

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

GEAUGA SAVINGS BANK,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2010-T-0052 and 2010-T-0060
JOHN J. MCGINNIS, et al.,	:	
Defendants,	:	
SECOND NATIONAL BANK OF WARREN, n.k.a. THE HUNTINGTON NATIONAL BANK,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 02233.

Judgment: Affirmed.

Anthony A. Cox, 118 West Streetsboro Street, Suite 95, Hudson, OH 44236 (For Plaintiff-Appellee).

Antonio J. Scarlato, Felty & Lembright Co., L.P.A., 1500 West Third Street, Suite 400, Cleveland, OH 44113-9873 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Second National Bank of Warren, n.k.a. The Huntington National Bank ("Second National"), appeals from the March 18 and April 15, 2010 judgment entries of the Trumbull County Court of Common Pleas. The trial court issued a judgment entry/foreclosure decree on April 22, 2009. Thereafter, the trial court denied

Second National's motion to stay confirmation of sale, to vacate sale, and to vacate decree of foreclosure of the property located at 2941 Hillcrest Avenue and three vacant lots. Second National maintained that the underlying judgment entry/foreclosure decree of April 22, 2009, is void for uncertainty for failing to fully instruct the parties of their rights and obligations, pursuant to this court's opinion in *NovaStar Mtge. v. Akins*, 11th Dist. Nos. 2007-T-0111 and 2007-T-0117, 2008-Ohio-6055. Based on the foregoing, we affirm the judgment of the trial court.

{¶2} The foreclosure action was filed by appellee, Geauga Savings Bank ("Gauga Bank"), in August 2008. The complaint named the following as defendants: mortgagors of the subject property, John and Elizabeth McGinnis; Second National; Chase Bank; and the Trumbull County Treasurer. The record reflects that each party was properly served. The Trumbull County Treasurer filed an answer and consent to decree in foreclosure. The other named defendants did not file an answer.

{¶3} Gauga Bank filed a motion for default judgment, which was granted by the trial court. A judgment entry/foreclosure decree was issued, and the subject property was sold at a sheriff's sale on January 28, 2010. A third party purchased the property for \$26,100.

{¶4} On February 8, 2010, Second National filed a motion for leave to file an answer, to stay confirmation of sale, to vacate the sheriff's sale, and to vacate the judgment entry/foreclosure decree. Unaware that the sheriff's sale had taken place, the trial court granted Second National's motion for leave to file an answer. Second National filed an answer and cross-claim on February 16, 2010.

{¶5} Second National argued that the judgment entry/foreclosure decree was void for uncertainty, based on this court's opinion in *NovaStar*, supra. Geauga Bank filed a response, and a hearing was scheduled on February 26, 2010. On March 18, 2010, the trial court overruled Second National's motions and ordered Geauga Bank to file a motion to amend the judgment entry/foreclosure decree with proposed entry to comply with *NovaStar*, supra. The trial court granted Geauga Bank's motion and issued an April 15, 2010 judgment entry "amending and correcting judgment entry/foreclosure decree *nunc pro tunc* and confirming sale and ordering distribution of sale proceeds."

{¶6} On April 23, 2010, Second National filed a motion to stay, which was denied by the trial court.

{¶7} Second National filed a timely notice of appeal and asserts the following assignments of error:

{¶8} "[1.] The trial court erred to the prejudice of defendant-appellant when it issued a nunc pro tunc entry as a means to remedy its original judgment entry.

{¶9} "[2.] The trial court's original judgment entry is void for uncertainty, because it fails to fully inform the parties of their rights and obligations."

{¶10} For ease of discussion, we first address Second National's second assignment of error. Under this assigned error, Second National claims the underlying judgment entry of April 22, 2009, is void pursuant to this court's opinion in *NovaStar*, supra, 2008-Ohio-6055. The trial court correctly recognized the very limited application of *NovaStar* in the foreclosure setting and properly declined to apply it to this case.

