

IN THE SUPREME COURT OF OHIO

NovaStar Mortgage, Inc.,

Plaintiff-Appellee,

vs.

Marjorie E. Akins, et al.,

Defendants,

Carol A. Villio,

Defendant-Appellant.

Case No. 08-2355

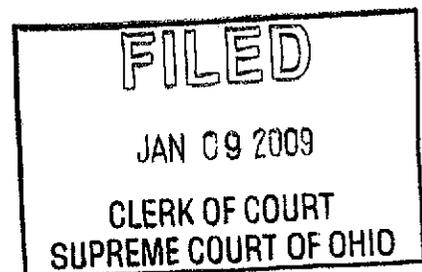
On Appeal from the Eleventh District Court
of Appeals, Trumbull County, Ohio

Case Nos. 2007-T-0111
2007-T-0117

PLAINTIFF-APPELLEE'S MEMORANDUM IN RESPONSE
TO MEMORANDUM IN SUPPORT OF JURISDICTION

Pamela S. Petas (0058627)
Manley Deas Kochalski LLC
P.O. Box 42666
Cincinnati, OH 45242
Phone & Fax (513) 618-6234
psp@mdk-llc.com
COUNSEL FOR APPELLEE NOVASTAR MORTGAGE, INC.

Robert L. York (0048217)
138 East Market Street
Warren, OH 44481
Phone (330) 399-1481
Fax (866) 441-6491
rlyorkatorklaw@roadrunner.com
COUNSEL FOR APPELLANT CAROL A. VILLIO



I. THIS CASE DOES NOT INVOLVE A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

The court of appeals answered the question of whether the 3-day rescission deadline in the Notice of Right to Cancel provided to appellant was rendered inaccurate by the issuance of a revised HUD 1 settlement statement one day after the loan closing. This narrow question does not involve a question of public or great general interest. In addition, whether the court of appeals committed a procedural error by misconstruing evidence outside the record is unique to this case and is not a matter of public or great general interest.

II. ARGUMENT

A. Procedural background.

The following background is set forth in the Opinion of the Court of Appeals Eleventh Appellate District Trumbull County, Ohio of November 24, 2008 attached to the Memorandum in Support of Jurisdiction ["Opinion"].

On March 9, 2006, plaintiff-appellant NovaStar Mortgage, Inc. ["NovaStar"] filed a foreclosure action against Marjorie Akins and co-mortgagor defendant-appellant Carol A. Villio ["Villio"] in the Trumbull County Court of Common Pleas Case No. 2006 CV 0632. *Opinion, p. 3.* Villio filed an Answer, Counterclaim and Motion to Dismiss in an effort to avoid the foreclosure. *Id.* Villio claimed in relevant part that she attended the closing of the mortgage loan on May 18, 2005 at which she received a HUD 1 settlement statement and Notice of Right to Cancel with a 3-day rescission deadline of May 21, 2005. *Id. p. 2.* On May 19, 2005, Villio received a revised HUD 1 settlement statement but did not receive a revised Notice of Right to Cancel. Villio argued that the issuance of the second, revised

HUD 1 was a novation of the loan contract, requiring that a revised Notice of Right to Cancel be issued with a rescission deadline of May 22, 2005. *Id.* p. 2, 8. She asserted that the rescission deadline in the Notice of Right to Cancel was rendered inaccurate by the revised HUD 1; therefore, she retained the right to rescind the loan for three years and was exercising her right to rescind under TILA and Regulation Z. *Id.*

NovaStar and Villio filed cross Motions for Summary Judgment. On September 14, 2007, the court of common pleas entered judgment in favor of NovaStar and against Villio. *Id.* p. 4. Villio filed an appeal to the eleventh district court of appeals which rendered an Opinion on November 24, 2008. The court of appeals held in relevant part that the issuance of the second HUD 1 settlement statement on May 19, 2005 was not a novation of the loan contract requiring that Villio receive a second Notice of Right to Cancel with a rescission deadline of May 22, 2005. *Id.* p. 10. The court noted that the revised HUD 1 settlement statement altered the distribution of the loan proceeds and recipients but did not change the terms of the note and mortgage. Hence, the issuance of the revised HUD 1 was not a novation requiring the issuance of a second Notice of Right to Cancel. *Id.*

