

IN THE SUPREME COURT OF OHIO

08-2355

NovaStar Mortgage, Inc.

Plaintiff-Appellee

v.

Marjorie E. Akins et al.,

Defendants

Carol A. Villio

Defendant-Appellant

On Appeal from Trumbull  
County Court of Appeals,  
Eleventh Appellate District

Court of Appeals  
Case Nos. 2007-T-0111  
2007-T-0117

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MEMORANDUM IN SUPPORT OF JURISDICTION

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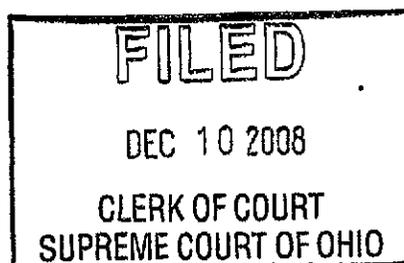


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THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

Given the growth of defaulted mortgage loans and lawsuits to foreclose on the defaulted mortgages, expected to continue and continue to grow in the future, with many homeowners attempting to exercise the right to rescind their loan transactions provided by federal law, announcement of the law of Ohio in regard to the existence and exercise of such right of rescission is of public and great general interest.

Given that federal statute mandates the approval and execution of a HUD-1 Settlement Statement in connection with nearly all loan transactions involving mortgages on Ohio property, announcement of the law of Ohio as to whether the Settlement Statement is part of the contract between borrower and lender, or merely an agreement between the borrower and closing agent, is of public and great general interest.

This case raises the following two questions of first impression for determination by this court:

1. What conditions constitute “consummation” of a loan transaction for purposes of application of the right of rescission provided to borrowers by 15 U.S.C. §1635(a)?

Under 15 U.S.C. §1635(a), where a loan providing funds to refinance existing debt is secured by the principal residence of the borrower, the borrower has a right to rescind the transaction by notifying the lender of such rescission before midnight of the third business day after “consummation” of the contract.

Per 12 C.F.R. §226(2)(a)(3) [Regulation Z]: “Consummation. State law governs. When a contractual obligation on the consumer’s part is created is a matter to be determined under applicable law. Regulation Z does not make this determination.” No Ohio court has made this determination.

Announcement by this court of the conditions constituting “consummation” of a mortgage loan transaction involving Ohio real property is of public and great general interest.

2. Is the HUD-1 Settlement Statement mandated by 12 U.S.C. §2603 in mortgage loan transactions for funds to refinance existing debt part of the contract between the borrower and mortgage lender?

A statement of settlement costs shall be completed and made available for inspection by the borrower at or before “settlement” by the person conducting the settlement. 12 U.S.C. §2603.

“Settlement” means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. 24 C.F.R. 3500.2 [Regulation X]

The adoption by this court of one of the two conflicting positions: 1) The Settlement Statement, along with the Note and Mortgage, comprise the mortgage loan contract between the borrower and the lender; 2) The Settlement Statement is not part of the mortgage loan contract between the borrower and lender, but is merely an agreement between the borrower and closing agent for disbursement of loan proceeds; is of public and great general interest.

In addition, this case provides opportunity for the court to instruct Ohio courts to apply the three-year period within which the borrower who did not receive notice of his right of rescission at consummation may rescind the transaction, under 15 U.S.C. §1635(f) and *Rudisell v. Fifth Third Bank* (6th Cir. 1980), 622 F.2d 243, 247, neither terminated nor diminished, other than by the intervening sale of the property, thus, correcting the errant holding in *ContiMortgage Corporation v. Delawder* (July 30, 2001) 4th Dist., 01-LW-2971, followed by the court in this case, that filing an action to enforce the Note and Mortgage within the three-year period, terminates the period in which the borrower may rescind the transaction.

Announcement by this court that the courts of Ohio will apply established and applicable federal law granting rights to homeowners, not arbitrarily diminish said rights, is of public and great general interest.

## STATEMENT OF THE CASE AND FACTS

On March 9, 2006 Appellee NovaStar Mortgage, Inc., filed a Complaint against Marjorie E. Akins and Carol A. Villio seeking judgment on a Promissory Note for \$80,750.00 executed on May 18, 2005, and for foreclosure of the right of redemption under a Mortgage executed on May 18, 2005.

On July 7, 2006, Appellant filed her Answer and Counterclaims against Appellee seeking judgment:

- a) declaring that the loan transaction was “consummated” on a date occurring after May 18, 2005, and that the Notice Of Right To Cancel delivered to Villio on May 18, 2005, purporting to advise Villio that her right to cancel said transaction will expire at midnight on May 21, 2005, does not satisfy the mandatory recitals stated in 15 U.S.C. §1635 and is, therefore, void and of no effect;
- b) declaring that, as a result of service of her Notice Of Rescission of said transaction upon Appellee within three years after the date of consummation of the transaction, pursuant to 15 U.S.C. §1635, Villio is not liable to pay any sum to NovaStar, including, but not limited to, upon said Note;
- c) declaring that, as a result of service of her Notice Of Rescission of said transaction upon Appellee within three years after the date of consummation of the transaction, pursuant to 15 U.S.C. §1635, upon service of said Notice, said Mortgage, and the lien on the premises thereunder, became void.

On October 16, 2006, Appellee filed a motion for “summary judgment on its complaint against Carol Villio and Marjorie Akins and Carol Villio’s counterclaims”, supported by the affidavit of an employee of Appellee establishing the execution of said Note and Mortgage, the validity of said Mortgage, the breach of said Note and Mortgage and the balance due for principal and accrued interest on said Note.