{¶11} In *NovaStar*, the mortgagor, Villio, sought review of a judgment from the trial court, which granted summary judgment to the mortgagee, NovaStar, in its

foreclosure action, based on the mortgagor's default in payments. Id. at ¶1-12. A complaint for foreclosure was filed by NovaStar, and Villio filed an answer. Id. at ¶7-9. The trial court issued an "agreed judgment entry and decree of foreclosure" on October 22, 2007. This court noted that "[w]hile 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.)" Id. at fn 4.

{¶12} On appeal, Villio alleged that the October 22, 2007 judgment entry for money judgment on the promissory note and mortgage was "so vague and uncertain that [she could not] ascertain the amount of the judgment or the amount she must pay to exercise her right of redemption with reasonable certainty." Id. at ¶45. This court found merit in Villio's assigned error and noted that the judgment "[did] not permit Villio to determine her obligations as they existed at the time of the decree with reasonable certainty." Id. at ¶57. We recognized that while there may be costs incurred by the lender that are unknown at the time of the confirmation of sale and the mortgagor makes a specific objection to failure to include them, the lender should include those costs which have been incurred and are known at the time of the decree of foreclosure. Id. at ¶58. "If the specific costs are submitted, the borrower has an opportunity to object before it becomes a judgment." Id. We held that the October 22, 2007 judgment entry was "void for uncertainty." Id. at ¶57.

{¶13} In the present case, Second National claims that the underlying judgment is "void for uncertainty" since it is "indefinite and does not supply the parties with

sufficient information to bring resolution to the matter.” Additionally, Second National claims the judgment does not allow the parties to “determine payment obligations with reasonable certainty.”

{¶14} We decline to adopt our holding in *NovaStar* to the facts of the instant case. As the trial court observed in its March 18, 2010 entry, the holding in *NovaStar* “protected individual property owner debtors by giving them as much information as possible in attempts to resolve the foreclosure proceedings. *NovaStar* was not decided in order to address priorities of parties, in particular banks, who had failed to respond when properly served and failed to plead their case.” *NovaStar* is only applicable under the limited facts and circumstances presented in that case.

{¶15} Unlike the defendant in *NovaStar*, Second National did not participate in the underlying proceedings despite receiving proper notice. Further, Second National failed to object to the April 22, 2009 judgment entry, although the record indicates that it was submitted to Second National on February 9, 2008. Conversely, the defendant in *NovaStar* was attempting to exercise her right of redemption prior to her property being foreclosed upon, yet the judgment entry failed to inform her of costs known to *NovaStar* at the time of decree of foreclosure. Despite Villio’s objections to the entry, the trial court signed the entry and proceeded with foreclosure.

{¶16} In *HSBC Bank USA Natl. Assn. as Trustee v. Lampron*, 5th Dist. No. 10-CA-5, 2010-Ohio-5088, at ¶19, the Fifth Appellate District determined that a judgment entry was not void for vagueness, stating:

{¶17} “Appellant did not object to the court’s failure to itemize the costs and expenses, and did not bring the matter to the court’s attention. Similarly, appellee did

not outline any expenses it had advanced to preserve the property during the pendency of the case, so the court had no evidence before it from which to determine any advances. Neither party fulfilled its obligation to the court.”

{¶18} Although *NovaStar* is inapplicable to the facts of the instant case, we take this opportunity to overrule that opinion to the limited extent this court utilized improper nomenclature. In *NovaStar*, the October 22, 2007 judgment entry should have been deemed erroneous and voidable, but not “void for uncertainty.” The distinction between “void” and “voidable” is crucial. For example, a void judgment is considered a legal nullity and may be attacked collaterally. On the other hand, a voidable judgment, although imposed irregularly or erroneously, has the effect of a proper legal order unless it is successfully challenged on direct appeal. *GMAC v. Greene*, 10th Dist. No. 08AP-295, 2008-Ohio-4461, at ¶26-27; see, also, *State v. Biondo*, 11th Dist. No. 2009-P-0009, 2009-Ohio-7005, at ¶20-26, exploring void versus voidable in the criminal context.

{¶19} Based on the foregoing, Second National’s second assignment of error is without merit.

