide Home Loans (In re Dickson)*, 655 F.3d 585, 591-92 (6th Cir. 2011). Section 522(h) provides that a debtor may avoid a transfer of property, including a lien, to the extent that the debtor could have exempted such property under § 522(g)(1) had the trustee avoided such transfer if: (1) the transfer is avoidable under § 544 or certain other sections of the Bankruptcy Code; and (2) the trustee does not attempt to avoid the transfer. 11 U.S.C. § 522(h).

Significantly, a debtor’s avoidance power under § 522(h) is limited to involuntary transfers. 11 U.S.C. § 522(g)(1). The Sixth Circuit has held that a debtor has standing to avoid a transfer under § 522(h) when five conditions are met:

(1) the transfer was not voluntary; (2) the transfer was not concealed; (3) the trustee did not attempt to avoid the transfer; (4) the debtor seeks the avoidance pursuant to §§ 544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code; and (5) the transferred property is of a kind that the debtor would have been able to exempt from the estate if the trustee had avoided the transfer under one of the provisions in § 522(g).

*Dickson*, 655 F.3d at 592 (citing *Kildow v. EMC Mortg. Corp. (In re Kildow)*, 232 B.R. 686, 692-93 (Bankr. S.D. Ohio 1999)). The transfer at issue is the Huntington mortgage. Because the Debtor voluntarily executed the mortgage with Huntington, he cannot avoid the lien under 11 U.S.C. § 522(h). See *Hargrove v. Wachovia Mortg. Corp. (In re Hargrove)*, Nos. 12-30511, 12-3159, 2012 Bankr. LEXIS 3188, at \*3-4 (Bankr. S.D. Ohio July 12, 2012) (finding that Chapter 7 debtor

could not use § 522(h) to avoid a voluntary lien) (citing *Dickson*, 655 F.3d at 592). Consequently, the Debtor lacks direct standing to challenge Huntington’s lien under § 544(a) and § 522(h).

### **C. Lack of Derivative Standing**

Alternatively, bankruptcy courts may grant derivative standing to debtors or creditors to bring a § 544(a) avoidance action on behalf of the estate in certain circumstances. See *Hyundai Translead, Inc., v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 243 (6th Cir. 2009); *U.S. Bank N.A. v. Barbee (In re Barbee)*, 461 B.R. 711, 714-15 (B.A.P. 6th Cir. 2011). A party asserting derivative standing must show that: (1) a demand was made on the trustee to act, (2) the trustee declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee’s inaction was an abuse of discretion. *Trailer Source*, 555 F.3d at 244-45 (discussing the *Gibson Group* test for derivative standing) (citing *Canadian Pacific Forest Products, Ltd. v. J.D. Irving, Ltd. (In re The Gibson Group, Inc.)*, 66 F.3d 1436, 1446 (6th Cir. 1995)).<sup>2</sup> In other words, “[a] prerequisite for derivative standing . . . is that the creditor or debtor request the trustee to pursue the avoidance action and only if the trustee refuses may the creditor

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<sup>2</sup> In *Gibson Group*, the Sixth Circuit held:

. . . a creditor or creditors’ committee may have derivative standing to initiate an avoidance action where: 1) a demand has been made upon the statutorily authorized party to take action; 2) the demand is declined; 3) a colorable claim that would benefit the estate if successful exists, *based on a cost-benefit analysis performed by the court*, and 4) the inaction is an abuse of discretion (“unjustified”) in light of the debtor-in-possession’s duties in a Chapter 11 case.

66 F.3d at 1446 (emphasis added). The distinction between the holdings in *Trailer Source, Inc.* and *Gibson Group* has been analyzed as follows:

Despite this wording difference, it is clear that the Sixth Circuit did not intend in *Trailer Source* to change the “colorable claim . . .” requirement of *Gibson Group*. Rather, *Trailer Source* simply held that the *Gibson Group* requirements apply in Chapter 7 cases as well as in Chapter 11 cases. And the *Trailer Source*’s summary of the *Gibson Group* requirements, quoted above, was not intended to change those requirements.

*In re Blume*, 625 B.R. 662, 668 (Bankr. E.D. Mich. 2021) (applying the *Gibson Group* requirements, including a cost-benefit analysis).

or debtor seek from the court the authority to proceed.” *Hargrove*, 2012 Bankr. LEXIS 3188, at \*6.

Another significant requirement is that a colorable claim exists that, if successful, would benefit the bankruptcy estate. “In determining whether a claim is colorable in this context, courts initially look to the ‘face of the complaint.’” *Trailer Source*, 555 F.3d at 245 (citing *Gibson Group*, 66 F.3d at 1439). Whether a claim is “colorable” depends on whether the claim is a “plausible claim[] for relief that would survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).” *In re Blume*, 625 B.R. 662, 669 (Bankr. E.D. Mich. 2021) (citing *In re Dzierzawski*, 518 B.R. 415, 419-20 (Bankr. E.D. Mich. 2014)). The “colorable claim” requirement has been understood to “require[] this Court to assume that [the] colorable claims will be ‘successful,’ and then to determine, based on a cost-benefit analysis, whether such successful claims ‘would benefit the estate’ in the bankruptcy case.” *Blume*, 625 B.R. at 670 (citing *Dzierzawski*, 518 B.R. at 420). This requirement for derivative standing is lacking when a debtor brings an action solely for his own benefit. *See Brennan v. Slone (In re Fisher)*, 296 F. App’x 494, 504 (6th Cir. 2008) (citing *Wellman v. Wellman*, 933 F.2d 215, 218-19 (4th Cir. 1991)). *See also Geraci*, 507 B.R. at 229 n.6 (a debtor attempting to avoid a voluntary mortgage using a trustee’s avoidance powers under § 544 does so only as a representative of the bankruptcy estate and may not obtain an exemption in any recovery under 11 U.S.C. § 522(g)).

In this case, the Debtor’s Complaint lacks any reference to derivative standing. Even more significantly, nothing in the Complaint suggests that the Debtor pursues the claim on behalf of the bankruptcy estate rather than to benefit himself. *See Hargrove*, 2012 Bankr. LEXIS 3188, at \*6 (questioning whether a debtor has reason to pursue an avoidance action of a mortgage using derivative standing as a trustee under § 544 because, pursuant to 11 U.S.C. § 550, any recovery

would benefit the estate and not the debtor). Consequently, the Debtor lacks derivative standing to pursue the claims in the Complaint.<sup>3</sup>

### **III. CONCLUSION**

For the reasons given, this Court concludes that the Debtor lacks standing to pursue the claims in the Complaint. Accordingly, the *Motion of The Huntington National Bank to Dismiss Complaint* [Docket Number 7] is granted pursuant to Rule 12(b)(1). A separate order of dismissal will be entered contemporaneously with this opinion.

### **SO ORDERED.**

Distribution List:

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<sup>3</sup> Although the issue need not be reached, this Court questions whether the Debtor could demonstrate a “colorable claim” even if derivative standing could otherwise be shown. While in the past, trustees routinely avoided defectively executed mortgages to benefit the bankruptcy estate pursuant to 11 U.S.C. § 544(a) and Ohio law, changes to Ohio law in 2013 and 2017 have greatly curtailed this practice. *See Ohio Rev. Code § 1301.401*, *Ohio Rev. Code § 5301.07(C) and (D)*; *Harker v. PNC Mort. Co. (In re Oakes)*, 917 F.3d 523 (6th Cir. 2019); *In re Messer*, 145 Ohio St.3d 441, 50 N.E.3d 495 (2016).