On November 3, 2006, Appellant Villio filed her Affidavit, in which she testified:

- a) Prior to May 18, 2005, Akins was sole owner of the property described in the subject Mortgage;
- b) On May 18, 2005, Villio resided in the property, along with Akins, as her principal residence;
- c) On May 18, 2005, Akins signed and acknowledged a deed conveying a survivorship tenancy in the property to Akins and Villio. Said deed was filed for record on May 23, 2005;
- d) Villio continuously held title to the property under said survivorship tenancy during the period from May 18, 2005 to the date of the Affidavit, October 18, 2006;
- e) On May 18, 2005 Villio executed the Mortgage Deed on the property attached to the Complaint and deposited said Mortgage into escrow. Said Mortgage was filed for record on May 23, 2005;
- f) On May 18, 2005, Villio approved a Settlement Statement specifying the manner of disbursement of the loan funds and received a Notice OF Right To Cancel prior to midnight on May 21, 2005;
- g) On May 19, 2005, Villio approved a Settlement Statement specifying a different disbursement of the loan funds, but did not receive a Notice Of Right To Cancel on a date after May 21, 2005;
- h) Villio received no Notice Of Right To Cancel between May 18, 2005 and May 4, 2006;
- i) On May 4, 2006, Villio delivered a written Notice Of Rescission of the transaction to NovaStar.

On November 21, 2006, Appellee filed a Memorandum In Opposition To Motion By NovaStar For Summary Judgment On The Complaint And On Counterclaims by Villio, incorporating the Affidavit Of Villio and the Response Of Defendant Akins To Requests For Admission in which Akins admitted:

- 1) on May 18, 2005, Akins approved a Settlement Statement specifying a \$3,089.35 payment to her;
- 2) on May 19, 2005, Akins approved a Settlement Statement specifying a \$50.00 contribution from her;
- 3) on May 19, 2005, Akins wrote her check for \$50.00 payable to the Settlement/Escrow Agent.

The subject mortgage [Fannie Mae/Freddie Mac Uniform Instrument-Form 3035] provides:

“RESPA’ means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, ‘RESPA’ refers to all requirements and regulations that are imposed in regard to a ‘federally related mortgage loan’ even if the loan does not qualify as a ‘federally related mortgage loan’ under RESPA.” [emphasis added]

The Settlement Statements identified in the Affidavit of Villio as having been approved by Villio on May 18, 2005, and as having been approved by Villio on May 19, 2005, are summarized as follows:

| <u>SETTLEMENT STATEMENT - MAY 18, 2005:</u> |               | <u>SETTLEMENT STATEMENT - MAY 19, 2005:</u> |              |
|---|---------------|---|--------------|
| Amount of New Loan                          | \$ 80,750.00  | Amount of New Loan                          | \$ 80,750.00 |
| Payoff First Place Bank                     | \$ 33,854.62  | Payoff First Place Bank                     | \$ 33,882.72 |
| Payoff First Place Bank                     | \$ 9,987.87   | Payoff First Place Bank                     | \$ 9,903.01  |
|   | \$ 43,842.49  |   | \$ 43,785.73 |
| Settlement Charges                          | \$ 6,109.88   | Settlement Charges                          | \$ 6,109.88  |
|   | \$ 49,952.37  |   | \$ 49,895.61 |
|   | \$ 30,797.63  |   | \$ 30,854.39 |
| Treasurer-2004 Taxes                        | \$ 483.28     | Treasurer-2004 Taxes                        | \$ 438.28    |
| Chase                                       | \$ 16,431.00  | Chase                                       | \$ 16,431.00 |
| US Dept of Education                        | \$ 2,500.00   | MBNA  | \$ 10,000.00 |
| E-Trade Credit Card                         | \$ 2,250.00   | E-Trade Credit Card                         | \$ 2,250.00  |
| CitiFinancial                               | \$ 1,700.00   |   |              |
| Bank of America                             | \$ 908.00     | Bank of America                             | \$ 908.00    |
| Capital One Bank                            | \$ 537.00     |   |              |
| Kaufmanns                                   | \$ 426.00     |   |              |
| GEMB/Dillards                               | \$ 417.00     |   |              |
| Macys/FDSB                                  | \$ 348.00     |   |              |
| Kaufmanns                                   | \$ 262.00     | Kaufmanns                                   | \$ 262.00    |
| HSBC NV                                     | \$ 250.00     |   |              |
| New York & Co.                              | \$ 235.00     |   |              |
| CBUSASears                                  | \$ 207.00     |   |              |
| Discover                                    | \$ 754.00     | Discover                                    | \$ 754.00    |
|   | \$ 27,708.28  |   | \$ 31,088.28 |
|   |               | Gross ( <i>From</i> Borrower)               | \$ - 233.89  |
|   |               | Less Broker Credit                          | \$ + 183.89  |
| Balance ( <i>To</i> Borrower)               | \$ + 3,089.35 | Balance ( <i>From</i> Borrower)             | \$ - 50.00   |

On September 14, 2007, the trial court granted summary judgment to Appellee on its complaint and denied summary judgment to Appellant on her counterclaims. Said judgment was affirmed on appeal.

To support its motion for summary judgment and oppose Appellant's motion for summary judgment, Appellee made the following claims in the trial court:

- a) Villio became contractually obligated on the loan transaction on May 18, 2005 and, therefore, the transaction was consummated for purposes of TILA on May 18, 2005;
- b) Villio received Notice Of Right To Cancel on May 18, 2005 and did not serve notice of rescission of the loan within three days after receiving the Notice Of Right To Cancel;
- c) There is nothing to support Villio's argument that she should have been afforded a new Notice Of Right To Cancel at or after approving the Settlement Statement on May 19th.