The court also commented that there was no evidence that Villio was prejudiced or desired to rescind prior to her default and foreclosure. *Id.* Hence, in accord with *ContiMortgage Corp. v. Delawder*, 2001 Ohio App. Lexis 3410, even if the rescission deadline in the Notice of Right to Cancel was inaccurate by one day, resulting in a technical violation of TILA, Villio was not entitled to rescind the loan. *Id.* p. 11.

B. This case does not involve a question of public or great general interest to invoke the discretionary jurisdiction of the Ohio Supreme Court.

S Ct Prac R II (A)(3) provides that "[a]n appeal that involves a felony or a question of public or great general interest invokes the discretionary jurisdiction of the Supreme

Court and shall be designated a discretionary appeal.” The court of appeals applied Ohio law regarding novation to a set of unique and undisputed facts. Therefore, it is unclear in what way the court could have misconstrued evidence outside the record as Villio alleges. Moreover, even if the court of appeals made a procedural error, it would not be of public or great general interest and would be specific to this case.

In granting judgment in NovaStar's favor, the court of appeals simply answered the very narrow question of whether the issuance of the revised HUD 1 was a novation requiring that Villio receive a second Notice of Right to Cancel with a new rescission deadline. Having no legitimate explanation of why this question is of great public importance, Villio provides an overly-broad description of the question. The question is limited to applying Ohio law regarding novation to a set of rare, unique and undisputed facts.

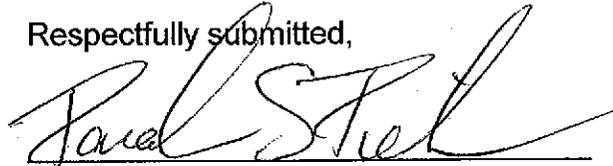
In *ContiMortgage Corp. v. Delawder*, (July 30, 2001), Lawrence App. No. 00CA28, 2001 WL 884085, unreported, the court criticized the mortgagor's reliance on a non-prejudicial, technical violation of TILA to create a defense to foreclosure. In this case, the court of appeals, in *dicta*, referred favorably to the *Delawder* decision in noting that Villio did not intend to rescind prior to default and foreclosure. However, the reasoning in *Delawder* was not the sole grounds for the court's decision, which was primarily based upon the finding that no novation occurred. Villio improperly seeks this Court's review of the *Delawder* holding, which is not on appeal.

III. CONCLUSION

For the foregoing reasons, the narrow question of whether the issuance of a revised HUD 1 renders the Notice of Right to Cancel inaccurate is not of public or great

general interest. It is limited to applying Ohio law on novation to a unique set of undisputed facts. The court of appeals' alleged procedural error is not of public or great general interest. Therefore, this Court must deny discretionary jurisdiction.

Respectfully submitted,

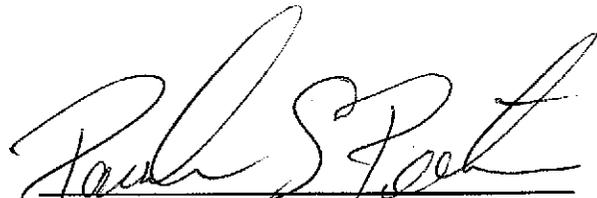


Pamela S. Petas (0058627)
Manley Deas Kochalski LLC
Counsel for Plaintiff-Appellee
NovaStar Mortgage, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum in Response to Memorandum in Support of Jurisdiction has been duly served upon the following by ordinary U.S. Mail this 9th day of January 2009.

Robert L. York
138 East Market Street
Warren, Ohio 44481
Counsel for Defendant-Appellant
Carl A. Villio



Pamela S. Petas