{¶20} Under the first assignment of error, Second National argues the trial court erred by issuing the April 15, 2010 judgment entry, as the errors contained in the April 22, 2009 entry were substantive errors and could not be cured by a nunc pro tunc entry. In its March 18, 2010 judgment entry, the trial court stated the following:

{¶21} “The Court acknowledges that the language [in *NovaStar*] does say that the judgment entry is void. The general process to correct an improper entry pursuant to *NovaStar* is a motion to amend the entry to comply with the requirement of *NovaStar*.

{¶22} “[Geauga Bank] is directed to file appropriate motion and proposed judgment entry that complies with *NovaStar* for this Court[']s review. Upon the review if the Court finds that the requirements of *NovaStar* have been addressed the Court will execute the amended judgment entry that cures the prior defect.”

{¶23} Geauga Bank submitted a “motion to amend and correct judgment entry/foreclosure decree *nunc pro tunc* and to confirm sale and for order of distribution of sale proceeds.” In said motion, Geauga Bank moved to amend the judgment entry/foreclosure decree by deleting paragraph seven, as it is “entirely superfluous to the facts of this case in that [Geauga Bank] advanced no taxes or other expenses during the pendency of this action and the property was sold at sheriff’s sale for \$100,000 less than [Geauga Bank’s] mortgage balance, leaving no funds for additional advances in any event.”

{¶24} The trial court granted Geagua Bank’s motion and executed the April 15, 2010 entry, captioned “judgment entry amending and correcting judgment entry/foreclosure decree *nunc pro tunc* and confirming sale and ordering distribution of sale proceeds.” In that entry, the trial court deleted, in its entirety, paragraph seven, which related to further advances and other expenses.

{¶25} “The purpose of a *nunc pro tunc* order is to have the judgment of the court reflect its true action. The power to enter a judgment *nunc pro tunc* is restricted to placing upon the record evidence of judicial action which has actually been taken. *** It does not extend beyond the power to make the journal entry speak the truth *** and can be exercised only to supply omissions in the exercise of functions which are merely clerical ***. It is not made to show what the court might or should have decided, or

intended to decide, but what it actually did decide. ***.” *McKay v. McKay* (1985), 24 Ohio App.3d 74, 75. (Citations omitted.)

{¶26} Civ.R. 60(A) is the proper vehicle by which a court may correct clerical mistakes. The Eighth District Court of Appeals, in *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, paragraph one and two of the syllabus, stated:

{¶27} “A court has the power to correct a clerical error pursuant to Civ.R. 60(A). However, this rule is applied to inadvertent clerical errors only, and cannot be used to change something which was deliberately done. Thus, a nunc pro tunc entry made pursuant to Civ.R. 60(A) does not reflect a modification of an erroneous judgment but rather supplies omissions of a clerical nature which serve to have the record speak the truth. As used in Civ.R. 60(A), a “clerical mistake” is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.” *Swift v. Gray*, 11th Dist. No. 2007-T-0096, 2008-Ohio-2321, at ¶68 (Trapp, J., concurring in judgment only).

{¶28} The trial court instructed Geauga Bank to file a motion and amended judgment entry. The trial court filed the nunc pro tunc, presumably prepared by Geauga Bank, in order to satisfy this court’s concerns as expressed in *NovaStar*. Although Second National claims, in their assigned error, that they were prejudiced by the April 15, 2010 judgment entry, they failed to object at the trial court level. This court has stated, “(g)enerally, the failure to object or otherwise bring an error to the trial court’s attention constitutes a waiver of that error on appeal.” *Carrolls Corp. v. Planning Comm*, 11th Dist. No. 2005-L-112, 2006-Ohio-3209, at ¶31. (Citation omitted.)

{¶29} Although a nunc pro tunc entry may not have been appropriate in this circumstance, we find that it was not necessary to alter the April 22, 2009 judgment entry/foreclosure decree based on our analysis under Second National's second assignment of error. In addition, since Second National did not object below to that form of the amendment and give the trial court an opportunity to correct the entry, appellant has waived any right to object for the first time on appeal. Second National's first assignment of error is without merit.

{¶30} Based on the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.