To support her motion for summary judgment and oppose Appellee's motion for summary judgment, Appellant made the following claims in the trial court:

- a) The Settlement Statement signed on May 19, 2005 was a novation replacing the loan transaction consummated on May 18, 2005 and constituted a separate consummation;
- b) Akins and Villio were entitled to receive a separate Notice Of Right To Cancel within three days after the loan transaction consummated on May 19, 2005;
- c) Villio did not receive a Notice Of Right To Cancel the loan transaction consummated May 19, 2005 prior to service of her Notice Of Rescission on NovaStar in May, 2006.

In its Opinion, filed on November 24, 2008, the court of appeals made the following findings:

- a) "We note the settlement statement was an agreement with the title agency regarding how to distribute the proceeds of the loan." {¶30}.
- b) In sum, Villio and Akins decided they wanted more money of the loan proceeds to go toward paying off existing debt. It appears NovaStar made efforts to accommodate Villio and Akins' wishes." {¶30}.
- c) "Moreover, while the settlement statement was related to this transaction, it was a separate contract with its own terms." {¶32}.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: Where a reviewing court relies upon facts not in the record, its grant or denial of summary judgment is in error.**

This court reviews the summary judgment rulings of the court of appeals de novo. *Bonacorsi v. Wheeling & Lake Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24.

Summary judgment shall be rendered if the pleadings, admissions, and affidavits filed in the action, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. No evidence may be considered except as stated in this rule. Civil Rule 56(C).

The moving party bears the initial responsibility of identifying those portions of the record which demonstrate absence of a genuine issue of fact on a material element of the non-moving party's claims by specifically pointing to some evidence of the type listed in Civil Rule 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the that party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Drescher v. Burt* (1996), 75 Ohio St.3d 280. 292-293.

A party seeking summary judgment must specifically delineate the basis for summary judgment in the trial court in order to allow the opposing party a meaningful opportunity to respond. The moving party cannot expand the basis for seeking summary judgment upon appeal. Affirmance of summary judgment on appeal upon a basis not specifically delineated in the trial court is reversible error. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 116.

The findings by the court of appeals that: 1) the Settlement Statement was an agreement related to the transaction, but between Appellant and the title/escrow agency; and not Appellant and Appellee; and 2) Appellee acquiesced in the revisions in the second Settlement Statement at the Appellant's request; were not claims made by Appellee in the trial court and reliance thereon by the court of appeals is error.

**Proposition of Law No. 2: Where a reviewing court fails to construe all evidence in favor of nonmovant, its grant of summary judgment is error.**

This court reviews the summary judgment rulings of the court of appeals de novo. *Bonacorsi v. Wheeling & Lake Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, {¶24}.

A summary judgment shall not be rendered unless it appears from the evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in the party's favor. Civil Rule 56(C).

In deciding whether a genuine issue of fact precludes summary judgment, the court must adhere to Civil Rule 56(C) and view the evidence, and all inferences drawn from facts contained in affidavits and admissions filed in the action in a light most favorable to the nonmoving party. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341; *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485.

In finding that no reasonable mind could conclude other than that disbursement of the loan proceeds approved by Villio in the second Settlement Statement was done by Appellee at Appellant's request, the court of appeals erroneously construed the evidence of creation of the second Settlement Statement not in favor of Appellant, as required by Civil Rule 56, but construed such evidence, against Appellant.

**Proposition of Law No. 3: The HUD-1 Settlement Statement is a part of the contract between borrower and lender in a mortgage loan transaction.**

This court reviews the summary judgment rulings of the court of appeals de novo. *Bonacorsi v. Wheeling & Lake Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, {¶24}.

A statement of settlement costs shall be completed and made available for inspection by the borrower at or before “settlement” by the person conducting the settlement. 12 U.S.C. §2603(b).

“Settlement” means the process of executing legally binding documents regarding a lien on property that is subject to a federally related loan. 24 C.F.R. §3500.2 [Regulation X].

The reliance by the court of appeals upon the footnote in *Schuetz*, {¶29}, as authority for finding the Settlement Statement is a contract between Appellee and the title agency is clearly misplaced and error. Reasonable minds could conclude the addendum to each Settlement Statement applying loan proceeds to pay existing debt strengthened the ability to repay the loan, which was of no concern to the title agency.

Construing the differences in disbursement under the separate Settlement Statements, together with the affidavit of Appellant and admissions by Akins, and all inferences therefrom, in favor of Appellee, reasonable minds could conclude that each Settlement Statement constituted a contract between Appellee and Appellant which was part of the overall loan contract between Appellee and Appellant.

Construing the differences in disbursement under the separate Settlement Statements, together with the affidavit of Appellant and admissions by Akins, and all inferences therefrom, in favor of Appellant, reasonable minds could conclude only that each Settlement Statement constituted a contract between Appellee and Appellant which was part of the overall loan contract between Appellee and Appellant.

**Proposition of Law No. 4: Execution of a HUD-1 Settlement Statement altering the amounts and recipients of mortgage loan proceeds provided in a prior HUD-1 Settlement Statement is a novation of the loan contract and the loan is consummated pursuant to the later Settlement Statement.**

This court reviews the summary judgment rulings of the court of appeals de novo. *Bonacorsi v. Wheeling & Lake Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, {¶24}.

Summary judgment shall be rendered if the admissions and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56(C).

A summary judgment shall not be rendered unless it appears from the evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in the party's favor. Civil Rule 56(C).

In deciding whether a genuine issue of fact precludes summary judgment, the court must adhere to Civil Rule 56(C) and view the evidence, and all inferences drawn from facts contained in affidavits and admissions filed in the action in a light most favorable to the nonmoving party. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341; *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485.

Consummation. State law governs. When a contractual obligation on the consumer's part is created for purposes of right of rescission under 15 U.S.C. §1635(a) is a matter to be determined under state law. 12 C.F.R. 226(2)(a)(3). [Regulation Z].

"Settlement" means the process of executing legally binding documents regarding a lien on property that is subject to a federally related loan. 24 C.F.R. §3500.2 [Regulation X].

Multiple documents pertaining to the same transaction may be construed together. *Thayer v. Luce* (1871), 22 Ohio St. 62. Syllabus. *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 314.

A “novation” is an agreement among the parties for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another. Where parties to a contract substitute another contract the first contract is discharged. 18 O.Jur.3d 147, 156, Contracts, §245, §256; *Grant-Holub Co. v. Goodman* (1926), 23 Ohio App. 540, 544.

In order to effect a novation, all parties to the original contract must consent to the new contract and there must be a clear and definite intention on the part of all parties that a novation is the purpose of the agreement. *Federal Land Bank of Louisville v. Taggart* (1987), 31 Ohio St.3d 8, 14; *Citizens State Bank v. Richart* (1984), 16 Ohio App.3d 445, 446.

Intent of the parties to effect a novation need not be expressed, but may be inferred from facts and circumstances surrounding transaction. *Bolling v. Clevepak Corp.* (1984), 20 Ohio App.3d 113, 125.

The requisites of a novation are a valid obligation to be displaced, creation of a valid new obligation, the consent of all parties to the substitution, consideration and the extinction of the old obligation. *Fitness Experience, Inc. v. TFC Fitness Equipment, Inc.* (N.D. Ohio 2004), 355 F.Supp. 877, 891; *Garret v. Lishawa* (1930), 36 Ohio App. 129, 132.

Where a novation is effected by the substitution of a new obligation for an old obligation between the same parties, the release of the old obligation is a sufficient consideration for the new obligation. *Bacon v. Daniels* (1881), 37 Ohio St. 279, 282; *Baker v. All States Life Ins.* (1950), 46 Ohio Op. 308. 313.

Based upon the evidence in the record, reasonable minds could conclude that the HUD-1 Settlement Statement is a contract between Appellee and Appellant. In fact, based upon the evidence in the record, reasonable minds could reach no other conclusion.

That reasonable minds could conclude the HUD-1 Settlement Statement is a contract between Appellant and the title/closing agency does not preclude finding Appellee is also a party to that contract.

Each Hud-1 form includes fees charged by Appellee in connection with consummation of the loan, (e.g., origination fee \$3,030; underwriting fee \$795). If any of said fees is not approved by Appellant, there is no loan contract between Appellee and Appellant and Appellee has no obligation to make a loan.

Reasonable minds could conclude that the payment of existing debt, to whom and in what amounts, was a condition upon which Appellee offered to make a loan and that, without approval of Appellant, there is no loan contract between Appellee and Appellant and Appellee has no obligation to make a loan.

Clearly the law of novations focuses on the intent of all affected parties to create a substitute contract and that determination is not governed by which party requested the substitution.

Also, the law of novations focuses on the complete contract, i.e., the "obligation" between the parties and, is not limited to agreement reflected in one document, permitting creation of a substituted contract reflected in multiple, separate documents, which are integrated and, in combination, form the contract.

The apparent, but not stated, finding by the court of appeals that no reasonable mind could conclude the agreement between Appellee and Appellant regarding disbursement of loan proceeds was integrated with the Note and the Mortgage, both separate, yet clearly integrated, to form the loan contract, is error.

**Proposition of Law No. 5: The filing of a complaint for judgment on the Note and foreclosure of the Mortgage has no effect upon the right of the borrower to rescind the loan transaction provided in 15 U.S.C. §1635(a).**

In any consumer credit transaction in which a security interest will be acquired in any property used as the principal dwelling of the person to whom the credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor of her intention to do so. 15 U.S.C. §1635(a).

An obligor's right of rescission shall expire three (3) years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding that the information and forms required under this section have not been delivered to the obligor. 15 U.S.C. §1635(f).

If the disclosures mandated by 15 U.S.C. §1635 are never made, the debtor has a continuing right to rescind, subject to 15 U.S.C. §1635(f). *Rudisell v. Fifth Third Bank* (6th Cir. 1980), 622 F.2d 243, 247.

In *ContiMortgage Corporation v. Delawder, supra*, the court justified its holding that the lender complied with 15 U.S.C. §1635(a) with findings that the borrower: a) suffered no prejudice or damage; b) gave notice of rescission only after the filing of a foreclosure action, 18 months after the loan closing.

The errant holding in *Delawder, supra*, the clear language of 15 U.S.C. §1635(f) and *Rudisell, supra*, notwithstanding, there is no right of rescission if: a) the borrower has not been prejudiced by the loan; b) an action to foreclose the mortgage is filed prior to service of notice of rescission by the borrower, applied by the court of appeals in this case, is error so egregious that it cannot be tolerated as Ohio law.

## CONCLUSION

This case raises questions of first impression for Ohio courts of public and great general interest.

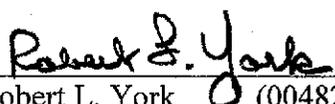
The court of appeals erred in: 1) basing affirmance of the grant and denial of summary judgment on claims not made by Appellee in the trial court; 2) failing to construe evidence in favor of Appellant on:

- a) whether either Settlement Statement constituted an agreement between Appellee and Appellant;
- b) whether either Settlement Statement was part of the loan contract, along with the Note and Mortgage;
- c) whether approval of the second Settlement Statement constituted a novation of the prior transaction;
- d) whether approval of the second Settlement Statement constituted the consummation of a transaction;

3) rejecting 15 U.S.C. §1635(f) by terminating the period for rescission on filing of a foreclosure action.

Therefore, the judgment of the court of appeals affirming summary judgment to Appellee and denying summary judgment to Appellant as to the enforceability of the Note and Mortgage must be reversed and summary judgment granted to Appellant and summary judgment denied to Appellee.

Respectfully submitted,

  
Robert L. York (0048217)  
COUNSEL FOR APPELLANT  
CAROL A. VILLIO

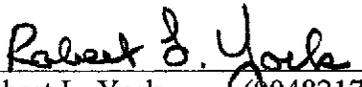
PROOF OF SERVICE

I hereby certify that a copy of this Memorandum was sent by ordinary U.S. Mail to each of the following on December 10<sup>th</sup>, 2008.

Manley, Deas, Kochalski, LLC, Counsel for Appellee,  
NovaStar Mortgage, Inc., 1400 Goodale Boulevard,  
Suite 200, Columbus, Ohio 43212, by serving said copy  
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CAROL A VILLIO

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO

**FILED**  
COURT OF APPEALS

NOV 24 2008

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

|                            |   |                       |
|----------------------------|---|-----------------------|
| NOVASTAR MORTGAGE, INC.,   | : | OPINION               |
| Plaintiff-Appellee,        | : |                       |
| - vs -                     | : | CASE NOS. 2007-T-0111 |
|                            | : | and 2007-T-0117       |
| MARJORIE E. AKINS, et al., | : |                       |
| Defendants,                | : |                       |
| CAROL A. VILLIO,           | : |                       |
| Defendant-Appellant.       | : |                       |

Civil Appeals from the Court of Common Pleas, Case No. 2006 CV 00632.

Judgment: Case No. 2007-T-0111 is affirmed; case No. 2007-T-0117 is dismissed.

*Rachel A. Leier*, Manley, Deas, Kochalski, L.L.C., 1400 Goodale Boulevard, Suite 200, Columbus, OH 43212 (For Plaintiff-Appellee).

*Robert L. York*, 138 East Market Street, Warren, OH 44481 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Carol A. Villio, appeals the judgment entered by the Trumbull County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, NovaStar Mortgage, Inc. ("NovaStar").

{¶2} Marjorie E. Akins is Villio's mother. Prior to May 18, 2005, Akins owned the residential property located at 1907 Parkwood Drive ("Parkwood Drive property") in

Warren, Ohio. On May 18, 2005, Akins conveyed the property to herself and Villio creating a survivorship tenancy. At that time, there were two prior mortgages on the Parkwood Drive property.

{¶3} Also on May 18, 2005, Akins and Villio entered into a mortgage loan agreement with NovaStar. Pursuant to the mortgage agreement, NovaStar was granted a priority lien on the Parkwood Drive property.<sup>1</sup> The amount of the loan was \$80,750.

{¶4} On May 18, 2005, Villio approved a "settlement statement." This document instructed the title agency how to distribute the proceeds from the loan. According to Villio's affidavit, on May 19, 2005, a second "settlement statement" was approved.<sup>2</sup> This second settlement statement revised the distribution of the loan proceeds.

{¶5} On May 18, 2005, NovaStar provided Villio and Akins a notice of right to rescind the loan agreement. This document notified Villio and Akins of their right to rescind the loan agreement until midnight on May 21, 2005. A new notice of right of rescission was not given to Akins and Villio when the distribution of the proceeds was revised by the second settlement statement.

{¶6} Pursuant to the mortgage note, Akins and Villio were to make monthly payments of \$655.55. Akins and Villio did not make the monthly payment due October 1, 2005. After collection efforts by NovaStar to allow Villio to make her obligations

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1. The mortgage document designated Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as NovaStar's nominee, as the mortgagee. However, MERS later assigned its interest in the mortgage to NovaStar.

2. This second settlement statement is also dated May 18, 2005. However, since this matter is at the summary judgment stage, we will accept Villio's assertion that this document was executed on May 19, 2005.

under the note current were unsuccessful, NovaStar invoked the acceleration clause in the loan.

{¶7} In March 2006, NovaStar filed a complaint for foreclosure of the Parkwood Drive property.

{¶8} In May 2006, Villio sent a notice of rescission to NovaStar. This document indicated that Villio “elected to rescind” the mortgage loan transaction.

{¶9} In July 2006, with leave of court, Villio filed an answer to the complaint.<sup>3</sup> In that same pleading, she filed counterclaims against NovaStar and a motion to dismiss the foreclosure complaint.

{¶10} NovaStar and Villio filed motions for summary judgment. In addition, both Villio and NovaStar filed briefs in opposition to the other party’s motion for summary judgment. NovaStar attached several documents to its motion for summary judgment, including: an affidavit from one of its employees, Matthew Montes; a copy of the note; a copy of the mortgage; a copy of the assignment from MERS to NovaStar; a copy of the correspondence sent to Akins and Villio indicating NovaStar’s intent to foreclose on the mortgage; a copy of the notice of right to cancel; and a copy of the rescission notice that Villio sent to NovaStar. Villio also attached several documents to her motion for summary judgment, including: her affidavit; a copy of the note; a copy of the mortgage; a copy of the first and second settlement statements; a copy of the notice of right to cancel; a copy of the rescission notice she sent to NovaStar; a copy of Akins’ responses to Villio’s request for admissions; and a copy of a \$50 check written by Akins to the title agency.

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3. Akins was also named as a defendant. However, Akins separately defended the matter at the trial court level and is not a party on appeal.

{¶11} On September 14, 2007, the trial court issued a judgment entry, which, among other matters, (1) granted NovaStar's motion for summary judgment, (2) denied Villio's motion for summary judgment, and (3) denied Villio's motion to dismiss. The trial court included language in this judgment entry, pursuant to Civ.R. 54(B), that there was no just reason for delay. Villio timely appealed the trial court's September 14, 2007 judgment entry to this court, and that appeal was assigned case No. 2007-T-0111.

{¶12} On October 22, 2007, the trial court issued an "agreed judgment entry and decree of foreclosure."<sup>4</sup> Therein, the trial court entered judgment in favor of NovaStar and against Villio "in the amount of \$80,619.43, plus interest thereon at the rate of 9.10% per annum from September 1, 2005, plus late charges, costs and advances, all as provided in the Note and Mortgage." Villio has also appealed the trial court's October 22, 2007 judgment entry to this court, and that appeal was assigned case No. 2007-T-0117. On appeal, this court has consolidated case No. 2007-T-0111 and case No. 2007-T-0117 for all purposes.

{¶13} Villio raises four assignments of error. Her first and third assignments of error are:

{¶14} "[1.] The court below erred in granting the motion for summary judgment [filed] by Appellee NovaStar upon the issue of the enforceability of the Promissory Note and the Mortgage.

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4. While this judgment entry was captioned as an agreed judgment entry, Villio's counsel did not sign the judgment entry and specifically responded to the proposed judgment entry with a memo to NovaStar's counsel, which stated, in part, "the judgment entry you propose is wholly inappropriate and you do not have permission to sign my consent." (Emphasis sic.) However, since this judgment entry was signed by the trial court, we will proceed as though it is a valid entry.

{¶15} “[3.] The court below erred in denying the motion for summary judgment by Appellant Villio upon the issue of the enforceability of the Promissory Note and the Mortgage.”

{¶16} Due to the similar nature of these assigned errors, they will be addressed in a consolidated analysis.

{¶17} Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. Civ.R. 56(C). The standard of review for the granting of a motion for summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶18} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R.

56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶19} \*\*\*\*

{¶20} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' [*Dresher v. Burt*, 75 Ohio St.3d at 276.]" *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40-42. (Emphasis sic.)

{¶21} Villio does not challenge the trial court's finding that she was in default on the mortgage note. Instead, she argues that the trial court erred by finding that her notice of rescission was not valid. Thus, we will focus our analysis on this issue.

{¶22} Since this transaction conveyed a security interest in a residential property, which was the borrowers' primary residence, it was subject to the provisions of the Federal Truth in Lending Act ("TILA"). See Section 1601, Title 15, U.S.Code, et

seq. Specifically relevant to the instant matter is Section 1635, Title 15, U.S.Code, which provides, in pertinent part:

{¶23} "(a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section."

{¶24} A lender's failure to give notice as required by TILA will extend the time period for a borrower's right to rescind "up to three years." *ContiMortgage Corp. v. Delawder* (July 30, 2001), 4th Dist. No. 00CA28, 2001 Ohio App. LEXIS 3410, at \*7. (Citations omitted.)

{¶25} The trial court noted that Section 1635, Title 15, U.S.Code permits the borrower three days to rescind the agreement from the date the rescission materials are

provided to the borrower or the date the transaction is consummated. In this matter, the trial court concluded that both of these events occurred on May 18, 2005, thereby providing Villio until midnight on May 21, 2005 to rescind the agreement.

{¶26} It is undisputed that NovaStar properly provided Villio with notice of her right to rescind the transaction on May 18, 2005. Villio argues that the second draft of the settlement statement amounted to a novation of the agreement and, as a result, she was entitled to a new notice of right to rescind. We disagree.

{¶27} “A novation is generally understood as a mutual agreement among all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation \*\*\*.” *Huntington Natl. Bank v. Martin* (Mar. 12, 1999), 11th Dist. No. 98-L-082, 1999 Ohio App. LEXIS 936, at \*6, citing 18 Ohio Jurisprudence 3d (1997) 204-205, Contracts, Section 283.

{¶28} “In order to effect a valid novation, all parties to the original contract must clearly and definitely intend the second agreement to be a novation and intend to completely disregard the original contract obligation.” *Kruppa v. All Souls Cemetery of the Diocese of Youngstown* (Feb. 22, 2002), 11th Dist. No. 2001-T-0029, 2002 Ohio App. LEXIS 773, at \*14, quoting *Moneywatch Cos. v. Wilbers* (1995), 106 Ohio App.3d 122, 125.

{¶29} The settlement statement was drafted on a form provided by the United States Department of Housing and Urban Development (“HUD”). See, e.g., *Podany v. Real Estate Mtge. Corp. Escrow Co.* (Dec. 16, 1999), 8th Dist. No. 75307, 1999 Ohio App. LEXIS 6083, \*4, fn. 3. “A HUD-1 Settlement Statement is a form that lenders must provide to borrowers to identify all settlement (or closing) costs on a federally related

mortgage loan.” *Schuetz v. Banc One Mtge. Corp.* (C.A.9, 2002), 292 F.3d 1004, 1008, fn. 2, citing Section 2603, Title 12, U.S.Code. See, also, *Vega v. First Fed. S. & L. Assoc. of Detroit* (C.A.6, 1980), 622 F.2d 918, 923. The HUD settlement Statement must also “inform the borrowers of the fees that they are paying in the loan transaction.” *Mills v. Equicredit Corp.* (E.D.Mich.2003), 294 F.Supp.2d 903, 908.

{¶30} We note the settlement statement was an agreement with the title agency regarding how to distribute the proceeds of the loan. The revised settlement statement did not change the fees charged; instead, it merely changed the designated recipients of some of the proceeds. Specifically, the payoff amounts of two accounts at First Place Bank were collectively reduced by \$56.76 in the revised settlement statement. Also, an “additional disbursement exhibit” was attached to both of the settlement statements. The total distribution amount increased by \$3,380 in the revised settlement statement. In the initial settlement statement, Villio and Akins were to receive a cash distribution of \$3,089.35. However, in the revised settlement statement, they owed \$50. The revised settlement statement shows a “broker credit” in the amount of \$183.89. Accordingly, when the amount Villio and Akins were to receive in the initial settlement statement (\$3,089.35) is added to the amount they owed in the revised settlement statement (\$50), the broker credit (\$183.89), and the difference between the payoff amount for the First Place accounts (\$56.76), the total comes to \$3,380 – the exact amount of the increase of the additional distributions. In sum, Villio and Akins decided they wanted more money of the loan proceeds to go toward paying off existing debt. It appears Novastar made efforts to accommodate Villio and Akins' wishes.

{¶31} We emphasize that none of the terms of the underlying note or mortgage changed as a result of the revised settlement statement. Specifically, the same amount of money was borrowed from NovaStar, and the same repayment conditions remained in effect.

{¶32} Moreover, while the settlement statement was related to this transaction, it was a separate contract with its own terms. The settlement statement itself did not convey any interest in real property; therefore, it was not necessary to comply with TILA by issuing a new notice of right to rescind due to the revisions of the settlement statement.

{¶33} Finally, even if there were technical mistakes in NovaStar's compliance with TILA, we do not believe those mistakes permit Villio to rescind the mortgage nearly one year after she executed the documents. NovaStar cites the following language from the Fourth Appellate District:

{¶34} "In sum, we agree with the trial court's conclusion that any TILA mistakes in the instant case constitute technical (if not hyper-technical) mistakes and do not violate the spirit of the law. We therefore find no error in the court's judgment that appellant could not rescind the mortgage loan. Our holding is supported by several other factors as well. First, whatever mistakes that may have occurred in the loan closing, neither appellant nor her mother suffered any apparent prejudice. We find no evidence to show that appellant was damaged or that appellant wanted to rescind the loan. Only after appellant was in default and foreclosure proceedings had begun (approximately eighteen months after the loan closing) did appellant express her desire

to rescind the loan.” *ContiMortgage Corp. v. Delawder*, 2001 Ohio App. LEXIS 3410, at \*16.

{¶35} In this matter, Villio did not seek to rescind the loan agreement within three days of May 18th or 19th of 2005. Instead, she provided NovaStar with her notice of rescission in *May 2006*. This was nearly one year after the mortgage loan was executed and after NovaStar had initiated foreclosure proceedings.

{¶36} The trial court did not err by granting NovaStar’s motion for summary judgment and denying Villio’s motion for summary judgment.

{¶37} Villio’s first and third assignments of error are without merit.

{¶38} Villio’s second assignment of error is:

{¶39} “The court below erred in granting judgment on September 14, 2007 in favor of Appellee NovaStar and against Appellant Villio for money judgment on the Promissory Note and Mortgage that is so vague and uncertain that Appellant cannot ascertain the amount of the judgment.”

{¶40} In its September 14, 2007 judgment entry, the trial court granted NovaStar’s motion for summary judgment. The trial court included language in the judgment entry that “[t]his is a final and appealable order and there is no just reason for delay.” The inclusion of this language rendered the legal issues contained in the judgment entry immediately appealable, even though other issues remained pending before the trial court. See Civ.R. 54(B). Further, we note the trial court included the following language in its September 14, 2007 judgment entry: “Plaintiff NovaStar shall submit a proposed entry in foreclosure upon receipt of this Judgment Entry.”

{¶41} The language of the trial court's September 14, 2007 judgment entry clearly indicates the trial court's intention that the judgment entry was not to serve as a final judgment entry outlining all of Villio's obligations. Instead, the language of the judgment entry provided Villio a means to immediately appeal the legal issues – addressed in our analysis of her first and third assignments of error – to this court.

{¶42} Since the trial court's September 14, 2007 judgment entry was not intended to be the final judgment of the case, the judgment was not vague or uncertain due to its failure to detail the parties' rights and obligations.

{¶43} Villio's second assignment of error is without merit.

{¶44} Villio's fourth assignment of error is:

{¶45} "The court below erred in entering judgment on October 22, 2007 in favor of Appellee NovaStar and against Appellant Villio for money judgment on the Promissory Note and Mortgage that is so vague and uncertain that Appellant cannot ascertain the amount of the judgment or amount that she must pay to exercise her right of redemption with reasonable certainty."

{¶46} The Fourth District has held:

{¶47} ""[T]he trial court must \*\*\* enter its own independent judgment disposing of the matters at issue between the parties, such that the parties need not resort to any other document to ascertain the extent to which their rights and obligations have been determined. In other words, the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court."" *Burns v. Morgan*, 165 Ohio App.3d 694, 2006-Ohio-1213, at ¶10, quoting *Yahraus v. Circleville* (Dec. 15, 2000), 4th Dist. No. 00CA04, 2000 Ohio App. LEXIS

6315, at \*9, quoting *Lavelle v. Cox* (Mar. 15, 1991), 11th Dist. No. 90-T-4396, 1991 Ohio App. LEXIS 1063, at \*7 (Ford, J., concurring).

{¶48} In this matter, the trial court's October 22, 2007 judgment entry entered judgment "in the amount of \$80,619.43, plus interest thereon at the rate of 9.10% per annum from September 1, 2005, plus late charges, costs and advances, all as provided in the Note and Mortgage." Further, the court stated that Villio owed NovaStar "the sums found to be owing to it as set forth above, together with interest due thereon, and the advances made on behalf of the Property for real estate taxes, insurance premiums and property protection and maintenance by [NovaStar.]"

{¶49} Regarding the interest and late fees, these matters are set forth in the note. While the better practice would be for the trial court to specify the exact interest rate and late charges in the judgment entry itself, the fact that these terms are unambiguously stated in the note does not render the judgment entry deficient in regard to these items. This is because it is possible for Villio to ascertain the amount of the interest and late fees by referencing the note and performing her own computations.

{¶50} The judgment entry also provides that Villio pay to NovaStar for its advance on real estate taxes and insurance premiums. The judgment entry does not provide a cost of these purported advancements. Further, the record does not contain any evidence that NovaStar made any advancements for real estate taxes or insurance premiums.

{¶51} We are also troubled by the trial court's assessment of "costs." In Paragraph 7(E), the note is entitled "Payment of Note Holder's Costs and Expenses" and provides:

{¶52} “If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this note to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys’ fees.”

{¶53} There is nothing in the record to demonstrate NovaStar’s costs and expenses or whether those costs and expenses were reasonable.

{¶54} In addition, the trial court’s judgment entry requires Villio to reimburse NovaStar for funds it advanced for “property protection.” Paragraph 9 of the mortgage provides, in part:

{¶55} “[If certain preconditions occur,] Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the property.”

{¶56} Again, there is nothing in the record to indicate what, if any, funds NovaStar expended relating to property protection. Further, if NovaStar did advance such funds, there is nothing in the record to show that those expenditures were “reasonable” and “appropriate.”

{¶57} The trial court’s October 22, 2007 judgment entry is vague and uncertain, because it does not permit Villio to determine her obligations as they existed at the time of the decree with reasonable certainty. Accordingly, the trial court’s October 22, 2007 judgment entry is “void for uncertainty.” *Short v. Short*, 6th Dist. No. F-02-005, 2002-Ohio-2290, at ¶10. (Citations omitted.) Further, since an appeal cannot arise from a

void judgment, the trial court's October 22, 2007 judgment entry is not a final, appealable order. Id.

{¶58} We recognize, as NovaStar contends, there will be costs incurred by the lender that will not be known until the time of confirmation of sale. However, to the extent specific costs of the lender have been incurred and are known at the time of the decree of foreclosure, those specific costs should be included in the decree. Otherwise, the debtor is being asked to review and approve a judgment without knowing the amount. This could result in an improperly-motivated lender submitting exorbitant statements for lawn care, insurance, maintenance, etc. Foreclosure proceedings can be time- and resource-intensive matters. However, at the time the final judgment is entered, the mortgage company has most likely expended the majority of the costs associated with the foreclosure case. Thus, the mortgage company should submit an amount certain that is owed by the borrower for the principal, interest, and fees at the time of the final judgment. If the specific costs are submitted, the borrower has an opportunity to object before it becomes a judgment. Further, this "owed to date" approach permits the trial court to review the charges and make sure that they are accurate and reasonable. This method would continue to protect the lender's interests, because the final decree could provide for an allowance of any additional costs incurred between the date of the decree and the date of the confirmation of sale. The confirmation of sale would then reflect reimbursement of those additional costs.

{¶59} Villio's fourth assignment of error has merit to the extent indicated.

{¶60} The judgment of the trial court in case No. 2007-T-0111 is affirmed. The appeal in case No. 2007-T-0117 is dismissed due to lack of a final, appealable order.

{¶61} As a result of our decision, this matter will return to the trial court's docket. A review of the trial court's docket indicates that the confirmation of sale has not occurred. Thus, the trial court is to issue a new judgment and decree of foreclosure, to replace the October 22, 2007 judgment entry, which is void. Consistent with this opinion, the new judgment entry and decree shall adequately and specifically state the rights and obligations of the parties. Thereafter, this matter shall proceed according to law.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.

STATE OF OHIO )  
 )SS.  
COUNTY OF TRUMBULL )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

NOVASTAR MORTGAGE, INC.,

Plaintiff-Appellee,

- vs -

MARJORIE E. AKINS, et al.,

Defendants,

CAROL A. VILLIO,

Defendant-Appellant.

**JUDGMENT ENTRY**

**CASE NOS. 2007-T-0111  
and 2007-T-0117**

For the reasons stated in the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is affirmed in 11th Dist. No. 2007-T-0111 and the appeal in 11th Dist. No. 2007-T-0117 is dismissed.

  
JUDGE TIMOTHY P. CANNON

FOR THE COURT

**FILED**  
COURT OF APPEALS

NOV 24 2008

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK