IN THE SUPREME COURT OF OHIO

Countrywide Home Loan Servicing, L.P.	Case No. 12-0578
Appellee,	On Certification of Conflict from Wood County Court of Appeals, Sixth Appellate District
vs.	
Michael P. Nichpor, *et al.*,	Court of Appeals Case No. WD-11-047
Appellants.	

MERIT BRIEF OF APPELLANTS MICHAEL P. NICHPOR AND JOANN M. NICHPOR

Kevin A. Heban (0029919)
(Counsel of Record)
heban@hsm-law.net
Gary O. Sommer (0006257)
sommer@hsm-law.net
R. Kent Murphree (0065730)
murphree@hsm-law.net
John P. Lewandowski (0085657)
lewandowski@hsm-law.net
Heban, Sommer & Murphree, LLC
200 Dixie Highway
Rossford, Ohio 43460
Telephone: (419) 662-3100
Facsimile: (419) 662-6533

Counsel for Appellants,
Michael P. Nichpor and Joann M. Nichpor.

Matthew J. Richardson (0077157)
(Counsel of Record)
Andrew C. Clark (0083519)
Manley Deas Kochalski
P.O. Box 165028
Columbus, Ohio 43216-5028
Telephone: (614) 754-1759
Facsimile: (614) 220-5613

Counsel for Appellee,
Countrywide Home Loans Servicing, L.P.

TABLE OF CONTENTS

APPENDIX

Appendix Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions **Page**

Statutes **Page**

Other Authorities **Page**

INTRODUCTION

This case is before the Court pursuant to Article 4, Section 3(B)(4) and Article 4, Section 2(B)(2)(f) of the Ohio Constitution to resolve a conflict between the Second and Sixth District Courts of Appeal. This Court has accepted certification from the Sixth Appellate District to answer the following narrow question of procedure:

> Whether a foreclosure action, in which judgment of foreclosure has, in fact, been issued, can be dissolved in its entirety prior to confirmation of sale, with the filing of a voluntary dismissal, filed by a party in accordance with Civ.R. 41(A).

Appellants assert the answer to the certified question is "no," as Civ.R. 60(B) prescribes the sole mechanism with which a party can obtain relief from a final judgment. A party cannot voluntarily dismiss a final appealable order to avoid the result.

STATEMENT OF FACTS

Appellant Michael P. Nichpor executed a promissory note and a mortgage in connection with his purchase of real estate (the "Property") which is the subject of the instant action. (Appendix "Appx." 24). Appellee Countrywide Home Loan Servicing, L.P. ("Countrywide") is the assignee holder of the note and the mortgage. (*Id.*).

In 2009, Countrywide filed a complaint in foreclosure against Appellant Michael P. Nichpor and his spouse Joann M. Nichpor (the "Nichpors"), Wood County Case 2009CV0215 (the "First Case"), praying for foreclosure of the Property and judicial sale in accordance with the Ohio Revised Code. (Appx. 18).

On May 18, 2009, the trial court in the First Case, upon request of Countrywide, granted a judgment entry and decree in foreclosure in favor of Countrywide. (Appx. 18, 46). The trial court ordered the Property foreclosed and that an Order of Sale be issued to the Wood County Sheriff

directing him to appraise, advertise and sell the Property. (Appx. 48). The foreclosure decree, prepared by Countrywide, included Civ.R. 54(B) certification that "[t]here is no just reason for delay in entering Judgment as aforesaid." (Appx. 49).

Countrywide filed a praecipe for Order of Sale on April 29, 2010, and on May 3, 2010, the trial court issued a Writ for Order of Sale. (Appx. 39, 59; First Case Trial Docket "T.d." Nos. 36, 38). The Property was appraised on May 20, 2010, in the amount of $198,000.00. (Appx. 39; First Case T.d. 39). A sheriff's sale was scheduled to take place on July 1, 2010, at 10:00 a.m., and a Notice of the Sale was served upon Countrywide. (Appx. 59; First Case T.d. 40).

The sheriff's sale was conducted and a third party purchaser, Jennifer L. Reichert ("Reichert"), was the successful bidder of the Property. (Appx. 18, 40; First Case T.d. 46). Jennifer L. Reichert, as required by Ohio law, bid at least two-thirds (2/3) the appraised value ($132,000.00) and made a deposit which was accepted by the Wood County Sheriff. (Appx. 40; T.d. 46). The Wood County Sheriff filed the writ of execution with the Clerk of Courts. (*Id.*). *Countrywide* failed to attend the sheriff's sale. (Appx. 18).

After the Sale, Countrywide filed a Civ.R. 41(A) Notice of Voluntary Dismissal of the First Case. (Appx. 18). Reichert was permitted to intervene in the First Case and moved the trial court to confirm the sale. (Appx. 59). Contemporaneous therewith, Reichert filed a "Notice of Invalidity of attempted Voluntary Dismissal pursuant to Civ.R. 41(A)." (*Id.*). Undersigned counsel, who is present before this Court on behalf of the Nichpors, represented Reichert in her attempt to confirm the sheriff's sale in the First Case.

The trial judge in the First Case faced a similar situation in 2005, *NOIC v. Yarger,* Wood County Court of Common Pleas Case No. 2005CV0219 (Appx. 59, 60). In *Yarger*, discussed at length below in Section II of the Argument, the trial judge *sua sponte* struck from the record a

mortgagee's voluntary dismissal after the sheriff's sale had already taken place. (Appx. 60, 78). The Sixth District Court of Appeals reversed the trial court. *NOIC v. Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658. (Appx. 59, 60, 78-80).[1]

Having been reversed just six years prior on the same procedural matter, the trial judge in the First Case issued an Order on July 29, 2010, allowing Countrywide's voluntary dismissal. (Appx. 58-60). Within his Order allowing the dismissal, the trial judge stated:

> According to Civ.R.41(A)(1)(a), a plaintiff may dismiss a case 'at any time before commencement of trial'. When this court refused to allow the plaintiff in Yarger to dismiss its case after the sheriff's sale had taken place, it was acting on the premise that a "trial" had in fact occurred and that the notice of dismissal had therefore not been timely filed. R.C. 2311.01 defines a "trial" as "a judicial examination of the issues, whether of law or of fact, in action or proceeding". In Yarger, this court was acting under the belief that the matter had been "tried" when the court examined and decided the motion for default judgment. This court disagrees with the view that a decision on a motion for default judgment in a foreclosure case is not a trial for purposes of Civ.R. 41(A)(1)(a). This court further believes that allowing a plaintiff to dismiss a foreclosure action after a sheriff's sale has occurred is an abuse of the civil rules. Nevertheless, this court is required to follow the law of the district, as articulated by the court of appeals.
>
> ***
>
> The sale, *unfortunately*, cannot be confirmed.

(Emphasis added). (Appx. 60).

Countrywide then filed a second foreclosure action requesting the same relief as was requested in the First Case and naming the same parties, Wood County Case No. 2010CV0680 (the

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[1] The Sixth District Court of Appeals essentially relied upon *Yarger* when it entered its decision from which the case sub judice originates. Instead of overruling its own precedent, the Sixth Appellate District certified an intradistrict conflict for this Court to resolve.

"Second Case"). (Appx.18). The Complaint in the Second Case was identical to the Complaint in the First Case, it even contained the same case number as the First Case. (Second Case Trial Docket "T.d." No. 2, filed with this Court as part of the record). As part of the filing of the Second Case, Countywide filed a Notice of Preliminary Judicial Report. (Appx. 50-57). Within that Report, at Schedule B, Number 4, there was listed a "*Judgment* in favor of [Countrywide] and against Michael Nichpor***". (Emphasis added.) (*Id.*).

The Nichpors contacted undersigned counsel to represent them in the Second Case. Bound by the Sixth Appellate District's precedent suggesting that an order of foreclosure can be voluntarily dismissed, the Nichpors filed a motion for summary judgment asserting the Second Case was barred by the doctrine of *res judicata*. (Appx. 18, 20; Second Case T.d. 27, 32). The Nichpors maintained in their summary judgment motion that the dismissal of the First Case was improper because a final appealable order cannot be dismissed. (*Id.*). Therefore, argued the Nichpors, *res judicata* barred the Second Case. (*Id.*). Countrywide filed a cross motion for summary judgment. (*Id.*). The trial court granted Countrywide's summary judgment motion and signed a judgment entry and decree in foreclosure, submitted by Countrywide, that contained no legal analysis nor acknowledgement of the Nichpors' position. (Appx. 23-26).

The Nichpors appealed the trial court's judgment entry and decree in foreclosure in the Second Case to the Sixth District Court of Appeals presenting three assignments of error: (1) the First Case's order of foreclosure is a final appealable order, (2) Countrywide could not voluntarily dismiss a final appealable order, and (3) res judicata barred Countrywide's Second Case. (Appx. 20).

The Sixth Appellate District held that an order of foreclosure is a final appealable order. (Appx. 21). Relying on its own six year old precedent, the Sixth District affirmed the dismissal of the order of foreclosure and order of sale in the First Case, but certified its decision to be in direct

conflict with a 1987 case from the Second District Court of Appeals, *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (March 27, 1987). (Appx. 20-22). Because it affirmed the Civ.R. 41(A)(1)(a) dismissal of the First Case, the Sixth District Court of Appeals never reached the question of whether the doctrine of *res judicata* barred the Second Case. (*Id.*)

ARGUMENT

I. Final Appealable Orders Cannot be Dismissed Pursuant to Civ.R. 41(A)

This case presents an unlikely situation. Normally, a party seeking relief from a judgment is the party against whom the judgment operates. Here, the judgment from which relief is sought operates to the benefit of the party who seeks a dismissal of that judgment.

Civ.R. 41(A)(1)(a) allows an action to be dismissed by a plaintiff without court order " *** by filing a notice of dismissal at any time *before commencement of trial* ***." (Emphasis added). Countrywide's presumed argument is as follows: There was no "commencement of trial," therefore Countrywide was entitled to voluntarily dismiss the First Case pursuant to Civ.R.41(A)(1)(a). As explained below, Countrywide's premise is flawed because the trial court issued a final appealable order after "trial" had been commenced (as defined by R.C. 2311.01) and Civ.R. 60(B) motion for relief from judgment is the only mechanism for relief from such a judgment.

A. An Order of Foreclosure is a Final Appealable Order

A judgment entry and decree in foreclosure, or an order of sale, is a final appealable order. See *Third Natl. Bank v. Speakman*, 18 Ohio St.3d 119, 120, 480 N.E.2d 411 (1985); *Oberlin Savings Bank v. Fairchild*, 175 Ohio St. 311, 194 N.E.2d 580 (1963); and, *Buckeye Supply Co. v. Sandhill Energy, Inc.*, 4th Dist. No. 88 CA 38, 1990 WL 34093 (March 13, 1990) (an order of foreclosure is a final appealable order even if no sheriff's return or confirmation of sale appear in the record).

Typically an order must satisfy R.C. 2505.02 to constitute a final order. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). R.C. 2505.02(B)(1) provides that an order is final if it "affects a substantial right in an action that in effect determines the action and prevents judgment." An order of foreclosure clearly affects a substantial right, determines the action, and prevents further judgment in favor of the homeowner. *JDI Murray Hill, L.L.C. v. Flynn Properties, L.L.C.*, 8th Dist. No. 94259, 2011-Ohio-301, ¶ 29, 30.In the First Case, the trial court's decree of foreclosure and order of sale were final orders.

For a final order to become "appealable," the court's entry must meet the requirements of Civ.R. 54(B). Under Civ.R. 54(B), "the court may enter final judgment *** upon an express determination that there is no just reason for delay." Civ.R. 54(B) ensures that parties to an action know when an order has become final and therefore appealable. *Bay W. Paper Corp. v. Schregardus*, 137 Ohio App.3d 685, 689, 739 N.E.2d 860 (10th Dist. 2000). Accordingly, the use of the words "there is no just reason for delay" in an entry is mandatory under Civ.R. 54(B). *Id.*, citing *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989). Unless those words appear, an order is subject to modification and is neither final nor appealable. *Id.*

There is clearly a distinction between the Civ.R. 41(A)(1)(a) voluntary dismissal of an interlocutory order, and the attempted dismissal of a final appealable order. As to the latter, it is axiomatic that a final judgment is "imbued with a permanent character when filed with the clerk." *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 83, 523 N.E.2d 851 (1988), quoting *Cale Products, Inc. v. Orrville Bronze & Aluminum Co.*, 8 Ohio App.3d 375, 378, 457 N.E.2d 854 (9th Dist. 1982). As to the former, Appellate district courts have allowed the dismissal of judgments which do not include Civ.R.54(B) language because such orders are interlocutory, or temporary.

Interlocutory orders can be dismissed, final appealable orders cannot. In *Toledo Heart Surgeons v. The Toledo Hospital*, 6th Dist. No. L-02-1059, 2002-Ohio-3577, the Sixth District Court of Appeals, addressing a ruling on summary judgment motions, held that a Civ.R. 41(A) dismissal negates a summary judgment ruling *without* Civ.R. 54(B) certification that "no just reason for delay exists." (Emphasis added). ¶¶ 26-35.

In *Bartlett v. Sunamerica Life Insurance Company*, 6th Dist. No. L-09-1124, 2010-Ohio-1884, the Sixth Appellate District suggested a final order cannot be dismissed. "[I]n cases *** where***the underlying action has been dismissed 'without prejudice,' a *temporary order* imposed therein no longer has any effect." (Emphasis added). *Id.* at ¶13.

The court in *Hicks v. Mulvaney*, 2d. Dist. No. 22721, 2008-Ohio-4391, pronounced:

> In the instant case, Hicks voluntarily dismissed [the first case] without prejudice *** Thus, the action is treated as though it had never been commenced. [citations omitted]. There were *no final appealable orders issued* *** and no actions taken in the first instance would, *therefore*, have any effect on the management or outcome of another case if Hicks were to re-file his complaint.

(Emphasis added). *Id.* at ¶20.

See also *Central Mutual Insurance Company v. Bradford-White Company*, 35 Ohio App.3d 26, 28, 519 N.E.2d 422 (6th Dist. 1987), wherein the court stated, after dismissal of plaintiff's complaint pursuant to Civ.R.41, that "[s]*ince these judgment entries never became final appealable orders*, the trial court's rulings therein are not *res judicata* in a subsequent proceeding." (Emphasis added).

The underlying premise of the proffered cases is clear: interlocutory orders can be dismissed, final appealable orders cannot. When the trial court in the First Case issued its judgment entry and decree in foreclosure, with Civ.R.54(B) certification affixed, it issued a judgment that was a final

appealable order. The Sixth Appellate District below agreed. (Appx. 21). Countrywide has admitted to the permanence of the order of foreclosure in the preliminary judicial report, attached to the Second Case's Complaint, which evidences a "*Judgment* in favor of [Countrywide] and against [the Nichpors]***". (Emphasis added.) (Appx. 50-57). If the First Case was truly dismissed, a judgment should not have appeared as a cloud on title in the preliminary judicial report.

B. A Final Appealable Order Occurs After Trial

A voluntary dismissal is timely so long as it occurs prior to "commencement of trial." Civ.R.41(A)(1)(a); *Schwering v. TRW Vehicle Safety Sys., Inc.*, --- Ohio St. 3d ---, ---N.E.2d ---, 2012-Ohio-1481, 2012 WL 1138195. Ohio is one of only a handful of states that allows a party to dismiss an action at such a late stage of litigation. *Id.; Jackson v. Allstate Ins. Co.*, 2d. Dist. No. 20443, 2004-Ohio-5775, ¶ 33. (Compare, *e.g.*, Fed.R.Civ.P. 41(a)(1), which permits unilateral voluntary dismissals until the earlier of the filing of an answer or a motion for summary judgment).

The existence of a "judgment," or a "final appealable order," presupposes the "commencement of trial." Interlocutory orders, such as the denial of dispositive motions or the granting of partial summary judgments, indubitably occur prior to trial. That said, it is hard to fathom the situation where a final appealable order precedes the commencement of trial. If a trial did not occur prior to the trial court's entry of a final appealable order, the decree of foreclosure in the First Case, query when the trial would have taken place?

The word "trial" is not defined in the Ohio Rules of Civil Procedure. "Trial" is defined by R.C. 2311.01 as "a judicial examination of the issues, whether of law or of fact, in an action or proceeding." Black's Law Dictionary similarly defines "trial" as "[a] judicial examination and determination of issues between parties to [an] action, whether they be issues of fact or law, before a court that has jurisdiction." (6th Ed.Rev. 1990).

The entry of a default judgment also presupposes the "commencement of trial." A default judgment is a final judgment, "[i]t is a final determination of the rights of the parties." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 149-150, 351 N.E.2d 113 (1976); *See also First Federal Savings and Loan v. Community Housing Development, Inc.*, 5th Dist. No. 10-CA-10, 2010-Ohio-4280, at ¶ 34 ("The inclusion of Civ.R. 54(B) language renders [a] default judgment entry a final appealable order.").

Civ.R. 55(A), addressing default judgments, states:

> *** If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

The comments to Civ.R. 55 suggest that a Court should "set a hearing, require the necessary proof of claim, and enter a default judgment if the motion were justified. *** [T]he requirement of necessary proof of claim at the default hearing is quite similar to the proof of claim requirement of R.C. § 2323.11." See Civ.R 55, Comment No. 2, Entry of Judgment, 1970.

The language of Civ.R. 55(A), which allows a court to conduct a hearing to establish the truth of any averment, and to accord a right to trial by jury, indicates that a default judgment occurs after "trial." The comments to Civ.R. 55, which require a plaintiff to "prove its claim" to obtain a default judgment, further establish that a "judicial examination and determination of the issues" occurs prior to an entry of default. Therefore, a default judgment occurs after "trial." In the case *sub judice*, the trial court's examination and determination to issue a decree of foreclosure, and order of sale, acted as a "trial." Countrywide was thus late with its Civ.R. 41(A)(1)(a) voluntary dismissal.

Lovins v. Kroger Co., 150 Ohio App.3d 656, 782 N.E.2d 1171 (2d Dist. 2002), is befitting to the instant action. In *Kroger*, a customer brought an action against a grocery company alleging that he had slipped and fallen at the grocery store. The matter proceeded to arbitration pursuant to local rules, wherein an arbitration panel rendered an opinion in favor of the defense and awarding the customer no damages. Prior to entering judgment in accordance with the arbitration panel's decision, the customer dismissed the action pursuant to Civ.R.41(A)(1)(a).

The applicable local rules in *Kroger* mandated that all arbitration awards "shall be final and shall have the legal effect of a verdict *** " and that if the losing party does not appeal, the trial court "shall enter judgment ***." *Id.* at 659. The Second District Court of Appeals held that the customer's voluntary dismissal was improper because (1) rendering a verdict, the legal effect of the arbitration award, necessarily follows the commencement of a trial, and (2) the arbitration award was *final* as opposed to interlocutory. (Emphasis added.) *Id.* at 661-663.

Coates v. Navarro, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (March 27, 1987) (Appx. 72-77) is the factual equivalent of the instant action. In *Coates*, the Second District Court of Appeals found a notice of voluntary dismissal to be improper once an order of foreclosure had been duly journalized. *Coates* is the case with which the Appellate Court below found its decision to be in direct conflict. It is thoroughly addressed below in Section II of the Argument.

C. Civ.R.60(B) Provides the Only Mechanism with which a Party can Vacate a Final Appealable Order

The title of Civ.R. 60 is "Relief from Judgment or Order." Civ.R. 60(B) allows a trial court "on motion and upon such terms as are just , [to] relieve a party *** from a final judgment, order or proceeding for [the reasons stated therein, including "excusable neglect"]." The last paragraph of Civ.R. 60(B) states that "[t]he procedure for obtaining *any* relief from a judgment *shall* be made by

motion as prescribed in these rules." (Emphasis added). The effect of interpreting the civil rules so that a party can obtain relief from a final judgment in a manner other than through Civ. R. 60(B), as Countrywide urges, would change a mandatory "shall" requirement to a discretionary one.

Nowhere in the annals of Ohio's reported caselaw does authority stand for the proposition that a final appealable order, duly journalized and bound by Civ.R. 54(B) certification, can be voluntarily dismissed. Since the adoption of the Ohio Rules of Civil Procedure, Civ.R. 60(B) provides the exclusive means for vacating final judgments and orders. *Cale Products, Inc. v. Orrville Bronze & Aluminum Co.*, 8 Ohio App.3d 375, 378, 457 N.E.2d 854 (9th Dist. 1982).

Countrywide's order of foreclosure and order of sale in the First Case was a default judgment. Nevertheless, "[t]he law supports the finality of judgments, including default judgments." *Portfolio Recovery Assoc., L.L.C. v. Thacker*, 2d Dist. No. 2008 CA 119, 2009-Ohio-4406, at ¶ 61. "Regardless of whatever else may be said of a default judgment, it is a judgment. It is as good as any other judgment. It is a final determination of the rights of the parties." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 149-150, 351 N.E.2d 113 (1976). The express language of Ohio's default judgment rule, Civ.R. 55(B), states that "[i]f a judgment by default has been entered, the court may set it aside *in accordance with Rule 60(B)*." (Emphasis added). Ohio's Civil Rules do not suggest that even a default judgment can be summarily dismissed by Civ.R. 41.

Regarding the foreclosure process, the general policy of the law is to give judicial sales a certain degree of finality. *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 56, 563 N.E.2d 1388 (1990). "Whether a judicial sale should be *** set aside is within the sound discretion of the trial court." *Id.* at 55. The "sound discretion" of a trial court is only obtained through Civ.R. 60(B), not a party's unilateral dismissal.

There are a handful of cases in Ohio where a mortgagee sought vacation of an unwanted sheriff's sale result. See, *e.g.*, the following cases discussed herein: *Atlantic Mtge. & Invest Corp. v. Sayers,* 11th Dist. No. 2000-A-0081, 2002-Ohio-844, 2002 WL 331734; *Harris Trust and Savings Bank v. National Republic Bank of Chicago*, 9th Dist. No. 21668, 2004-Ohio-1602; *Fed. Home Loan Mortgage Co. v. Langdon*, 4th Dist. No. 07AP12, 2008-Ohio-776. In all of these cases, the mortgagee sought vacation of a final judgment via Civ.R. 60(B).

In *Atlantic Mortgage*, the Eleventh District Court of Appeals rejected the Bank's Motion for Relief from Judgment when an attorney for the Bank, who was to submit a bid, was five minutes late to the sheriff's sale due to circumstances beyond the attorney's control. *Atlantic Mortgage* at *2. The Eleventh District did not find "preoccupation" and a "busy schedule" to rise to the level of Civ.R. 60(B) "excusable neglect." *Id.* As a general proposition of law, Ohio courts routinely reject the setting aside of a sheriff's sale because of counsel's tardiness. *Michigan Mortg. Corp. v. Oakley*, 68 Ohio App.2d 83, 85, 426 N.E.2d 1195 (1st Dist. 1980).

Similarly, in *Harris Trust*, a successful third party purchaser bid enough to pay off the first mortgage and a portion of the second. *Harris Trust* at ¶¶ 2, 3. The mortgagee moved to set aside the sale claiming its representative and a third party intended to bid higher, but were ten minutes late because of traffic. *Id.* The Ninth District Court of Appeals affirmed the trial court's denial of the mortgagee's Motion to Set Aside the Sale, finding the property sold for more than the minimum bid and the appraised value, the sale was regular, the bidding was active, and the mortgagee's failure to arrive timely did not constitute good cause to set aside the sale. *Id.* at ¶ 8. Befitting to the case at hand, the court in *Harris Trust*, quoting the trial court, stated "[i]f a successful bidder in good faith can have a sale set aside simply because another potential bidder *** decides he would have bid higher and wants a second chance, then no bid can be awarded with confidence at sale." *Id.* at ¶ 6.

In *Langdon*, the Fourth Appellate District refused to set aside the Sheriff's Sale when an agent for the mortgagee was confused as to her bidding instructions and failed to make a bid on the mortgagee's behalf. The trial court found a *mistake did not occur in the bidding process itself*, but rather, the bidding instructions were confusing and led to a mistake. (Emphasis added). *Langdon* at ¶ 22. Because the trial court fully considered all of the evidence and conducted a hearing, the appellate court found the trial court did not abuse its discretion when it refused to set aside the sale. *Id.* at ¶ 24.

Had Countrywide filed a Motion for Relief from Judgment pursuant to Civ.R.60 (B) in the instant action, it could have made its "good cause" argument to the trial court for its failure to attend the sale. A hearing on that Motion would have afforded the Nichpors and Reichert, the third party purchaser who successfully intervened in the First Case, the opportunity to oppose Countrywide's Motion. Based on the caselaw discussed above (*Atlantic Mortgage*, *Harris Trust*, and *Langdon*), there would have been a strong argument that Countrywide's failure to attend the sheriff's sale would be insufficient grounds for Civ.R. 60(B) relief.

A motion, required by the express language of Civ.R. 60(B), would have provided the trial court an opportunity to conduct a hearing, examine and hear the proferred evidence, and balance the equities. The denial of a hearing, by Countrywide's use of Civ.R. 41(A) rather than Civ.R. 60(B), violates the due process rights of both the Nichpors and Reichert. Proper procedure matters, and an opportunity for parties to be heard is exceptionally critical. Countrywide instead opted to employ a procedural maneuver, circumvent a hearing, and dismiss the First Case unilaterally.

Countrywide in effect has obtained Civ.R. 60(B) relief from the trial court without fulfilling the requirements for such. As a consequence, opposing parties have been denied a hearing and an opportunity to respond. The Ohio Civil Rules and due process require such practice not be tolerated.

Civ.R. 5(A) and 7(B); *Rice v. Bethel Associates, Inc.*, 35 Ohio App.3d 133, 134, 520 N.E.2d 26 (9th Dist. 1987) (Trial court erred as a matter of law when vacating a final order without notice or hearing, and when neither party made a Motion pursuant to Civ.R. 60(B)); *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 83, 523 N.E.2d 851 (1988); *Cale Products, Inc. v. Orrville Bronze & Aluminum Co.*, 8 Ohio App.3d 375, 378, 457 N.E.2d 854 (9th Dist. 1982).

"If a movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief ***, the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983). When a party seeks relief from judgment, the only time a hearing is not required is when the movant, the one who seeks vacation of the judgment, has not presented operative facts which warrant relief. *Residential Funding Co., LLC v. Thorne*, 6th Dist. No. L-11-1131, 2012-Ohio-2552, *9, 10, citing *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974). If relief from judgment could be considered proper, failure to conduct a hearing is an abuse of the trial court's discretion. *Id.*

Because no party filed a motion for relief from judgment, the order of foreclosure in the First Case has not been vacated, nor the sheriff's sale set aside. Should the Court hold otherwise, any party aggrieved by any adverse final judgment can eradicate that judgment simply by filing a voluntary dismissal. That premise violates all sense of fair play and justice, and, moreover, defies logic.

D. The Applicability of Civ.R. 60(B)

In prior briefing, Countrywide has maintained that the relief provided by Civ.R. 60(B) is available only to defendants in a civil action. A plain reading of Ohio's Rules of Civil Procedure shows Countrywide's suggestion to be in error. The statute Countrywide relies upon for its voluntary dismissal, Civ.R. 41(A)(1), allows for "a *plaintiff* *** [to] dismiss all claims asserted *** by ***

filing a notice of dismissal at any time before commencement of trial ***." (Emphasis added). Conversely, Civ.R. 60(B) allows a "court [to] relieve a *party* *** from a final judgment [for the reasons set forth therein] ***." (Emphasis added).

It is well-settled that statutes relating to the same general subject matter must be read *in pari materia*, and that courts are required to apply the plain language of a statute when it is clear and unambiguous. *State v. Cook*, 128 Ohio St.3d 120, 942 N.E.2d 357, 2010-Ohio-6305, ¶¶ 31, 45 (citations omitted), Additionally, courts should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting a statute. *State v. Taniguchi* , 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995). Presuming the drafters of Ohio's Civil Rules acted purposefully when they used disparate language within Civ.R. 41(A)(1) and Civ.R. 60(B), Civ.R. 60(B) must be construed to apply to both defendants and plaintiffs.

Ohio caselaw supports that position. In the factually-similar cases examined above in Section I(C) (*Atlantic Mortgage*, *Harris Trust*, and *Langdon*), the mortgagees sought vacation of the decree in foreclosure and sheriff's sale through a Civ.R. 60(B) motion and a hearing. The mortgagees did not attempt to voluntarily dismiss their actions. The Second Appellate District in *Coates v. Navarro*, discussed below in Section II, has also held that a decree of foreclosure and order of sale can only be vacated in accordance with Civ.R. 60(B) and cannot be dismissed pursuant to Civ.R. 41(A).

A case from Portgage County, Ohio, *Fifth Third Mortgage v. Preferred Builders of Solon, et al.*, Common Pleas Case No. 2008 CV 1934, illustrates that counsel for Countrywide understands and recognizes that Civ.R. 60(B) is the proper mechanism for vacation of final judgments. (Appx. 61-71). Similar to the captioned matter, the mortgagee in the Portage County case, who was represented by Countrywide's counsel (the law firm of Manley, Deas & Kochalski, LLC) missed the

sheriff's sale. (Appx. 63-64, 69). A third party won the bid for two-thirds of the appraised value. (*Id.*).

In that case, contrary to the captioned matter, counsel for the mortgagee filed a "Motion to Set Aside Sheriff's Sale" after the sheriff's sale was complete. (Appx. 63). The sheriff's sale was not confirmed. (Appx. 63). Though the mortgagee's motion was cached as a "Motion to Set Aside the Sheriff's Sale," the basis for such Motion was "excusable neglect." (Appx. 67, 68). Civ.R. 60(B)(1-5) allows for relief from judgment for "excusable neglect" and is the only avenue for relief from a final judgment as expressly prescribed in Ohio's Rules of Civil Procedure.

After the hearing on the motion to set aside the sheriff's sale, wherein the Magistrate received evidence and heard testimony of both the third party bidder and the mortgagee, the Magistrate held that the mortgagee failed to present a sound argument for not attending the sheriff's sale. (Appx. 67-68). Additionally, the Magistrate was not persuaded that the mortgagee would have bid more had it attended the sheriff's sale. (Appx. 66). In the end, the Magistrate found that the mortgagee had not presented "excusable neglect" so as to set aside the duly journalized decree of foreclosure and completed sheriff's sale. (Appx. 68, 69). On September 7, 2010, Judge John A. Enlow, of the Portage County Court of Common Pleas, adopted the Magistrate's findings. (Appx. 70-71).

Counsel for Countrywide knows Civ.R 60(B) is the only proper procedural way to obtain relief from a final judgment. It used that procedural process in the Portage County Case. Based on the caselaw discussed in Section I(C), and the personal knowledge obtained from the Portage County Case, counsel for Countrywide also knew that its likelihood for obtaining relief from judgment was poor in the case *sub judice* as failure to attend a sheriff's sale consistently has been held to not constitute "excusable neglect." That is because an evidentiary hearing would have to be conducted, testimony taken, equities weighed, and the ultimate decision adjudicated by the trial judge. To avoid

scrutiny and an unwanted result, Countrywide opted to file a Civ.R. 41(A)(1)(a) dismissal. Counsel for Countrywide should have known better.

II. An Examination of the Cases in Conflict

This case arises before the Court by the Sixth Circuit Court of Appeals certification of a conflict, *sua sponte,* between its decision issued below, *Countrywide Home Loans Servicing, L.P., v. Nichpor,* 6th Dist. No. WD-11-047, 2012-Ohio-1101 (March 16, 2012)(Appx. 17-22), and a decision from the Second District Court of Appeals, *Coates v. Navarro,* 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (March 27, 1987). (Appx. 72-77). The Sixth Appellate District held that a judgment of foreclosure can be dissolved in its entirety by the filing of a voluntary dismissal in accordance with Civ.R. 41(A). (Appx. 21). In reaching its decision, the Court below relied predominantly upon its own decision from six years prior that reached the same conclusion, *NOIC v. Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658. (Appx. 20-21).

As mentioned, the trial judge in the instant action, Judge Mayberry of the Wood County Court of Common Pleas, happened to be the judge in the *Yarger* case. In *Yarger,* Judge Mayberry initially ruled that a judgment in foreclosure could not be dismissed by Civ.R. 41(A)(1)(a) and, accordingly, declared such a dismissal invalid and a nullity. (Appx. 79). Judge Mayberry's decision in *Yarger* was ultimately overruled by the Sixth District Court of Appeals in 2006. (Appx. 80).

Perhaps conscious of his recent reversal, and bound by Sixth Appellate District's precedent, Judge Mayberry in the instant action allowed Countrywide's voluntary dismissal. Judge Mayberry did so with great reluctance:

> According to Civ.R.41(A)(1)(a), a plaintiff may dismiss a case 'at any time before commencement of trial'. When this court refused to allow the plaintiff in Yarger to dismiss its case after the sheriff's sale had taken place, it was acting on the premise that a "trial" had in fact occurred and that the notice of

> dismissal had therefore not been timely filed. R.C. 2311.01 defines a "trial" as "a judicial examination of the issues, whether of law or of fact, in action or proceeding". In Yarger, this court was acting under the belief that the matter had been "tried" when the court examined and decided the motion for default judgment. This court disagrees with the view that a decision on a motion for default judgment in a foreclosure case is not a trial for purposes of Civ.R. 41(A)(1)(a). This court further believes that allowing a plaintiff to dismiss a foreclosure action after a sheriff's sale has occurred is an abuse of the civil rules. Nevertheless, this court is required to follow the law of the district, as articulated by the court of appeals.
>
> ***
>
> The sale, *unfortunately*, cannot be confirmed.

(Emphasis added). (Appx. 60).

In order to properly analyze the conflict at issue, an examination of *Yarger* is imperative. At first blush, *Yarger* appears to be apposite to the case at hand, but on closer examination, it is distinguishable. The *Yarger* Court simply held that a trial court has no authority *to strike*, *sua sponte*, a plaintiff's voluntary dismissal. (Emphasis added.) *Yarger* at ¶¶ 1, 9, 10, 19. (Appx. 78, 79). Presumably, a voluntary dismissal has to be challenged by a party, not on a court's unilateral action. Because the *Yarger* court narrowly held that Judge Mayberry improperly struck, *sua sponte*, the plaintiff's voluntary dismissal, any suggestion from *Yarger* that a final appealable order can be dismissed via Civ.R. 41(A) is *obiter dicta.* As applied to the case at hand, *Yarger* should not be considered binding precedent.

The *Yarger* decision cites two cases that stand for the proposition that a Civ.R. 41(A)(1)(a) dismissal is self-executing. See, *e.g., Murphy v. Ippolito*, 8th Dist. No. 80682, 2002-Ohio-3548; *Payton v. Rehberg,* 119 Ohio App.3d 182, 694 N.E.2d 1379 (8th Dist. 1997). (Appx. 79). Though both of those cases discuss voluntary dismissals, neither of them is factually similar to the captioned matter. *Murphy* addresses the failure of a plaintiff to file a dismissal after the case has been settled,

Payton speaks to the interplay between a voluntary dismissal and the savings statute when a personal injury plaintiff re-files outside the two year statute of limitations. The Sixth Appellate District's *Yarger* decision is bereft of a single case advancing the proposition that a party can dismiss an action after a final appealable order has been journalized. (Appx. 78-80).

The appellee in *Yarger* was not represented by legal counsel. Conversely, appellant, the mortgagee, was represented by competent counsel. Within its *Yarger* decision, the Sixth Appellate District stated "[w]e find no compelling or persuasive legal authority to suggest a *** notice of voluntary dismissal is invalidated by an unconfirmed sheriff's sale." *Yarger* at ¶¶ 16, 18 (Appx. 79). Had the appellee in *Yarger* been represented by counsel, perhaps the case in conflict today, *Coates v. Navarro*, would have been recognized at the time as nineteen year old precedent. At the very least, the Sixth Appellate District could have expounded logical bases for its rejection of *Coates* and its new pronouncement of law. Instead, the Court of Appeals proferred only conclusory statements of law, wholly unsupported by precedent. (*Id.*).

In reviewing the Wood County Auditor's website, it appears that the mortgagee in *Yarger* never initiated a second action as is what happened in the instant action. Rather, mortgagee obtained a quit claim deed from the title owners to clear the title to the property. Perhaps that is because the mortgagee in *Yarger* knew that a final appealable order existed and *res judicata* would preclude a second foreclosure complaint on the same note and mortgage.

The facts in *Coates v. Navarro* mirror those of the instant action. (Appx. 72-77). In *Coates,* the creditor obtained judgment for the debtors' failure to pay on a land installment contract. *Coates* at *4 (Appx. 75). Creditor proceeded to obtain a certificate of judgment, which was filed with the Greene County Recorder and resulted in a lien on the subject real estate. (*Id*). Creditor filed a complaint to foreclose on the real estate. (*Id*). The trial court issued a judgment entry determining the

land contract terminated and the subject real estate foreclosed. (*Id*). Creditor then filed a voluntary dismissal after the order of sale, but before confirmation of sale. (*Id*).

The Second Appellate District, in *Coates*, declared that "[t]he decree in foreclosure and order of sale *** was binding ** and was *subject only to change by being vacated in accordance with Civ.R. 60(B).*" (Emphasis added.) *Coates* at *5. (Appx. 75). Presumably, the Creditor in *Coates* wished to seek a remedy other than foreclosure, such as forfeiture, after the order of foreclosure had been journalized. The Second Appellate District denied this request, even though the sale was not yet confirmed. "The fact that the sale was never confirmed bears no relationship to the initial election to foreclose." *Coates* at *5. (Appx. 75). What the *Coates* court implicitly declares is that final appealable orders, such as orders of foreclosure and orders of sale, are "imbued with a permanent character." *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 83, 523 N.E.2d 851 (1988).

Coates concerns a land contract as opposed to a traditional note and mortgage through a commercial lender. That is a distinction without a difference. Ohio law pertaining to land installment contracts is clear; if the vendee in a land installment contract obtains a certain amount of equity in the property, the vendor may recover possession of the property only by use of foreclosure and judicial sale. R.C. 5313.07. The foreclosure proceeding contemplated by the state assembly in R.C. 5313.07 is the same foreclosure proceeding used in standard commercial lender foreclosures. *See, generally, Triple F Invests., Inc. v. Pacific Fin Servs., Inc.*, 11th Dist. No. 2000-P-0090, 2001 WL 589343 (June 2, 2001); *Flora v. Pullins*, 2nd Dist. Case No. 96-CA-13, 1996 WL 648353 (Nov. 8, 1996). In *Coates*, foreclosure and judicial sale was the remedy sought for that particular breach of land contract, and was the remedy under which the Court analyzed the matter. The analysis is the same as the case *sub judice*.

Inc. v. Orrville Bronze & Aluminum Co., 8 Ohio App.3d 375, 378, 457 N.E.2d 854 (9th Dist. 1982); Civ.R. 55(B); Civ.R. 60(B).

III. The Contours of the Foreclosure Process and the Consequences of Answering the Certified Question in the Affirmative.

A. The Foreclosure Process

R.C. Chapter 2329 governs the procedures for executing against property. "[I]f the court of common pleas finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61of the Revised Code," R.C. 2329.31(A) commands that "it *shall* [confirm the sale]." The statute speaks in mandatory terms, and any decision to set aside that sale is "within the sound discretion of the court." *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 55, 563 N.E.2d 1388 (1990).Blundering plaintiffs do not have the luxury to simply dismiss the sale.

"In exercising its discretion in a foreclosure action, the court must keep in mind that the primary purpose of the judicial sale is to protect the interest of the mortgagor-debtor and to promote a general policy which provides judicial sales with a certain degree of finality." *Ohio Savings Bank* at 55. Therefore, the confirmation of a judicial sale cannot be set aside except for "fraud, mistake or some other cause, for which equity would avoid a like mistake between private parties." *Winkler v. Westhaven Group, L.L.C.*, 6th Dist. No. L-07-1282, 2009-Ohio-1530, at ¶ 20, citing *Pion v. Wofford*, 6th Dist. No. L-86-191, 1987 WL 14228 (July 17, 1987).

Keeping in mind that the purpose of a judicial sale is to protect the mortgagor-debtor, not the mortgagee-bank, the court issues a separate confirmation of sale to ensure that the sale was conducted in compliance with R.C. 2329.01, *et seq*. For example, the court confirms that notice requirements were met [R.C. 2329.27 (A), (B)(3)(a)(i), (B)(3)(a)(ii)]; that the minimum sale price was met [R.C. 2329.20]; that three disinterested freeholders impartially appraised the property [R.C.

2329.17]; that public notice of the time and place of sale was published for a mandated period of time [R.C. 2329.26 and 2329.27]; that the land was sold for at least two-thirds of the appraised value [R.C. 2329.20]; and so forth.

These safeguards protect the *mortgagor-debtor's* opportunity to their equitable right of redemption before confirmation [R.C.2329.33] and ensure a mitigation of their deficiency by mandating a minimum bidding price. (Emphasis added). The confirmation provisions are not in place to protect a mortgagee-bank who neglected to attend the sheriff's sale.

Ohio's Rules of Civil Procedure recognize the difference between a judgment and the procedure for execution thereon. Once a trial court files a final judgment or order, a party has a legal right to initiate proceedings to aid in execution of that judgment, even after notice of appeal is filed, unless a valid stay order has been issued and a supersedeas bond has been posted. Civ.R. 62(B); App.R. 7; *Triple F Investments, Inc. v. Pacific Fin Servs., Inc.*, 11th Dist. No. 2000-P-0090, 2001 WL 589343 (June 2, 2001).

The sheriff's sale and confirmation of sale are simply enforcement mechanisms of the court. As recently stated by the Eighth Appellate District:

> Once an order of sale and decree of foreclosure is filed, a creditor may file a praecipe for an order directing the sheriff to sell the property. This second phase of the [foreclosure] proceedings is viewed as a separate and distinct action seeking *enforcement* of an order of sale and decree of foreclosure. [citation omitted]. The appraisal of the foreclosed property, the sheriff's sale, and the confirmation of sale have been described as special proceedings to *enforce* an order of sale and decree of foreclosure.

(Emphasis added). *Sky Bank v. Mamone*, 8th Dist. No. 91812, 2009-Ohio-2265, at ¶ 24, citing *Triple F Investments, supra.*

The confirmation process is akin to a garnishment proceeding, or a debtor's examination. If a non-dismissable order has been journalized, all that is left before the court to rule upon is the *enforcement* of that final judgment. It is obvious that a garnishment proceeding occurs after a "trial." This is true even if the garnishment proceeding arises out of a final judgment from which no jury is empaneled, no opening statement given, and no witness examined. The fact that litigation has progressed to a point of enforcement presupposes that a "trial," or "a judicial determination of the issues," has occurred. Black's Law Dictionary (6th Ed.Rev. 1990). The confirmation stage of the foreclosure process is simply enforcement of the final appealable order of sale and decree of foreclosure, which indubitably occurs after "trial." (See Argument Section I(B) above). Because enforcement of a judgment necessarily occurs after "trial," a foreclosure decree and order of sale cannot be dismissed pursuant to Civ.R. 41(A)(1)(a).

Another appropriate analogy is the attachment of personal property in aid of execution of a judgment. Take, for example, when a trial court enters judgment in favor of a creditor for a debt owed. After filing a certificate of judgment, the creditor could move the court for a writ of execution to instruct the county sheriff to levy upon the debtor's personal property (i.e. a boat). In such a situation, the trial judge retains jurisdiction over execution of the judgment. The execution stage of the proceeding even retains the same case number as the underlying action. Yet, the judgment entry is a final appealable order that cannot be vacated by a Civ.R. 41(A) dismissal. Similarly, here, a judgment entry has been journalized and the case had proceeded, with the same case number, to the execution stage of the action. The execution phase had actually already commenced - the sheriff's sale occurred in full compliance with R.C. 2329.01, *et seq*. The only act left was the trial court's confirmation that the sale was valid.

In the case at hand, all the procedural formalities were met. Because there was no error with the decree of foreclosure or the administration of the sale, confirmation was forthcoming. The two-step foreclosure process requiring confirmation of sale is not intended to allow a mortgagee-bank to employ procedural gamesmanship, it is intended to act as a safeguard of the mortgagor-debtor's interest. Because the sheriff's sale was properly conducted, Countrywide should not be allowed to unilaterally dismiss the final appealable foreclosure decree and order of sale, nor set aside the sheriff's sale.

B. The Adverse Consequences of Answering the Certified Question in the Affirmative

To answer "yes" to the certified conflict question would create an imprudent proposition of law. Final judgments cannot be vacated simply because a party does not like the eventual outcome. Permitting Countrywide to abort the sheriff's sale after *Countrywide* failed to attend the sheriff's sale punishes the wrong person, Reichert, the innocent third party purchaser.

Moreover, allowing a mortgagee to simply dismiss a foreclosure proceeding because it failed to attend a Saturday morning sheriff's sale undermines the entire system of judicial foreclosure. Why would anyone ever attend a sheriff's sale and bid with confidence if a mortgagee can simply undo that transaction *ex post facto*?

This paradox was recognized by the court in *Harris Trust and Savings Bank v. National Republic Bank of Chicago*, 9th Dist. No. 21668, 2004-Ohio-1602: "If a successful bidder in good faith can have a sale set aside simply because another potential bidder *** decides he would have bid higher and wants a second chance, then no bid can be awarded with confidence at sale." *Id.* at ¶ 6. This is why *Harris Trust*, and its progeny of cases discussed above in Section I(C) of this Brief, stand for the proposition that a foreclosure order can only be vacated in accordance with a Motion as

prescribed by Civ.R. 60(B). Such a Motion would have afforded all parties, including the third party purchaser, the opportunity to present their position to the trial court judge. Such a Motion would have also allowed the trial court to weigh the equities and facts of the case, for the trial court is granted sole discretion in determining whether a sheriff's sale should be set aside. *Ohio Savings Bank* at 55.

Instead, Countrywide opted to circumvent the civil rules, rob the trial court judge of his discretion, and accomplish the dismissal of a final appealable order by artifice. This matter is before the Court upon a narrow issue of procedure. Proper procedure is important. "The purpose of the [Rules of Civil Procedure] is to provide certainty, fairness, and set forth consistent procedures to be followed by all parties and the courts in civil actions. Continued failure to comply with these rules will result in rendering them meaningless." *Butler v. Butler*, 8th Dist. No 37637, 1978 WL 218134 (November 24, 1978).

CONCLUSION

Appellants, the Nichpors, do not suggest that they have cured the default on their note. The Nichpors do, however, suggest that the integrity of court proceedings and the Rules of Civil Procedure need to be protected.

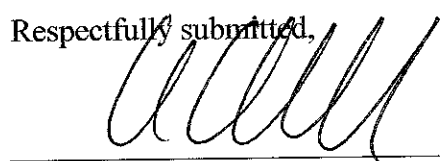
Countrywide elected its remedy of foreclosure, accelerated the payments owed, and obtained a final appealable order of foreclosure. Countrywide then failed to be present at the sheriff's sale. Ohio caselaw is clear that had Countrywide properly brought a Civ.R. 60(B) motion to set aside the order of sale and decree of foreclosure, it would have had a difficult time convincing the trial court that failure to attend the sale equates to "excusable neglect." Consequently, Countrywide attempted to utilize procedural tactics to circumvent its own delinquent conduct by voluntarily dismissing the action pursuant to Civ.R. 41(A)(1)(a). This was all done to the detriment of the Nichpors and

Reichert (the innocent third party purchaser), who would have both been interested parties at the Civ.R. 60(B) hearing.

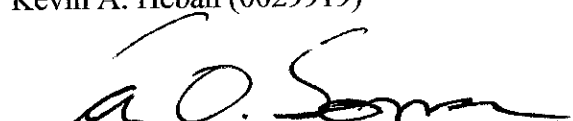
The certified question before this Court is a narrow question of procedure and practical import: whether a party can voluntarily dismiss a foreclosure action after a decree of foreclosure and order of sale have been journalized, and after conclusion of the sheriff's sale. In today's economic climate, mortgage foreclosures comprise a large portion of Ohio's civil dockets. An answer to the question before this Court is significant and will have a far-reaching impact on the administration of the judicial foreclosure process for years to come. This Court should answer the certified question in the negative and adopt the quarter century old precedent of the Second Appellate District in *Coates v. Navarro.* A decree of foreclosure and order of sale are both final appealable orders, and, therefore, cannot be dismissed pursuant to Civ.R. 41(A)(1)(a).

Wherefore, Appellants respectfully request that this Court reverse the decision of the Sixth District Court of Appeals; hold that a mortgagee cannot dismiss a foreclosure action after a decree of foreclosure has been entered and a sheriff's sale completed; and remand this matter to the Sixth District Court of Appeals to rule on the issue of *res judicata*, whether the 2009 Judgment stands, and whether the third party bidder should be allowed to move the trial court to proceed with the confirmation of sale in the First Case, Wood County Court of Common Pleas Case No. 2009CV0215.

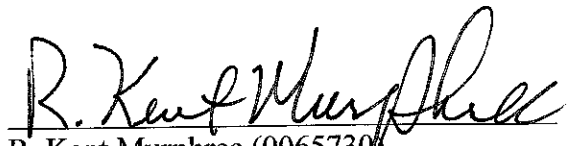
Respectfully submitted,



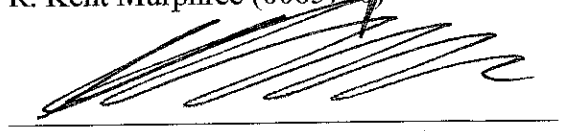
Kevin A. Heban (0029919)



Gary O. Sommer (0006257)



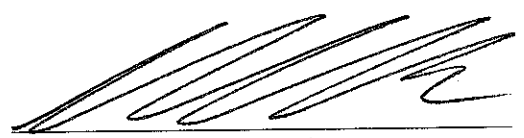
R. Kent Murphree (0065730)



John P. Lewandowski (0085657)
HEBAN, SOMMER & MURPHREE, LLC
200 Dixie Highway
Rossford, Ohio 43460
Telephone: (419) 662-3100
Facsimile: (419) 662-6533
E-Mail: (last name)@hsm-law.net
Counsel for Appellants,
Michael P. Nichpor and Joann M. Nichpor.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief was served by ordinary U.S. Mail, postage prepaid, upon Matthew J. Richardson, Esq., Counsel for Appellee, at P.O. Box 165028, Columbus, Ohio 43216 this 8th day of August, 2012.



An Attorney for Appellants

APPENDIX

Appendix Page No.

IN THE SUPREME COURT OF OHIO

Countrywide Home Loan Servicing, L.P.	)	Supreme Court Case No.
Appellee,	)	12-0578
vs.	)	On Appeal from the Wood County Court of Appeals, Sixth Appellate District Case No. WD-11-047
Michael P. Nichpor, *et al.*,	)	
Appellants.	)	

NOTICE OF CERTIFIED CONFLICT

Kevin A. Heban (0029919) (Counsel of Record)
heban@hsm-law.net
Gary O. Sommer (0006257)
sommer@hsm-law.net
R. Kent Murphree (0065730)
murphree@hsm-law.net
John P. Lewandowski (0085657)
lewandowski@hsm-law.net
Heban, Sommer & Murphree, LLC
200 Dixie Highway
Rossford, Ohio 43460
Telephone: (419) 662-3100
Facsimile: (419) 662-6533

Counsel for Appellants,
Michael P. Nichpor and Joann M. Nichpor.

Melissa N. Meinhart (0083909)
Manley Deas Kochalski, L.L.C.
P.O. Box 165028
Columbus, Ohio 43216
Telephone: (614) 917-1793
Facsimile: (614) 220-5613

Counsel for Appellee,
Countrywide Home Loans Servicing, L.P.

Notice of Certified Conflict between Decisions of the Sixth and Second Appellate Districts

Pursuant to S. Ct. Prac. R. IV, §1, Appellants Michael P. Nichpor and Joann M. Nichpor hereby give notice to the Supreme Court of Ohio that the Sixth Appellate District has issued an Order, in accordance with Article IV, §3(B)(4) of the Ohio Constitution, certifying a conflict with the Second Appellate District in the following decisions: *Countrywide Home Loans Servicing, L.P. v. Michael Nichpor, et al.*, 6th Dist. No. WD-11-047, 2012-Ohio-1101 (March 16, 2012), and *Coates v. Navarro*, 2nd Dist., Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987).

The Supreme Court of Ohio has acknowledged three requirements that must be satisfied for an appellate court to certify an intrastate conflict for further review:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on the rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993) (emphasis sic).

On March 16, 2012, the Sixth District Court of Appeals issued a Decision and Judgment ("Judgment") affirming the decision of the trial court. A true and accurate copy of the Judgment is attached hereto as Exhibit A and is incorporated herein by reference.

In its Judgment, the Sixth Appellate District stated that "[it] hereby find[s] that the judgment entered in this case is in conflict with the judgment pronounced upon the same question by another court of appeals, the same being the Court of Appeals for Greene County in the case *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (March 27, 1987)." (Exhibit A at ¶ 15). A true and accurate copy of *Coates v. Navarro* is attached hereto as Exhibit B and is incorporated herein by reference.

The Sixth Appellate District proceeded to expressly certify the conflict to the Supreme Court of Ohio for final review and determination. (Exhibit A at ¶¶ 15, 16). More specifically, the Sixth Appellate District certified for review the following question:

> Whether a foreclosure action, in which judgment of foreclosure has, in fact, been issued, can be dissolved in its entirety prior to confirmation of sale, with the filing of a voluntary dismissal, filed by a party in accordance with Civ.R. 41(A).

(Exhibit A at ¶ 17).

The Sixth District Court of Appeals has acknowledged its Judgment to be in direct conflict with the Second District Court of Appeals, the conflict clearly contemplates a rule of law, and the Appellate Court has neatly enunciated the question for consideration by the Supreme Court. (Exhibit A, ¶¶ 15-17). Based upon the foregoing, the Supreme Court's test for conflict certification, as prescribed by the Ohio Constitution and expounded upon by *Whitelock*, is satisfied.

Respectfully submitted,

Kevin A. Heban (0029919)

Gary O. Sommer (0006257)

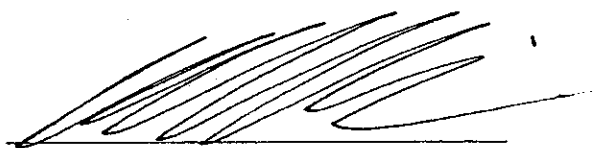
R. Kent Murphree (0065730)

John P. Lewandowski (0085657)
HEBAN, SOMMER & MURPHREE, LLC
200 Dixie Highway
Rossford, Ohio 43460

Telephone: (419) 662-3100
Facsimile: (419) 662-6533
Counsel for Appellants,
Michael P. Nichpor and Joann M. Nichpor.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, upon Melissa N. Meinhart, Counsel for Appellee, at P.O. Box 165028, Columbus, Ohio 43216 this 4th day of April, 2012.



John P. Lewandowski,
an Attorney for Appellants.

Exhibit
A

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Countrywide Home Loans Servicing, L.P.	Court of Appeals No. WD-11-047
Appellee	Trial Court No. 2010CV0680
v.	
Michael Nichpor, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: MAR 16 2012

* * * * *

Andrew C. Clark, for appellee.

Kevin A. Heban, R. Kent Murphree, and John P. Lewandowski, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} Appellants, Michael P. Nichpor and Joann M. Nichpor, in this accelerated appeal, appeal a judgment entry entered by the Wood County Court of Common Pleas granting summary judgment in favor of appellee, Countrywide Home Loan Servicing. For the reasons that follow, we affirm the judgment of the trial court.

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{¶ 2} On February 27, 2009, appellee filed a complaint in foreclosure against appellants in a previous case, Wood County case No. 2009CV0215. The trial court in that case granted a default judgment entry and decree in foreclosure, in favor of appellee. A sheriff's sale was conducted, and a third party, Jennifer L. Reichert, was the successful bidder on the real estate. Appellee was not in attendance at the sale. After the sale, but before its confirmation, appellee filed a Civ.R. 41(A) notice of voluntary dismissal of the case. An appeal was taken from the dismissal, but was later dismissed for failure to prosecute.

{¶ 3} On July 16, 2010, appellee filed the instant case, requesting the same relief that had been requested in the 2009 case, and naming the same parties. Appellants filed an answer to the new complaint and, within that answer, appellants presented res judicata as an affirmative defense. Appellants and appellee subsequently filed cross motions for summary judgment. Ultimately, the trial court granted appellee's motion for summary judgment, without specifically ruling on appellants' motion for summary judgment.

{¶ 4} Appellants appealed the trial court's judgment, raising the following sole assignment of error:

The Trial Court erred by not granting the Defendant-Appellants' Motion for summary judgment.

{¶ 5} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Civ.R. 56(C) provides:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule.

{¶ 6} Summary judgment is proper where: "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party." *Ryberg v. Allstate Ins. Co.*, 10th Dist. No. 00AP-1243, 2001 WL 777121 (July 12, 2001), citing *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629, 605 N.E.2d 936 (1992).

{¶ 7} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

{¶ 8} In the instant case, appellants argue that the trial court erred by not granting their motion for summary judgment based upon the doctrine of res judicata. Specifically,

appellants contend that: (1) the order of foreclosure that was issued in the 2009 case was a final appealable order that dealt with the same action and same parties involved in the 2010 case, (2) a Civ.R. 41(A) voluntary dismissal does not negate final appealable judgments of foreclosure, and (3) the doctrine of res judicata acts to bar appellee's claims in the subsequently filed 2010 action.

{¶ 9} We deal first with appellants' claim that appellee's Civ.R. 41(A) voluntary dismissal would be legally insufficient to nullify the trial court's order of foreclosure in the 2009 case.

{¶ 10} Foreclosure proceedings involve two distinct phases and two distinct judgment entries: the first is the order of foreclosure, and the second is the order confirming the sheriff's sale. *Mtge. Electronic Registration Systems, Inc. v. Harris-Gordon*, 6th Dist. No. L-10-1176, 2011-Ohio-1970, ¶ 10. Both judgment entries are final and appealable. *Id.*

{¶ 11} In *The N. Ohio Invest. Co. v. Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658, this court considered a case analogous to the one at hand. *Yarger*, like the instant case, involved the issuance of a default judgment of foreclosure, followed by a sheriff's sale that was unattended by an agent for the bank, together with a Civ.R. 41(A) voluntary dismissal that was filed by the bank prior to the issuance of an order confirming the sheriff's sale. Unlike in the current case, the trial court in *Yarger* sua sponte declared the notice of voluntary dismissal a nullity and ordered it stricken from the record. The bank appealed the court's decision. This court, reversing the trial court's

decision, held that the notice of voluntary dismissal that was filed by the bank was valid and operated to terminate the case as a whole. *Id.*

{¶ 12} Although appellants are correct in stating that an order of foreclosure is a final and appealable order, see *Harris-Gordon*, *supra*, and that at least one Ohio appellate court has held that Civ.R. 60(B), and not Civ.R. 41(A), provides the only mechanism to change such an order, see *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987), this court has taken the position that a foreclosure action, with its two-part process, is a unique process under the law and that prior to completion of both parts of that process—that is, completion of both the order of foreclosure and the order confirming the sheriff's sale—an entire foreclosure action, including any previously-issued order of foreclosure, can be dissolved with the filing of a Civ.R. 41(A) voluntary dismissal.

{¶ 13} Based on the foregoing, we conclude that the voluntary dismissal was properly allowed in the 2009 case and effectively terminated that action in its entirety. Given this conclusion, we find that appellants' argument regarding the application of the doctrine of res judicata is not persuasive. Accordingly, it will be given no additional consideration herein.

{¶ 14} For all of the foregoing reasons, we find appellants' sole assignment of error not well-taken.

{¶ 15} The judges of the Court of Appeals of the Sixth District of the state of Ohio hereby find that the judgment entered in this case is in conflict with the judgment

pronounced upon the same question by another court of appeals, the same being the Court of Appeals for Greene County in the case of *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987).

{¶ 16} Wherefore, the record in this cause, *Countrywide Home Loans Servicing v. Nichpor*, is hereby certified to the Supreme Court of Ohio for review and final determination. The issue for certification is:

{¶ 17} Whether a foreclosure action, in which a judgment of foreclosure has, in fact, been issued, can be dissolved in its entirety prior to the confirmation of sale, with the filing of a voluntary dismissal, filed by a party in accordance with Civ.R. 41(A).

{¶ 18} The judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____ JUDGE

Arlene Singer, P.J. _____ JUDGE

Stephen A. Yarbrough, J. _____ JUDGE
CONCUR.

JOURNALIZED
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This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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1987 WL 8490
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Greene County.

Martin COATES, Plaintiff-Appellee,
v.
Louis NAVARRO, et al., Defendants-Appellants.

Nos. 86-CA-11 and 86-CA-18. | March 27, 1987.

Attorneys and Law Firms

Robert L. Seeley, Centerville, for Martin J. Coates.

Wayne H. Dawson of Turner, Granzow & Hollenkamp, Dayton, for appellants Louis Navarro, Irene Navarro and Mortgage One, Inc.

Lloyd H. O'Hara and Robert M. Curry of Smith & Schnacke, Dayton, for appellant, Catherine H. Hannaford.

Opinion

BROGAN, Judge.

*1 The present appeal involves two consolidated cases. The first action involved a claim brought by Martin Coates for the foreclosure of a judgment lien. The second action was maintained by Louis Navarro and others for a declaratory judgment. The causes were combined below and the trial was bifurcated so that the only issue to be determined by the court was the validity of the judgment obtained by Martin Coates and the certificate issued thereon against real estate located at 645 Wyckshire Court, Fairborn, Ohio.

I. *FACTS*

Essentially all of the pertinent facts concerning the validity of the judgment were stipulated below. Based on the stipulations and other evidence adduced at trial, the court made the following factual findings:

1. On August 30, 1979, Phillip C. Hannaford signed and delivered to Coates a cognovit promissory note in the original principal sum of $32,500.00.

2. On October 1, 1979, Phillip C. Hannaford and Coates entered into a Land Installment Contract in which Phillip C. Hannaford agreed to purchase from Coates the Centerville Property for a total purchase price of $92,500.00.

3. At sometime after October 1, 1979, Phillip C. Hannaford did reside in a residential home located at 8890 Wells Spring Point, Centerville, Ohio (the "Centerville Property") which was constructed as a single-family residence and which was owned by Coates.

4. The cognovit note was executed and delivered to Coates as the down payment for the land contract.

5. On April 24, 1984, Coates filed a Petition in Case No. 84-1092 in the Common Pleas Court of Montgomery County, Ohio, to obtain a Cognovit Note Judgment in the sum of $49,257.83 together with interest thereon at 11.25% per annum from

March 30, 1984, against Phillip C. Hannaford for failure to pay the principal and interest which had become due and payable on the cognovit note.

6. On April 24, 1984, an Answer was filed on behalf of Phillip C. Hannaford in Case No. 84-1092 in the Common Pleas Court of Montgomery County, Ohio, in which John R. Wykoff confessed judgment against Phillip C. Hannaford upon the cognovit note by virtue of the warrant of attorney annexed to the cognovit note.

7. On April 24, 1984, a Judgment Entry was entered by the Common Pleas Court of Montgomery County, Ohio, in Case No. 84-1092 in which the Common Pleas Court of Montgomery County, Ohio, entered judgment in favor of Coates and against Phillip C. Hannaford upon a cognovit note in the sum of $49,257.83 together with interest thereon at 11.25% per annum from March 30, 1984, and Coates' cost of action in the sum of $30.00.

8. On April 24, 1984, the Clerk of Courts of Montgomery County, Ohio, issued a Certificate of Judgment for a Lien upon Lands and Tenements against Phillip C. Hannaford and in favor of Coates in the sum of $49,257.83 together with interest thereon at 11.25% per annum from March 30, 1984, plus $30.00 costs.

9. On April 25, 1984, the Certificate of Judgment was filed in the Office of the Clerk of Courts of the Common Pleas Court of Greene County, Ohio, in Judgment Docket 84CJ0300.

*2 10. On April 25, 1984, Phillip C. Hannaford, and his former wife, Catherine H. Hannaford, were the fee simple owners of a single-family residential home located at 645 Wyckshire Court, Fairborn, Greene County, Ohio 45323 (the "Fairborn Property").

11. On May 4, 1984, Phillip C. Hannaford filed in the Common Pleas Court of Montgomery County, Ohio, in Case No. 84-1092 a Motion for Relief after Judgment pursuant to Rule 60B(3) of the Ohio Rules of Civil Procedure in which he sought to vacate the Judgment Entry which was entered against him by the Montgomery County Common Pleas Court on April 24, 1984.

12. On May 14, 1984, Coates filed his Memorandum in Contra to Phillip C. Hannaford's Motion for Relief from Judgment.

13. On May 18, 1984, Phillip C. Hannaford and Catherine H. Hannaford, in consideration of the sum of $99,000.00 paid by the Navarros, transferred and conveyed the Fairborn Property to the Navarros by General Warranty Deed. The General Warranty Deed was thereafter recorded on May 22, 1984, in Deed Volume 216 at page 744 of the Deed Records of Greene County, Ohio.

14. On June 1, 1984, a Decision and Entry was entered by the Common Pleas Court of Montgomery County, Ohio, in which the Common Pleas Court of Montgomery County, Ohio, overruled Phillip C. Hannaford's Motion for Relief from Judgment.

15. On July 12, 1984, Coates and his wife, Antoinette Coates, filed a Complaint in Case No. 84-1858 in the Common Pleas Court of Montgomery County, Ohio, to foreclose the Land Contract.

16. On October 18, 1984, Coates, and his wife, Antoinette Coates, filed a Motion for Summary Judgment in Case No. 84-1858 in the Common Pleas Court of Montgomery County, Ohio, to obtain a Summary Judgment upon their Complaint to foreclose the Land Contract.

17. On December 10, 1984, a Judgment Entry was entered by the Common Pleas Court of Montgomery County, Ohio, in Case No. 84-1858 in which the Common Pleas Court of Montgomery County, Ohio, entered judgment in favor of Coates and his wife, Antoinette Coates, and against Phillip C. Hannaford and awarded a judgment of foreclosure and cancellation of the Land Contract.

18. On March 1, 1985, the Sheriff of Montgomery County, Ohio, sold by public auction the Centerville Property to Coates for a purchase price of $86,000.00.

19. The foreclosure action filed by Mr. Coates on this same property in Montgomery County, Ohio, which went to judgment, now shows a dismissal order of record signed by Judge Kilpatrick and signed by Mr. Seely. And as of last Friday Mrs. Hannaford filed her motion to set aside that dismissal order as being improper since that judgment had been rendered.

That she has filed an answer in that case and a motion to intervene and those matters are pending.

(Note: Stipulation No. 19 made during trial of "validity" on September 30, 1985.)

20. On June 6, 1986, Catherine Hannaford's motion to intervene and vacate the dismissal filed in the land contract foreclosure action was overruled.

A non-jury trial was held on September 30, 1985 to determine the validity of Coates' cognovit note judgment and judgment lien. On November 18, 1985, the trial court rendered findings of fact and conclusions of law. The court held that the cognovit note judgment and the certificate of judgment issued thereon were valid. A final judgment entry was filed on January 16, 1986 and specifically noted that there was no just reason for delay in accordance with Civ.R. 54(B).

*3 On February 10, 1986, Louis and Irene Navarro filed a timely notice of appeal. Catherine Hannaford filed a timely notice of appeal on February 18, 1986. The parties appeal the trial court's judgment rendered below.

II. *ISSUES PRESENTED*

Appellants assert two assignments of error on appeal. Appellants' first assignment of error claims the trial court erred in finding that Revised Code Section 2323.13(E)(1), which prohibits the use of cognovit notes in consumer loan transactions, does not apply to real estate transactions.

The validity of a warrant of attorney to confess judgment is recognized by both statute and decision in Ohio. Cognovit notes are lawful and the entry of a judgment as authorized by a cognovit clause does not, per se, violate the due process guaranties of the Constitution. However, pursuant to R.C. Section 2323.13(E), a warrant of attorney to confess judgment is invalid in connection with consumer loans or consumer transactions.1 R.C. 2323.13(E) provides in pertinent part,

(E) A warrant of attorney to confess judgment contained in any instrument executed on or after January 1, 1974, arising out of consumer loan *or* consumer transaction, is invalid and the court shall have no jurisdiction to render a judgment based upon such a warrant. (Emphasis ours).

....

(1) 'Consumer loan' means a loan to a natural person and the debt incurred is primarily for a personal, family, educational, or household purpose. The term 'consumer loan' includes the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor; the creation of the debt by a credit to an account with the lender upon which the debtor is entitled to draw; and the forbearance of debt arising from a consumer loan.

In the present action, the trial court held as a matter of law that R.C. 2323.13(E) does not apply to real estate transactions. In reaching its decision, the court relied on *Vroman v. Halisak* (1984), 22 Ohio App.3d 14. In *Vroman,* appellants had executed a cognovit note for $20,000 as part consideration for the purchase of a house and farm. Appellants defaulted on the note and judgment was taken against them on a warrant of attorney. Appellants filed a Civ.R. 60(B) motion claiming the judgment was void under R.C. 2323.13(E). The trial court overruled the motion.

On appeal to the Cuyahoga Court of Appeals, Judge Jackson commented on the applicability of R.C. 2323.13(E),

These provisions are unambiguous. In defining a "consumer loan" and a "consumer transaction," the statute obviously refers to personalty, goods, services, and intangibles. No reference is made to a transaction which involves real estate. Consequently, we hold that R.C. 2323.13(E)(1) does not apply to real estate transactions. In reaching this decision, it is appropriate to quote from a recent decision of the Ohio Supreme Court:

" * * * [I]t is well-settled that when a statute is free from ambiguity this court will not, under the guise of judicial interpretation." * * * delete words used or * * * insert words not used [within a statute].' Columbus-Suburban Coach Lines v. Pub. Util. Comm. (1969), 20 Ohio St.2d 125, 127 [49 O.O.2d 445]; Wheeling Steel Corp. v. Porterfield (1970), 24 Ohio St.2d 24, 28 [53 O.O.2d 13]; Bernstfini v. Bd. of Edn. (1979), 58 Ohio St.2d 1, 4 [12 O.O.3d 1]; Dougherty v. Torrence (1982), 2 Ohio St.3d 69, 70; Ohio Assn. of Pub. School Emp. v. Twin Valley Local School Dist. Bd. of Edn. (1983), 6 Ohio St.3d 178, 181." State, ex rel. Molden v. Callander Cleaners Co. (1983), 6 Ohio St.3d 292, 294.

*4 *Id.* at 17-18.

Although the *Vroman* case is instructive, we decline to follow the line of reasoning adopted by the Cuyahoga Court of Appeals. The critical issue presented is not whether the loan was incurred to purchase real estate, but rather whether the debt incurred was primarily for a personal, family, educational, or household purpose.

The statute provides a two step test to determine whether a party is entitled to protection under R.C. 2323.13(E). First, the loan must be made to a natural person. Clearly, appellant satisfies this portion of the test. The second requirement necessitates that the debt incurred is primarily for a personal, family, educational or household purpose. The *Vroman* court unduly restricted the provisions of the statute by finding it referred only to personalty, goods, services, and intangibles, and not to transactions involving real estate. The purchase of a personal residence is admittedly one of the most significant obligations a consumer will ever incur. No distinction is made in R.C. 2323.13(E)(1) between a debt incurred for personal property as opposed to one incurred for real property.

In reaching a decision under this section, the trial court must inquire into the party's primary purpose for incurring the obligation. A transaction need only be entered into *primarily* for a personal purpose, not exclusively personal, to be within the scope of the statute.

The court below refused to enter a particular finding on the question of Mr. Hannaford's primary purpose for incurring the obligation. In light of the conflicting evidence in the record, we would normally remand this issue for further consideration by the court below. However because of our resolution of the second assignment, a remand for resolution of this factual issue would serve no useful purpose. Appellants' first assignment of error is well taken.

Before considering appellants' second assignment of error, a review of several pertinent facts is necessary:

1) April 24, 1984, Appellee-Coates obtained judgment on the cognovit notes, a certificate of judgment was issued thereon.

2) April 25, 1984-certificate of judgment was filed in Greene County resulting in lien on Fairborn property.

3) July 12, 1984-Coates filed complaint to foreclose land installment contract on Centerville property.

4) December 10, 1984-Judgment entry declares Centerville property foreclosed and land installment contract terminated.

5) December 11, 1984-Coates filed foreclosure action in Greene County on Fairborn property seeking to recover on cognovit note judgment.

6) July 19, 1985-Dismissal entry filed in action foreclosing Centerville property.

Preliminarily, we must consider the effect of the dismissal entry filed in the Centerville foreclosure action. Appellee claims that because the foreclosure action was dismissed, the matter stands as if the case was never commenced. He reasons therefore, that appellants' second assignment of error is moot because R.C. 5313 has no applicability unless and until action is brought on the land installment contract.

*5 A review of the record in the Centerville foreclosure proceeding reveals that a "judgment entry" was filed on December 10, 1984 which declared a judgment against Phillip C. Hannaford of foreclosure, cancellation of the land contract and an order of sale. Further filings in the matter evidence an appraisal of the property, advertisements of sheriff sale, an order of sale and report of sheriff which stated the property had sold to appellee for $86,000. Thereafter, the dismissal entry is of record.

Although the sale was apparently never confirmed, a judgment for the vendor operates to cancel the land contract as of the date specified by the court. *See,* R.C. 5313.09. The decree of foreclosure and order of sale on December 10, 1984 was binding on appellee and was subject only to change by being vacated in accordance with Civ.R. 60(B). It was irregular for the court below to grant appellee a voluntary dismissal of the matter. The consequence of carrying the foreclosure proceeding to judgment was that appellee made an election of his remedy as provided for in R.C. Chapter 5313. The fact that the sale was never confirmed bears no relationship to the initial election to foreclose. Accordingly, the issue of whether R.C. 5313.10 prohibited appellee's action to foreclose the Fairborn property is properly before this court.

Revised Code Section 5313.10 provides,

The election of the vendor to terminate the land installment contract by an action under section 5313.07 or 5313.08 of the Revised Code is an exclusive remedy which bars further action on the contract unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee's use. In such case the vendor may recover the difference between the amount paid by the vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use.

In *Dalton v. Acker* (1981), 5 Ohio App.3d 150, 151 the Court of Appeals for Ashland County stated that the prohibition of "further action on the contract" is plainly a bar to a deficiency judgment. In the event foreclosure and judicial sale are elected, the vendor is entitled to sale proceeds up to and including the unpaid balance on the land installment contract. In *Dalton,* the trial court granted plaintiffs a judgment of foreclosure on a land installment contract and $20,792.86 for the balance due on the contract. The appellate court reversed the personal money award finding it was a deficiency judgment.

When the sale proceeds are less than the unpaid balance, the vendor is limited to the sale amount plus the difference between the amount paid on the contract and the fair rental value plus deterioration or destruction of the property occasioned by the vender's use. R.C. 5310.10; *Dalton, supra, Kathera v. Stroupe* (Sept. 12, 1984) Summit App. No., 11693, unreported.

In *Good Shepherd Baptist Church Inc. v. City of Columbus* (1984), 20 Ohio App.3d 228, Douglas and Barb Kelley purchased premises on Cleveland Avenue for $31,000 on a land installment contract. In lieu of a cash down payment, the Kelley's executed and delivered to the vendor a note and mortgage for $3,000 on real estate located on East 15th Avenue in which Mr. Kelley owned a one-half interest. When the Kelley's defaulted on their Cleveland Avenue property payments, appellant filed an action to regain possession of the property and cancellation of the land contract. Appellant was granted the relief prayed for in February of 1982.

*6 Prior to appellant's judgment in November 1979, the first mortgage holder on the Fifteenth Avenue property, the North Central Mortgage Corporation, foreclosed its mortgage lien, and eventually that property was acquired by the appellee city of Columbus.

In January 1983, appellant brought an action seeking to foreclose the mortgage and seeking recovery of $3,000 from the appellee, city of Columbus, on the theory that, as the current owner of the premises upon which the Kelley mortgage exists, the city was liable for the indebtedness to appellant.

The trial court declared the mortgage void and cancelled of record and dismissed appellants' complaint. On appeal, the Franklin County court affirmed finding that, because appellant elected to terminate the land installment contract under R.C. 5313.08, he was barred from seeking the $3,000 down payment by foreclosing a mortgage given as additional security upon the Kelley's property. *Id.* at 229.

In the present action, appellee argues, and the court below agreed, that the note given as a down payment on the Centerville property was effectively separated and independent from the installments under the land contract. The court therefore found that appellee's action to foreclose the Fairborn property was not one for deficiency such that R.C. 5313.10 prohibited the proceeding. Appellants however contend that the down payment was part of the purchase price under the land contract and cannot be separated merely because a separate note was taken.

We find appellants' argument more persuasive. In lieu of a cash down payment, Mr. Hannaford, as a term of the land installment contract executed a note for $32,500. Title was reserved in appellee until the entire $92,500 purchase price was paid. All payments as a whole were the essence of the contract and indicate that the down payment note was not severable. *See generally,* 18 Ohio Jurisprudence 3d, 89 Contracts Sec. 191. The note was essentially an additional "installment" under the contract.

Having elected to foreclose on the Centerville property, appellee's proceeding to execute on the cognovit judgment was clearly prohibited by R.C. 5313.10. The *Good Shepherd* case is particularly instructive in the present situation. Appellee's action to foreclose the land installment contract was commenced and taken to judgment. Thereafter, appellee attempted to foreclose on real property which was subject to the lien obtained on the cognovit judgment. The fact that appellee obtained judgment on the note *prior* to the commencement of the foreclosure action on the Centerville property does not negate the applicability of R.C. 5313.10. The proceeding was nevertheless "further action on the contract."

Appellee argues that vendors who accept a note as a down payment instead of cash will be precluded from ever recovering the amount due under the note. We disagree. Upon foreclosure, appellee is entitled to the unpaid balance due on the land installment contract. Because the note was effectively incorporated into the land contract, the "unpaid balance" referred to in R.C. 5313.07 includes amounts owed on the note as well.

*7 Accordingly, we find appellants' second assignment of error is well taken.

In light of the foregoing, the judgment of the trial court is reversed and the cause is remanded for proceedings consistent with this opinion. (i.e. resolution of remaining claims).

WOLFF and FAIN, JJ., concur.

Footnotes

1 The parties concede that the present action does not involve a consumer transaction.

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Countrywide Home Loans Servicing, L.P. — Court of Appeals No. WD-11-047

Appellee — Trial Court No. 2010CV0680

v.

Michael Nichpor, et al. — **DECISION AND JUDGMENT**

Appellants — Decided: MAR 16 2012

* * * * *

Andrew C. Clark, for appellee.

Kevin A. Heban, R. Kent Murphree, and John P. Lewandowski, for appellants.

* * * * *

HANDWORK, J.

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{¶ 8} In the instant case, appellants argue that the trial court erred by not granting their motion for summary judgment based upon the doctrine of res judicata. Specifically,

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{¶ 9} We deal first with appellants' claim that appellee's Civ.R. 41(A) voluntary dismissal would be legally insufficient to nullify the trial court's order of foreclosure in the 2009 case.

{¶ 10} Foreclosure proceedings involve two distinct phases and two distinct judgment entries: the first is the order of foreclosure, and the second is the order confirming the sheriff's sale. *Mtge. Electronic Registration Systems, Inc. v. Harris-Gordon*, 6th Dist. No. L-10-1176, 2011-Ohio-1970, ¶ 10. Both judgment entries are final and appealable. *Id.*

{¶ 11} In *The N. Ohio Invest. Co. v. Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658, this court considered a case analogous to the one at hand. *Yarger*, like the instant case, involved the issuance of a default judgment of foreclosure, followed by a sheriff's sale that was unattended by an agent for the bank, together with a Civ.R. 41(A) voluntary dismissal that was filed by the bank prior to the issuance of an order confirming the sheriff's sale. Unlike in the current case, the trial court in *Yarger* sua sponte declared the notice of voluntary dismissal a nullity and ordered it stricken from the record. The bank appealed the court's decision. This court, reversing the trial court's

decision, held that the notice of voluntary dismissal that was filed by the bank was valid and operated to terminate the case as a whole. *Id.*

{¶ 12} Although appellants are correct in stating that an order of foreclosure is a final and appealable order, see *Harris-Gordon*, *supra*, and that at least one Ohio appellate court has held that Civ.R. 60(B), and not Civ.R. 41(A), provides the only mechanism to change such an order, see *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987), this court has taken the position that a foreclosure action, with its two-part process, is a unique process under the law and that prior to completion of both parts of that process—that is, completion of both the order of foreclosure and the order confirming the sheriff's sale—an entire foreclosure action, including any previously-issued order of foreclosure, can be dissolved with the filing of a Civ.R. 41(A) voluntary dismissal.

{¶ 13} Based on the foregoing, we conclude that the voluntary dismissal was properly allowed in the 2009 case and effectively terminated that action in its entirety. Given this conclusion, we find that appellants' argument regarding the application of the doctrine of res judicata is not persuasive. Accordingly, it will be given no additional consideration herein.

{¶ 14} For all of the foregoing reasons, we find appellants' sole assignment of error not well-taken.

{¶ 15} The judges of the Court of Appeals of the Sixth District of the state of Ohio hereby find that the judgment entered in this case is in conflict with the judgment

pronounced upon the same question by another court of appeals, the same being the Court of Appeals for Greene County in the case of *Coates v. Navarro*, 2d Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490 (1987).

{¶ 16} Wherefore, the record in this cause, *Countrywide Home Loans Servicing v. Nichpor*, is hereby certified to the Supreme Court of Ohio for review and final determination. The issue for certification is:

{¶ 17} Whether a foreclosure action, in which a judgment of foreclosure has, in fact, been issued, can be dissolved in its entirety prior to the confirmation of sale, with the filing of a voluntary dismissal, filed by a party in accordance with Civ.R. 41(A).

{¶ 18} The judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____ JUDGE

Arlene Singer, P.J. _____ JUDGE

Stephen A. Yarbrough, J. _____ JUDGE
CONCUR.

JOURNALIZED
COURT OF APPEALS
MAR 16 2012
Vol. 35 Pg. 853

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO

Countrywide Home Loans Servicing, L.P.	**Case No. 2010CV0680**
Plaintiff,	**Judge Alan Mayberry**
vs.	**JUDGMENT ENTRY AND DECREE IN FORECLOSURE**
Michael Nichpor, et al.	
Defendants.	

This matter is before the Court on Plaintiff's Motion for Summary Judgment. The real property that is the subject of this foreclosure action (the "Property") is as follows:

> Situated in the City of Perrysburg, County of Wood, State of Ohio, is described as follows:
>
> Lot Number Ninety-nine (99) in Valleybrook Farms, Plat 5, City of Perrysburg, Wood County, Ohio.

In response to Defendants Michael Nichpor's and Joann M. Nichpor's Motion for Summary Judgment and to Plaintiff's cross Motion for Summary Judgment, the Court has reviewed the Complaint, the Answers filed by Michael Nichpor and Joann M. Nichpor, and all evidence submitted, including the affidavits submitted by Plaintiff in support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Affidavits"). The Court finds that there are no genuine issues of material fact and that Plaintiff is entitled to judgment in its favor as a matter of

E42

law. The Court further finds that reasonable minds can come to but one conclusion, which is adverse to the foregoing defendants, and therefore grants Plaintiff's Motion for Summary Judgment on all claims presented and hereby denies Defendants Michael Nichpor's and Joann M. Nichpor's Motion for Summary Judgment.

The Court finds that Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Decision One Mortgage Company, LLC, LTD. has been served with a Summons and Complaint but is in default for failure to file an Answer or other responsive pleading. As a result, with respect to such defendant, the Court hereby grants Plaintiff's Motion for Default Judgment and enters judgment in favor of Plaintiff for the relief sought by Plaintiff in its Complaint.

The Court further finds that Michael Nichpor executed the promissory note referenced in the Complaint (the "Note") and therefore promised, among other things, to make monthly payments on or before the date such payments were due. The Court further finds that the sums due under the Note were accelerated in accordance with the terms of the Note and Mortgage. The Court further finds that Michael Nichpor and Joann M. Nichpor executed and delivered the mortgage referenced in the Complaint (the "Mortgage"), that the Mortgage secures the amounts due under the Note.

The Court finds that the Note and Mortgage are in default because payments required to be made under the Note and Mortgage have not been made. The Court further finds that the conditions of the Mortgage have broken, the break is absolute, and Plaintiff is entitled to have the equity of redemption and dower of the current title holders foreclosed.

The Court further finds that there is due to Plaintiff on the Note principal in the amount of $222,642.61 plus interest on the principal amount at the rate of 7.09% per annum from

November 16, 2008. The Court further finds that there is due on the Note all late charges imposed under the Note, all advances made for the payment of real estate taxes and assessments and insurance premiums, and all costs and expenses incurred for the enforcement of the Note and Mortgage, except to the extent the payment of one or more specific such items is prohibited by Ohio law.

The Court notes that, all personal obligations of Michael Nichpor on the Note have been discharged under the United States Bankruptcy Code. As a result, the Court does not grant personal judgment against Michael Nichpor for the amount due on the Note.

The Court finds that the Mortgage was recorded with the County Recorder and is a valid and subsisting first mortgage on the Property. The Court further finds that the parties to the Mortgage intended that it attach to the entire fee simple interest in the Property. The Mortgage is, however, junior in priority under Ohio law to the lien held by the County Treasurer to secure the payment of real estate taxes and assessments. All amounts payable under Section 323.47 of the Ohio Revised Code shall be paid from the proceeds of the sale before any distribution is made to other lien holders.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that unless the sums found to be due to Plaintiff are fully paid within three (3) days from the date of the entry of this decree, the equity of redemption of the defendant title holders in the Property shall be foreclosed and the Property shall be sold free of the interests of all parties to this action. In addition, an order of sale shall issue to the Sheriff of Wood County, directing him to appraise, advertise and sell the Property according to the law and the orders of this Court and to report his proceedings to this Court.

Notice of the time and place of the sale of the Property shall be given to all persons who have an interest in the Property according to the provisions of Section 2329.26 of the Ohio Revised Code.

IT IS FURTHER ORDERED that the Sheriff shall send counsel for the party requesting the Order of Sale a copy of the publication notice promptly upon its first publication.

There is no just reason for delay in entering Judgment as aforesaid.

IT IS SO ORDERED.

Alan R Mayberry

Judge Alan Mayberry
Common Pleas Judge

Approved:

Melissa N. Meinhart (0083909)
Manley Deas Kochalski LLC
P. O. Box 165028
Columbus, OH 43216-5028
Telephone: 614-917-1793
Fax: 614-220-5613
Email: mnm@mdk-llc.com
Attorney for Plaintiff

Circulating for Approval

Mary Loeffler Mack
Attorney for Wood County Treasurer
One Courthouse Square
Bowling Green, OH 43402
419-354-7627

Circulating for Approval

Kevin Heban
Attorney for Michael and Joann Nichpor
200 Dixie Highway
Rossford, OH 43460

...TO ALL COUNSEL OF
...TED PARTIES
...TO APPEAR
...ENTRY INCLUDING
THE DATE OF ENTRY ON THE JOURNAL

JOURNALIZED
AUG 05 2011
Vol 501 Pg 716

Ref# 10-514682/SMB2

00026

10W0059

Case Number	Status	Judge
2009CV0215	Closed	Mayberry, Alan R

In The Matter Of

Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

Action

Foreclosure

Party		Attorneys
Countrywide Home Loans Servicing LP % Countrywide Home Loans Servicing LP 7105 Corporate Drive PLANO, TX 75024	PLNTF	GODBEY TESZNAR, CYNTHIA Manley Deas Kochalski LLC P O Box 165028 COLUMBUS, OH 43216 Meinhart, Melissa N Manley Deas Kochalski LLC P.O. Box 165028 COLUMBUS, OH 43216 Janes, Charles R Manley Deas Kochalski LLC P.O. Box 165028 COLUMBUS, OH 43216
Nichpor, Michael P 1153 Timberbrook Court Perrysburg, OH 43551	DFNDT	
Nichpor, Joann M 1153 Timberbrook Court Perrysburg, OH 43551	DFNDT	
Mortgage Electronic Registration Systems Inc 3300 S W 34th Avenue, Suite 101 OCALA, FL 34474	DFNDT	
Decision One Mortgage Company	NOM	
Wood County Treasurer One Courthouse Square Bowling Green, OH 43402	DFNDT	DOBSON, PAUL A ONE COURTHOUSE SQUARE BOWLING GREEN, OH 43402 MACK, MARY L ASST. WOOD CO. PROS. 1 COURTHOUSE SQUARE BOWLING GREEN, OH 43402
Wood County Sheriff Attention: Phyllis 1960 E. Gypsy Lane Bowling Green, OH 43402	SP	
Reichert, Jennifer L 29060 Belmont Farm Road Perrysburg, OH 43551	SUBI	
Reichert, Jennifer L	IN	HEBAN, KEVIN A 200 Dixie Hwy Rossford, OH 43460 MURPHREE, R K 200 Dixie Hwy Rossford, OH 43460 Lewandowski, John 200 Dixie Highway Rossford, OH 43460

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO. COMMON PLEAS COURT, BOWLING GREEN, OHIO
CINDY A. HOFNER, CLERK OF COURTS
BY _____ DEPUTY CLERK
THIS 23 DAY OF Aug 10

FILED
WOOD COUNTY, OHIO
2010 AUG 23 A 10: 35
SIXTH DISTRICT
COURT OF APPEALS
CINDY A. HOFNER, CLERK

CRTR5925 Detail

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

Opened	Disposed	Case Type
02/27/2009	(A12) Guilty/no Cntst-orig. chrg(CR / Default (CV)	Civil

Comments: Court of Appeals Case No 2010WD0052

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	02/27/09	Deposit received from Manley Deas Kochalski LLC Receipt: 88019 Date: 02/27/2009	91.00	0.00
	02/27/09	Civil Filing Fee Receipt: 88019 Date: 02/27/2009	89.00	0.00
	02/27/09	Basic Handling Fee	25.00	25.00
1	02/27/09	Case Designation Form (3:54) 1	0.00	0.00
2	02/27/09	Complaint (3:54) 2	0.00	0.00
3	02/27/09	Preliminary judicial report. (3:54) Attorney: Meinhart, Melissa N (83909) 3	0.00	0.00
4	02/27/09	Praecipe for service by certified mail and Private Process Server. (3:54) 4	0.00	0.00
5	02/27/09	Motion for order appointing private process server. (3:54) Attorney: Meinhart, Melissa N (83909) 5	0.00	0.00
	03/02/09	Writ Issued 6	8.00	8.00
6	03/02/09	Issue Date: 03/02/2009 Service: Summons on Complaint Issued Method: Certified Mail Cost Per: $ 6.98	20.94	20.94

Nichpor, Michael P
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: 71603901984561991070

Nichpor, Joann M
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: 71603901984561991087

Mortgage Electronic Registration Systems Inc
3300 S W 34th Avenue, Suite 101

OCALA, FL 34474
Tracking No: 71603901984561991094

Wood County Treasurer
One Courthouse Square
Bowling Green, OH 43402
Tracking No: 71603901984561991100

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	03/02/09	Form Generated Civil Summons by certified mail (N) Sent on: 03/02/2009 08:55:16 7	0.00	0.00
7	03/03/09	Order appointing Private Process server Pro Vest LLC as servers in this action. (10:38) Vol 476 pg 1002-1003 8	4.00	4.00
	03/03/09	Issue Date: 03/03/2009 Service: Court Forwarded copies of J.E.Vol 476 pg 1002-1003 Method: Regular U.S. Mail Cost Per: $ 0.42 Countrywide Home Loans Servicing LP c/o ATTY: Meinhart, Melissa N Manley Deas Kochalski LLC P.O. Box 165028 COLUMBUS, OH 43216 Tracking No: R000087126	0.84	0.84
	03/03/09	Copies of JE Vol 476 pg 1002-1003	0.50	0.50
8	03/04/09	Successful Service Method : Certified Mail Issued : 03/02/2009 Service : Summons on Complaint Issued Served : 03/03/2009 Return : 03/04/2009 On : Nichpor, Joann M Signed By : Signature Illegible Reason : Successful Comment : (1:42) Tracking #: 71603901984561991087	0.00	0.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
9	03/04/09	Successful Service Method : Certified Mail Issued : 03/02/2009 Service : Summons on Complaint Issued Served : 03/03/2009 Return : 03/04/2009 On : Nichpor, Michael P Signed By : Signature Illegible Reason : Successful Comment : (1:43) Tracking #: 71603901984561991070	0.00	0.00
10	03/04/09	Successful Service Method : Certified Mail Issued : 03/02/2009 Service : Summons on Complaint Issued Served : 03/04/2009 Return : 03/04/2009 On : Wood County Treasurer Signed By : Reason : Successful Comment : Stamped: Jill Engle, Treasurer; Signed: Patti A Bankey (4:02) Tracking #: 71603901984561991100	0.00	0.00
	03/05/09	Writ Issued	4.00	4.00
		9		
11	03/05/09	Issue Date: 03/05/2009 Service: Summons on Complaint Issued Method: Special Process Server Provider: Process Server-ProVest Cost Per: $ ***On 3/5/09 @ 11:20 am Called ProVest that Service is ready for pick-up*** Nichpor, Michael P 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: P000001743 Nichpor, Joann M 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: P000001744	0.00	0.00
	03/05/09	Form Generated	0.00	0.00
		Civil Summons by process server (N) Sent on: 03/05/2009 11:20:49		

00030

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
12	03/09/09	Successful Service Method : Certified Mail Issued : 03/02/2009 Service : Summons on Complaint Issued Served : 03/05/2009 Return : 03/09/2009 On : Mortgage Electronic Registration Systems Inc Signed By : Reason : Successful Comment : Stamped by Tremayne Pearson (2:45) Tracking #: 71603901984561991094	0.00	0.00
13	03/13/09	Successful Service Method : Special Process Server Issued : 03/05/2009 Service : Summons on Complaint Issued Served : 03/05/2009 Return : 03/13/2009 On : Nichpor, Joann M Signed By : Reason : Successful Comment : By Personal Service (1:26) Tracking #: P000001744	0.00	0.00
14	03/13/09	Successful Service Method : Special Process Server Issued : 03/05/2009 Service : Summons on Complaint Issued Served : 03/05/2009 Return : 03/13/2009 On : Nichpor, Michael P Signed By : Reason : Successful Comment : By Residence Service leaving with JoAnn M. Nichpor (1:26) Tracking #: P000001743	0.00	0.00
15	03/16/09	Answer of defendant, Jill Engle, Treasurer of Wood County, Ohio with certification (11:11) Attorney: DOBSON, PAUL A (64126) Attorney: MACK, MARY L (47132) 11	0.00	0.00
16	04/01/09	Notice of filing of assignment of mortgage. With certificate of service. (1:36) Attorney: Meinhart, Melissa N (83909) 12	0.00	0.00
17	04/09/09	Notice of Filing Final Judicial Report with Certificate of Service (1:14) Attorney: Meinhart, Melissa N (83909) 13	0.00	0.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	04/14/09	Deposit for Order of Sale. From Manley Deas Kochalski, for pltf. Receipt: 90370 Date: 04/14/2009	500.00	0.00
18	04/14/09	Plaintiff's Motion for Default Judgment. Certificate of Service attached. (12:54) Attorney: Meinhart, Melissa N (83909) 14	0.00	0.00
19	04/14/09	Affidavit Regarding Account and Competency and Military Status; Certificate of Service and exhibit A (copy of note) attached. (12:54) 15	0.00	0.00
20	05/18/09	Motion for judgment granted; Lands foreclosed, liens marshalled and order of sale to be issued. (10:14) 479-5- 16	8.00	8.00
	05/18/09	Issue Date: 05/18/2009 Service: Mailed Copies of J.E. Vol 479 Pg 05-08 (file stamped 05/14/09 @ 10:14) Method: Regular U.S. Mail Cost Per: $ 0.44	2.20	2.20

Countrywide Home Loans Servicing LP
c/o ATTY: Meinhart, Melissa N
Manley Deas Kochalski LLC
P.O. Box 165028
COLUMBUS, OH 43216
Tracking No: R000095552

Nichpor, Michael P
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000095553

Nichpor, Joann M
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000095554

Mortgage Electronic Registration Systems Inc
3300 S W 34th Avenue, Suite 101
OCALA, FL 34474
Tracking No: R000095555

Wood County Treasurer
c/o ATTY: DOBSON, PAUL A
ONE COURTHOUSE SQUARE
BOWLING GREEN, OH 43402
Tracking No: R000095556

Wood County Treasurer
c/o ATTY: MACK, MARY L
ASST. WOOD CO. PROS.
1 COURTHOUSE SQUARE

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

BOWLING GREEN, OH 43402
Tracking No: R000095557

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	05/18/09	Copies of J.E. Vol 479 Pg 05-08 (file stamped 05/14/09 @ 10:14)	5.00	5.00
21	05/20/09	Praecipe for Order of Sale. (10:25) Attorney: Meinhart, Melissa N (83909) 17	0.00	0.00
22	05/20/09	Order of sale issued 18	2.00	2.00
	05/20/09	Issue Date: 05/20/2009 Service: Order of Sale Issued Method: Sheriff/personal Provider: Wood County Sheriff Cost Per: $ Nichpor, Michael P 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: S000008301	0.00	0.00
	05/20/09	Form Generated Order of Sale Sent on: 05/20/2009 10:30:37 19	0.00	0.00
23	06/09/09	Land appraisement $234,000.00 (10:24) 20	0.00	0.00
24	06/10/09	Motion to Vacate Order For Sale and Withdraw Property From Sale with Certificate of Service (1:50) Attorney: Meinhart, Melissa N (83909) 21	0.00	0.00
	06/17/09	Writ Recalled Method : Sheriff/personal Issued : 05/20/2009 Service : Order of Sale Issued Served : Return : 06/17/2009 On : Nichpor, Michael P Signed By : Reason : Recalled Comment : Received notice to cancel sale (1:17) Tracking #: S000008301 23	0.00	0.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	06/17/09	Wood County Sheriff return on order of sale	72.50	72.50
	06/17/09	PRINTER FEE Receipt: 94817 Date: 07/16/2009	50.74	0.00
	06/17/09	Appraiser Fee for Paul Sargent Receipt: 94930 Date: 07/16/2009	75.00	0.00
	06/17/09	Appraiser Fee for Melissa Sargent Receipt: 94930 Date: 07/16/2009	75.00	0.00
	06/17/09	Appraiser Fee for Gregg Snyder Receipt: 94930 Date: 07/16/2009	75.00	0.00
25	06/22/09	Order: This matter is before the court on the motion of plaintiff for an order vacating the order for sale filed on May 20, 2009, issued by the clerk of courts and withdrawing the property that is the subject of this foreclosure action from a sheriff's sale. The court hereby grants plaintiff's motion. The property shall be and hereby is withdrawn from the sheriff's sale. The sheriff is hereby ordered to return the order for sale without execution. It is so ordered. (Filed on 6/16/09 at 10:32) 479-952- 22	2.00	2.00
	06/22/09	Issue Date: 06/22/2009 Service: Mailed Copies of J.E. journalized on 6/22/09 (479/952) Method: Regular U.S. Mail Cost Per: $ 0.44	2.20	2.20

Countrywide Home Loans Servicing LP
c/o ATTY: Meinhart, Melissa N
Manley Deas Kochalski LLC
P.O. Box 165028
COLUMBUS, OH 43216
Tracking No: R000099447

Nichpor, Michael P
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000099448

Nichpor, Joann M
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000099449

Mortgage Electronic Registration Systems Inc
3300 S W 34th Avenue, Suite 101
OCALA, FL 34474
Tracking No: R000099450

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

Wood County Treasurer
c/o ATTY: MACK, MARY L
ASST. WOOD CO. PROS.
1 COURTHOUSE SQUARE
BOWLING GREEN, OH 43402
Tracking No: R000099451

Wood County Treasurer
c/o ATTY: DOBSON, PAUL A
ONE COURTHOUSE SQUARE
BOWLING GREEN, OH 43402
Tracking No: R000099452

Wood County Sheriff
Attention: Phyllis
1960 E. Gypsy Lane
Bowling Green, OH 43402
Tracking No: R000099453

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	06/22/09	Copies of JE journalized on 6/22/09 (479/952)	1.50	1.50
96	07/23/09	Order of Sale Deposit received from Manley Deas Kochalski LLC Receipt: 95321 Date: 07/23/2009	500.00	0.00
97	07/23/09	Motion to reinstate Case to the Active Docket. Certificate of Service. Attached Order from US Bankruptcy Court granting motion to annult he Automatic Stay and for for relief from stay and adandonment(Docket Number 10) as to real property located at 1153 Timberbrook Co, Perrysburg, OH 43551. (12:31) Attorney: Meinhart, Melissa N (83909) 24	0.00	0.00
98	07/24/09	Alias Praecipe for Order of Sale with Exhibit A-Legal Description (3:17) Attorney: Meinhart, Melissa N (83909) 26	0.00	0.00
99	07/28/09	Order Reinstating Case to the Active Docket-This matter comes before the Court on the motion of Plaintiff requesting this Court to reinstate the above referenced case to the Court's active docket. For good cause shown, this action is hereby reinstated to the Court's active docket. IT IS SO ORDERED. (File Date 7/24/09 @ 2:49) Vol. 481 Pg. 84 481-84- 25	2.00	2.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	07/28/09	Issue Date: 07/28/2009 Service: Mailed Copies of J.E. journalized 7/28/09 Vol. 481 Pg. 84 Method: Regular U.S. Mail Cost Per: $ 0.44 x 5 Countrywide Home Loans Servicing LP c/o ATTY: Meinhart, Melissa N Manley Deas Kochalski LLC P.O. Box 165028 COLUMBUS, OH 43216 Tracking No: R000104681 Nichpor, Michael P 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: R000104682 Nichpor, Joann M 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: R000104683 Mortgage Electronic Registration Systems Inc 3300 S W 34th Avenue, Suite 101 OCALA, FL 34474 Tracking No: R000104684 Wood County Treasurer c/o ATTY: DOBSON, PAUL A ONE COURTHOUSE SQUARE BOWLING GREEN, OH 43402 Tracking No: R000104685 Wood County Treasurer c/o ATTY: MACK, MARY L ASST. WOOD CO. PROS. 1 COURTHOUSE SQUARE BOWLING GREEN, OH 43402 Tracking No: R000104686 Wood County Sheriff Attention: Phyllis 1960 E. Gypsy Lane Bowling Green, OH 43402 Tracking No: R000104687	2.20	2.20
	07/28/09	Copies of J.E. journalized 7/28/09 Vol. 481 Pg. 84	1.50	1.50
30	07/28/09	Writ Issued-Alias Order of sale	2.00	2.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

27

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	07/28/09	Issue Date: 07/28/2009 Service: Alias Order of Sale Issued Method: Sheriff/personal Provider: Wood County Sheriff Cost Per: $ Nichpor, Michael P 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: S000008972	0.00	0.00
31	08/26/09	Plaintiff's notice of sheriff's sale set for October 1, 2009 at 10:00 A.M., Wood County Courthouse, w/certificate of service. (3:09) Attorney: Meinhart, Melissa N (83909) 28	0.00	0.00
32	09/29/09	Motion to vacate order for sale and withdraw property from sale, scheduled for October 1, 2009. With certificate of service. (12:41) Attorney: Meinhart, Melissa N (83909) 30	0.00	0.00
33	09/30/09	Vacated Method : Sheriff/personal Issued : 07/28/2009 Service : Order of Sale Issued Served : Return : 09/30/2009 On : Nichpor, Michael P Signed By : Reason : Vacated Comment : Received notice to cancel sale. (2:29) Tracking #: S000008972	0.00	0.00
	09/30/09	Wood County Sheriff's fees for return of Order of Sale	50.00	50.00
	09/30/09	PRINTER FEE Receipt: 100152 Date: 10/29/2009	152.22	0.00
34	10/01/09	Order Vacating Order for Sale and Withdraw Property From Sale- The Court hereby grants Pltf's motion. The property shall be and hereby is withdrawn from the Sheriff's sale that is scheduled for 10/1/09. The Sheriff is hereby ordered to return the Order for Sale without execution. IT IS SO ORDERED (file date 9/29/09 @ 3:11) Vol. 482 Pg 1083 482-1083- 29	2.00	2.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	10/01/09	Copies of JE journalized on 10/1/09 Vol. 482 Pg. 1083	1.50	1.50
	10/01/09	Issue Date: 10/01/2009 Service: Mailed Copies of J.E. Method: Regular U.S. Mail Cost Per: $ 0.44 Wood County Sheriff Attention: Phyllis 1960 E. Gypsy Lane Bowling Green, OH 43402 Tracking No: R000113037 Countrywide Home Loans Servicing LP c/o ATTY: Meinhart, Melissa N Manley Deas Kochalski LLC P.O. Box 165028 COLUMBUS, OH 43216 Tracking No: R000113038 Nichpor, Michael P 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: R000113039 Nichpor, Joann M 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: R000113040 Mortgage Electronic Registration Systems Inc 3300 S W 34th Avenue, Suite 101 OCALA, FL 34474 Tracking No: R000113041 Wood County Treasurer c/o ATTY: DOBSON, PAUL A ONE COURTHOUSE SQUARE BOWLING GREEN, OH 43402 Tracking No: R000113042 Wood County Treasurer c/o ATTY: MACK, MARY L ASST. WOOD CO. PROS. 1 COURTHOUSE SQUARE BOWLING GREEN, OH 43402 Tracking No: R000113043	2.20	2.20
35	10/28/09	Certificate of Publication: Last date of publication September 10, 2009 (9:19)	0.00	0.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	04/29/10	Deposit for Order of Sale paid by Manley Deas Kochalski LLC on behalf of plaintiff, Countrywide Home Loans Servicing, LP. Attorney: Meinhart, Melissa N (83909) Receipt: 109681 Date: 04/29/2010	500.00	0.00
36	04/29/10	Alias Praecipe for order of sale instructed to the Wood County Sheriff for property located at 1153 Timberbrook Court, Perrysburg, OH 43551. (4:16) Attorney: Meinhart, Melissa N (83909) 32	0.00	0.00
37	04/29/10	Property Description Approval Form (4:16) 34	0.00	0.00
38	05/03/10	Writ Issued-Alias Order of sale 33	2.00	2.00
	05/03/10	Issue Date: 05/03/2010 Service: Alias Order of Sale Issued Method: Sheriff/personal Provider: Wood County Sheriff 1153 Timberbrook Court Perrysburg, OH 43551 Tracking No: S000011554	0.00	0.00
39	05/20/10	Land appraisement ($198,000.00) (8:59) 35	0.00	0.00
40	06/03/10	Notice of Sale scheduled for July 1, 2010 @ 10:00 A.M. with Certificate of Service (2:48) 36	0.00	0.00
41	07/01/10	Motion to Vacate Sheriff Sale filed. Memorandum in Support. Certificate of Service. (4:17) Attorney: Meinhart, Melissa N (83909) 37	0.00	0.00
42	07/12/10	Pltf's Notice of Dismissal pursuant to Civ. R. 41 (A)(1)(a) filed. Certificate of Service. (8:27) Attorney: Meinhart, Melissa N (83909) 38	0.00	0.00
43	07/14/10	Motion to intervene pursuant to Civ R 24 of Jennifer L Reichert. Certificate of Service. (8:53) Attorney: HEBAN, KEVIN A (29919) Attorney: MURPHREE, R K (65730) Attorney: Lewandowski, John (85657) 39	0.00	0.00

CRTR5925 Detail

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
44	07/14/10	Notice of invalidity of attempted voluntary dismissal pursuant to Civ R. 41(A). Certificate of Service. (8:53) Attorney: HEBAN, KEVIN A (29919) Attorney: MURPHREE, R K (65730) Attorney: Lewandowski, John (85657) 40	0.00	0.00
45	07/14/10	Motion for order confirming sale filed. Memorandum in support. Certificate of Service. Exhibit A: Judgment entry and decree of Foreclosure. Exhibit B: Affidavit of JoAnn Nichpor. Exhibit C: Affidavit of Michal Nichpor. (8:53) Attorney: HEBAN, KEVIN A (29919) Attorney: MURPHREE, R K (65730) Attorney: Lewandowski, John (85657) 41	0.00	0.00
46	07/15/10	Property Sold at Sheriff's Sale Method : Sheriff/personal Issued : 05/03/2010 Service : Order of Sale Issued Served : 07/01/2010 Return : 07/15/2010 On : Nichpor, Joann M Signed By : Reason : Property Sold Comment : Sold to Jennifer L Reichert (Successful bidder) ($132,000.00) (11:59) Tracking #: S000011554 42	0.00	0.00
	07/15/10	Wood County Sheriff return on alias order of sale (11:59)	2,039.00	2,039.00
	07/15/10	PRINTER FEE	152.22	152.22
	07/15/10	Appraiser Fee for Paul Sargent	75.00	75.00
	07/15/10	Appraiser Fee for Gregg Snyder	75.00	75.00
	07/15/10	Appraiser Fee for Melissa Sargent	75.00	75.00
47	07/15/10	Certificate of Publication: Last date of publication June 10, 2010 (3:52) 43	0.00	0.00
48	07/20/10	Order: It is ordered that Jennifer L Reichert is permitted to intervene in this action as a Defendant. (File stamped 7/19/10 @ 1:29) Vol 491 pgs 351-352 491-351- 44	4.00	4.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	07/20/10	Issue Date: 07/20/2010 Service: Court Forwarded copies of J.E. Vol 491 pg 351-352 journalized 7/20/10 Method: Regular U.S. Mail Cost Per: $ 0.44 Countrywide Home Loans Servicing LP c/o ATTY: Meinhart, Melissa N Manley Deas Kochalski LLC P.O. Box 165028 COLUMBUS, OH 43216 Tracking No: R000150242 Wood County Treasurer c/o ATTY: MACK, MARY L ASST. WOOD CO. PROS. 1 COURTHOUSE SQUARE BOWLING GREEN, OH 43402 Tracking No: R000150243 Reichert, Jennifer L c/o ATTY: HEBAN, KEVIN A 200 Dixie Hwy Rossford, OH 43460 Tracking No: R000150244 Reichert, Jennifer L c/o ATTY: Lewandowski, John 200 Dixie Highway Rossford, OH 43460 Tracking No: R000150245 Reichert, Jennifer L c/o ATTY: MURPHREE, R K 200 Dixie Hwy Rossford, OH 43460 Tracking No: R000150246	0.88	0.88
	07/20/10	Copies of Je Vol 491 pg 351-352 journalized 7/20/10	1.50	1.50
49	07/21/10	Plaintiff's Motion to Quash or Strike Intervenor-Applicant's "Notice of Invalidity," and Declare "Notice of Invalidity" a Nullity; with Certificate of Service and JE from court of appeals, journalized 09/08/06 Vol 28 Pg 204-208 included (3:49) Attorney: Janes, Charles R (13138)	0.00	0.00
50	07/21/10	Plaintiff's Memorandum in Opposition to Motion to Intervene; Certificate of Service included. (3:50) Attorney: GODBEY TESZNAR, CYNTHIA (14792)	0.00	0.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
S1	07/21/10	Plaintiff's Memorandum in Opposition to Motion for Order Confirming Sale; Certificate of Service included. (3:50) Attorney: GODBEY TESZNAR, CYNTHIA (14792)	0.00	0.00
S2	07/22/10	Notice of substitution of Counsel: Charles R Janes of the Law Firm of Manley Deas Kochalski LLC is hereby substituted in the place of Melissa N Meinhart (of the same law firm) on behalf of Pltf Countrywide Home Loans Servicing LP. Certificate of Service. (2:16) Attorney: Janes, Charles R (13138) 45	0.00	0.00
	07/23/10	Intervener's Deposit received from Heban Sommer & Murphres CCL Receipt: 114007 Date: 07/23/2010	100.00	0.00
S3	07/26/10	Notice of substitution of counsel of Charles R. Janes, in the place of Melissa N. Meinhart. With certificate of service. (4:09) Attorney: Janes, Charles R (13138) 47	0.00	0.00
S4	07/28/10	Intervenor, Jennifer L. Reichert's Motion for Hearing. With certificate of service. (3:05) Attorney: HEBAN, KEVIN A (29919) Attorney: MURPHREE, R K (65730) Attorney: Lewandowski, John (85657) 48	0.00	0.00
S5	08/03/10	Order: This matter comes before the court on: 1. Plaintiff Countrywide's July 1, 2010, Motion to Vacate Sheriff Sale 2. Jennifer L. Reichert's July 14, 2010, Motion for Order Confirming Sale 3. Plaintiff's July 21, 2010, Memorandum in Opposition to Motion for Order Confirming Sale 4. Jennifer L. Reichert's July 14, 2010, Notice of Invalidity of Attempted 41(A) Dismissal 5. Plaintiff's July 21, 2010, Motion to Strike Intervenor-Applicant's Notice of Invalidity (see JE) This matter is deemed dismissed, without prejudice, at plaintiff's costs, as of plaintiff's July 12, 2010, notice of dismissal. So Ordered. (File Date 7/29/10 @ 2:37) Vol. 491 Pgs. 911-913 491-911- 49	6.00	6.00

2009CV0215 Countrywide Home Loans Servicing LP vs. Nichpor, Michael P et al

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	08/03/10	Issue Date: 08/03/2010 Service: Mailed Copies of J.E. journalized 8/3/10 Vol. 491 Pgs. 911-913 Method: Regular U.S. Mail Cost Per: $ 0.44	3.08	3.08

Countrywide Home Loans Servicing LP
c/o ATTY: GODBEY TESZNAR, CYNTHIA
Manley Deas Kochalski LLC
P O Box 165028
COLUMBUS, OH 43216
Tracking No: R000152289

Wood County Sheriff
Attention: Phyllis
1960 E. Gypsy Lane
Bowling Green, OH 43402
Tracking No: R000152290

Reichert, Jennifer L
29060 Belmont Farm Road
Perrysburg, OH 43551
Tracking No: R000152291

Reichert, Jennifer L
c/o ATTY: Lewandowski, John
200 Dixie Highway
Rossford, OH 43460
Tracking No: R000152292

Reichert, Jennifer L
c/o ATTY: MURPHREE, R K
200 Dixie Hwy
Rossford, OH 43460
Tracking No: R000152293

Reichert, Jennifer L
c/o ATTY: HEBAN, KEVIN A
200 Dixie Hwy
Rossford, OH 43460
Tracking No: R000152294

Countrywide Home Loans Servicing LP
c/o ATTY: Janes, Charles R
Manley Deas Kochalski LLC
P.O. Box 165028
COLUMBUS, OH 43216
Tracking No: R000152295

Nichpor, Michael P
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000152296

Nichpor, Joann M
1153 Timberbrook Court
Perrysburg, OH 43551

Tracking No: R000152297

Mortgage Electronic Registration Systems Inc
3300 S W 34th Avenue, Suite 101
OCALA, FL 34474
Tracking No: R000152298

Wood County Treasurer
c/o ATTY: MACK, MARY L
ASST. WOOD CO. PROS.
1 COURTHOUSE SQUARE
BOWLING GREEN, OH 43402
Tracking No: R000152299

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	08/03/10	Copies of J.E. journalized 8/3/10 Vol. 491 Pgs. 911-913	1.50	1.50
56	08/10/10	Notice of appeal with copy of J.E. filed on 7/29/10 and journalized 8/3/10. (9:27) (C.A. #2010WD0052) 50	25.00	25.00
57	08/10/10	Praecipe pursuant to 6th District Loc. App. R. 3(B); appellate record will not include a complete transcript pursuant to App. R. 9(B). (9:27) 51	0.00	0.00
58	08/10/10	Docketing Statement (pursuant to App. R. 3(F), Loc. R. 3(C) and 12(A); appellant requests that this case be assigned to the regular calendar. (9:28) 52	0.00	0.00
	08/10/10	Copies of Notice of Appeal, praecipe and docketing statement given to Court of Appeals. 53	0.00	0.00
	08/10/10	Issue Date: 08/10/2010 Service: Copy/Notice Appeal, prcp. & docketing stmt. sent Method: Regular U.S. Mail Cost Per: $ 0.44 ***Copies handed across counter to Attys Heban, Murphree and Lewandowski at time of filing***	1.76	1.76

Countrywide Home Loans Servicing LP
c/o ATTY: Janes, Charles R
Manley Deas Kochalski LLC
P.O. Box 165028
COLUMBUS, OH 43216
Tracking No: R000153594

Countrywide Home Loans Servicing LP
c/o ATTY: GODBEY TESZNAR, CYNTHIA

Manley Deas Kochalski LLC
P O Box 165028
COLUMBUS, OH 43216
Tracking No: R000153595

Nichpor, Michael P
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000153596

Nichpor, Joann M
1153 Timberbrook Court
Perrysburg, OH 43551
Tracking No: R000153597

Mortgage Electronic Registration Systems Inc
3300 S W 34th Avenue, Suite 101
OCALA, FL 34474
Tracking No: R000153598

Wood County Treasurer
c/o ATTY: DOBSON, PAUL A
ONE COURTHOUSE SQUARE
BOWLING GREEN, OH 43402
Tracking No: R000153599

Wood County Treasurer
c/o ATTY: MACK, MARY L
ASST. WOOD CO. PROS.
1 COURTHOUSE SQUARE
BOWLING GREEN, OH 43402
Tracking No: R000153600

Reichert, Jennifer L
c/o ATTY: MURPHREE, R K
200 Dixie Hwy
Rossford, OH 43460
Tracking No: R000153601

Reichert, Jennifer L
c/o ATTY: Lewandowski, John
200 Dixie Highway
Rossford, OH 43460
Tracking No: R000153602

Reichert, Jennifer L
c/o ATTY: HEBAN, KEVIN A
200 Dixie Hwy
Rossford, OH 43460
Tracking No: R000153603

Totals By:	COST	3,200.98	2,684.02
	DEPOSIT	1,691.00	0.00
	INFORMATION	0.00	0.00

*** End of Report ***

2009CV0215

PRLP Holding

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO. COMMON PLEAS COURT, BOWLING GREEN, OHIO
CINDY A. HOFNER, CLERK OF COURTS
BY _____ DEPUTY CLERK
THIS 18TH DAY OF July 2012

FILED
WOOD COUNTY CLERK
COMMON PLEAS COURT
2009 MAY 14 A 10: 14
CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO

Countrywide Home Loans Servicing, L.P.	**Case No. 2009CV0215**
Plaintiff,	**Judge Alan Mayberry**
vs.	**JUDGMENT ENTRY AND DECREE IN FORECLOSURE**
Michael P. Nichpor, et al.	
Defendants.	

This matter is before the Court on Plaintiff's Motion for Default Judgment. The real property that is the subject of this foreclosure action (the "Property") is as follows:

Situated in the City of Perrysburg, County of Wood, State of Ohio, is described as follows:

Lot Number Ninety-nine (99) in Valleybrook Farms, Plat5, City of Perrysburg, Wood County, Ohio.

In response to the Motion for Default Judgment, the Court finds that Michael P. Nichpor, Joann M. Nichpor and Mortgage Electronic Registration Systems, Inc., acting solely as a

JOURNALIZED
MAY 18 2009
Vol 479 Pg 05

E42

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nominee for Decision One Mortgage Company, LLC, LTD. have been served with a Summons and Complaint but are in default for failure to file an Answer or other responsive pleading. As a result, with respect to such defendants, the Court hereby grants Plaintiff's Motion for Default Judgment and enters judgment in favor of Plaintiff for the relief sought by Plaintiff in its Complaint.

The Court further finds that Michael P. Nichpor executed the promissory note referenced in the Complaint (the "Note") and therefore promised, among other things, to make monthly payments on or before the date such payments were due. The Court further finds that the sums due under the Note were accelerated in accordance with the terms of the Note and Mortgage. The Court further finds that Michael P. Nichpor and Joann M. Nichpor executed and delivered the mortgage referenced in the Complaint (the "Mortgage"), that the Mortgage secures the amounts due under the Note.

The Court finds that the Note and Mortgage are in default because payments required to be made under the Note and Mortgage have not been made. The Court further finds that the conditions of the Mortgage have broken, the break is absolute, and Plaintiff is entitled to have the equity of redemption and dower of the current title holders foreclosed.

The Court further finds that there is due to Plaintiff on the Note principal in the amount of $222,642.61 plus interest on the principal amount at the rate of 7.09% per annum from September 1, 2008. The Court further finds that there is due on the Note all late charges imposed under the Note, all advances made for the payment of real estate taxes and assessments and insurance premiums, and all costs and expenses incurred for the enforcement of the Note and Mortgage, except to the extent the payment of one or more specific such items is prohibited by

E42

Ohio law.

As a result, the Court hereby enters judgment for the amount due on the Note in favor of Plaintiff and against Michael P. Nichpor.

The Court finds that the Mortgage was recorded with the County Recorder and is a valid and subsisting first mortgage on the Property. The Court further finds that the parties to the Mortgage intended that it attach to the entire fee simple interest in the Property. The Mortgage is, however, junior in priority under Ohio law to the lien held by the County Treasurer to secure the payment of real estate taxes and assessments. All amounts payable under Section 323.47 of the Ohio Revised Code shall be paid from the proceeds of the sale before any distribution is made to other lien holders.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that unless the sums found to be due to Plaintiff are fully paid within three (3) days from the date of the entry of this decree, the equity of redemption of the defendant title holders in the Property shall be foreclosed and the Property shall be sold free of the interests of all parties to this action. In addition, an order of sale shall issue to the Sheriff of Wood County, directing him to appraise, advertise and sell the Property according to the law and the orders of this Court and to report his proceedings to this Court.

Notice of the time and place of the sale of the Property shall be given to all persons who have an interest in the Property according to the provisions of Section 2329.26 of the Ohio Revised Code.

JOURNALIZED

MAY 18 2009

Vol 479 Pg 07

E42

IT IS FURTHER ORDERED that the Sheriff shall send counsel for the party requesting the Order of Sale a copy of the publication notice promptly upon its first publication.

There is no just reason for delay in entering Judgment as aforesaid.

IT IS SO ORDERED.

Judge Alan Mayberry
Common Pleas Judge

Approved:

Melissa N. Meinhart (0083909)
Manley Deas Kochalski LLC
P. O. Box 165028
Columbus, OH 43216-5028
Telephone: 614-917-1793
Fax: 614-220-5613
Email: mnm@mdk-llc.com
Attorney for Plaintiff

CLERK TO FURNISH TO ALL COUNSEL OF RECORD AND UNREPRESENTED PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR WITH A COPY OF THIS ENTRY INCLUDING THE DATE OF ENTRY ON THE JOURNAL

circulating for approval

Mary Loeffler Mack
Attorney for Wood County Treasurer
One Courthouse Square
Bowling Green, OH 43402
(419) 353-2904

JOURNALIZED
MAY 18 2009
Vol 479 Pg 08 E42

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IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO

Countrywide Home Loans Servicing, L.P.	**Case No. 2010CV0680**
Plaintiff,	**Judge Alan Mayberry**
vs.	**NOTICE OF FILING OF PRELIMINARY JUDICIAL REPORT**
Michael P. Nichpor, et al.	
Defendants.	

Attached hereto as Exhibit A is a Preliminary Judicial Report in reference to the above captioned case.

Respectfully submitted,

Melissa N. Meinhart (0083909)
Manley Deas Kochalski LLC
P. O. Box 165028
Columbus, OH 43216-5028
Telephone: 614-917-1793
Fax: 614-220-5613
Email: mnm@mdk-llc.com
Attorney for Plaintiff

Ref# 09-05587/LME

EXHIBIT A

LandSafe

2380 Performance Drive
Richardson, TX 75082
RGV-C-174
972-498-5244

PRELIMINARY JUDICIAL REPORT INVOICE

7/20/2010

LandSafe File Number:09-6-037768C

Borrower's Name:MICHAEL P NICHPOR

Property Address:
1153 Timberbrook Court
Perrysburg, Ohio 43551

Amount Due:$125.00

First American Title

Judicial Report

Preliminary Judicial Report

ISSUED BY
First American Title Insurance Company

POLICY NUMBER
723-128461

Guaranteed Party Name:	Countrywide Home Loans Servicing, L.P. and/or MERS as appropiate	File No.: 09-6-037788C
Guaranteed Party Address:	c/o Manley, Deas & Kochalski, L.L.C. 1400 Goodale Blvd Suite 200	Effective Date: 7/8/2010
City, State, Zip:	Grandview, OH 43212	

Pursuant to your request for a Preliminary Judicial Report (hereinafter "the Report") for use in judicial proceedings, **FIRST AMERICAN TITLE INSURANCE COMPANY** (hereinafter "the Company") hereby guarantees in an amount not to exceed $222,842.61 *that it has examined the public records* in WOOD County, Ohio as to the land described in Schedule A, that the record title to the land is at the date hereof vested in Michael P. Nichpor and Joann M. Nichpor by instrument recorded in and free from all encumbrances, liens or defects of record, except as shown in Schedule B.

This is a guarantee of the record title only and is made for the use and benefit of the Guaranteed Party and the purchaser at judicial sale thereunder and is subject to the Exclusions from Coverage, the Exceptions contained in Schedule B and the Conditions and Stipulations contained herein.

This Report shall not be valid or binding until it has been signed by either an authorized agent or representative of the Company and Schedules A and B have been attached hereto.

Issuing Agent:	LandSafe Services LLC dba LandSafe Default
Agent Control No:	4040210
Address:	2380 Performance Drive, Bldg C
City, State, Zip:	Richardson TX 75082
Telephone:	972-498-2511

In Witness Whereof, First American Title Insurance Company has caused its corporate name to be hereunto affixed by its authorized officers as of Date of Policy shown in Schedule A.

First American Title Insurance Company

Dennis J. Gilmore
President

Timothy Kemp
Secretary

By:

This jacket was created electronically and constitutes an original document

Authorized Countersignature

CONDITIONS AND STIPULATIONS OF THIS PRELIMINARY JUDICIAL REPORT

1. Definition of Terms

a. "Guaranteed Party": The party or parties named herein or the purchaser at judicial sale.
b. "Guaranteed Claimant": Guaranteed Party claiming loss or damage hereunder.
c "Land": The land described specifically or by reference in Schedule A, and improvements affixed thereto, which by law constitute real property; provided however the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, lanes, ways or waterways.
d. "Public Records": Those records under state statute and, if a United States District Court resides in the county in which the Land is situated, the records of the clerk of the United States District Court, which impart constructive notice of matters relating to real property to purchasers for value without knowledge and which are required to be maintained in certain public offices in the county in which the land is situated.

2. Determination of Liability

This Report together with any Final Judicial Report or any Supplement or Endorsement thereof, issued by the Company is the entire contract between the Guaranteed Party and the Company

Any claim of monetary loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest guaranteed hereby or any action asserting such claim, shall be restricted to this Report.

3. Liability of Company

This Report is a guarantee of the record title of the Land only, as disclosed by an examination of the Public Records herein defined.

4. Notice of Claim to be given to Guaranteed Claimant

In case knowledge shall come to the Guaranteed Party of any lien, encumbrance, defect, or other claim of title guaranteed against and not excepted in this Report, whether in a legal proceeding or otherwise, the Guaranteed Party shall notify the Company within a reasonable time in writing and secure to the Company the right to oppose such proceeding or claim, or to remove said lien, encumbrance or defect at its own cost. Any action for the payment of any loss under this Report must be commenced within one year after the Guaranteed Party receives actual notice that they may be required to pay money or other compensation for a matter covered by this Report or actual notice someone claims an interest in the Land covered by this Report.

5. Extent of Liability

The liability of the Company shall in no case exceed in all the amount stated herein and shall in all cases be limited to the actual loss, including but not limited to attorneys fees and costs of defense, only of the Guaranteed Party. Any and all payments under this Report shall reduce the amount of this Report pro tanto and the Company's liability shall terminate when the total amount of the Report has been paid.

6. Options to Pay or Otherwise Settle Claims; Termination of Liability

The Company in its sole discretion shall have the following options:

a. To pay or tender to the Guaranteed Claimant the amount of the Report or the balance remaining thereof, less any attorneys fees, costs or expenses paid by the Company to the date of tender. If this option is exercised, all liability of the Company under this Report terminates including but not limited to any liability for attorneys fees, or any costs of defense or prosecution of any litigation.
b. To pay or otherwise settle with other parties for or in the name of the Guaranteed Claimant any claims guaranteed by this Report.
c. To continue, re-open or initiate any judicial proceeding in order to adjudicate any claim covered by this Report. The Company shall have the right to select counsel of its choice (subject to the right of the Guaranteed Claimant to object for reasonable cause) to represent the Guaranteed Claimant and will not pay the fees of any other counsel.
d. To pay or tender to the Guaranteed Claimant the difference between the value of the estate or interest as guaranteed and the value of the estate or interest subject to the defect, lien or encumbrance guaranteed against by this Report.

7. Notices

All notices required to be given to the Company shall be given promptly and any statements in writing required to be furnished to the Company shall be addressed to **First American Title Insurance Company, Attn: Claims National Intake Center, 1 First American Way, Santa Ana, California 92707. Phone 888-632-1642.**

EXCLUSIONS FROM COVERAGE

1. The Company assumes no liability under this Report for any loss, cost or damage resulting from any physical condition of the Land.
2. The Company assumes no liability under this Report for any loss, cost or damage resulting from any typographical, clerical or other errors in the Public Records.
3. The Company assumes no liability under the Report for matters affecting title subsequent to the date of this Report or the Final Judicial report or any supplement thereto
4 The Company assumes no liability under this Report for the proper form or execution of any pleadings or other documents to be filed in any judicial proceedings.
5. The Company assumes no liability under this Report for any loss, cost, or damage resulting from the failure to complete service on any parties shown in Schedule B of the Preliminary Judicial Report and the Final Judicial Report or any Supplemental Report issued thereto

First American Title Insurance Company

SCHEDULE A

Policy No. 723-128461

File No.: 09-6-037768C

DESCRIPTION OF LAND

THE LAND REFERRED TO IN THIS COMMITMENT, SITUATED IN THE CITY OF PERRYSBURG, COUNTY OF WOOD, STATE OF OHIO, IS DESCRIBED AS FOLLOWS

LOT NUMBER NINETY-NINE (99) IN VALLEYBROOK FARMS, PLAT 5, CITY OF PERRYSBURG, WOOD COUNTY, OHIO

PARCEL NO. 261300690103018000

PROPERTY COMMONLY KNOWN AS: 1153 Timberbrook Court, Perrysburg, Ohio 43551

First American Title Insurance Company

SCHEDULE B

The matters shown below are exceptions to this Preliminary Judicial Report and the Company assumes no liability arising therefrom.

1. Taxes and assessments as to Permanent Parcel No Q61300690103016000 for the first half of the tax year 2009 in the amount of $2,284.82 are paid. Taxes and assessments for second half of the tax year 2009 in the amount of $2,284.82 are paid Taxes and assessments, if any, for the tax year 2010 are a lien, undetermined, and not yet due and payable.

   Assessed Value. Land $14,000 00 Building $75,320.00 Total $89,320.00

   Notes:
   Special Assessments

   Tree paid in the amount of $14 44
   Lighting paid in the amount of $24.46

2. Mortgage from Michael P Nichpor and Joann M Nichpor husband and wife to (MERS) Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Decision One Mortgage Company, LLC, LTD, dated May 16, 2006 and recorded May 23, 2006 in Book 2656 Page 0868 in the Recorder's Office for the County of Wood, Ohio, securing the Lender an indebtedness in the original principal sum of $228,000.00 MIN # 100077910006225979. Assignment from Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Decision One Mortgage Company, LLC, LTD to Countrywide Home Loans Servicing, L.P. by separate instrument dated February 20, 2009 and filed March 6, 2009 in Book 2888 Page 22 Instrument # 2009 03297, Recorder's Office, Wood County, Ohio.

3. Mortgage from Michael P Nichpor and Joann M Nichpor husband and wife to (MERS) Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Decision One Mortgage Company, LLC, LTD., dated May 16, 2006 and recorded May 23, 2006 in Book 2656 Page 0881 in the Recorder's Office for the County of Wood, Ohio, securing the Lender an indebtedness in the original principal sum of $57,000.00 MIN # 100077910006226415.

4. Judgment in favor of Countrywide Home Loans Servicing, L P. c/o Countrywide Home Loans Servicing, LP and against Michael P. Nichpor dated February 27, 2009 in Case #2009CV215 in the amount of $222,642.61 plus interest, costs and fees of Wood County Records.

   Melissa N Meinhart Manley Deas Kochalski LLC
   P O. Box 165028 Columbus, Ohio 43216

   Notes:
   Case has been dismissed

5. We have made a search of the Bankruptcy PACER Dockets and we find that the Defendant has filed a bankruptcy. A Chapter 7 Bankruptcy, was filed May 18, 2009 by Michael P. Nichpor and Joann M. Nichpor , Case# 09-33308-maw and was discharged on September 28, 2009 and terminated on October 1, 2009.

Issuing Agent	LandSafe Services LLC dba LandSafe Default
Agent Control No:	4040210
Address.	2380 Performance Drive, Bldg C
City, State, Zip:	Richardson TX 75082
Phone:	972-498-2511

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Filing of Preliminary Judicial Report was sent to the following by ordinary U.S. Mail, postage prepaid, on the date indicated below:

Michael P. Nichpor
1153 Timberbrook Court
Perrysburg, OH 43551

Joann M. Nichpor
1153 Timberbrook Court
Perrysburg, OH 43551

Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Decision One Mortgage Company, LLC, LTD.
3300 Southwest 34th Avenue
Suite 101
Ocala, FL 34474

Wood County Treasurer
1 Courthouse Square
Bowling Green, OH 43402

Melissa N. Meinhart

July 29, 2010
Dated

Ref# 09-05587/LME

2009CV0215

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO. COMMON PLEAS COURT, BOWLING GREEN, OHIO
CINDY A. HOFNER, CLERK OF COURTS
BY _____ DEPUTY CLERK
THIS 18th DAY OF July 2012

FILED
WOOD COUNTY CLERK
COMMON PLEAS COURT
2010 JUL 29 P 2:37
CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

Countrywide Home Loans Servicing, L.P.,

Plaintiff,

Vs.

Michael P. Nichpor, et al.,

Defendants.

2009CV0215

Judge Mayberry

ORDER

July 29, 2010

JOURNALIZED
AUG 03 2010
Vol 491 Pg 911

This matter comes before the court on:

1. Plaintiff Countrywide's July 1, 2010, Motion to Vacate Sheriff Sale
2. Jennifer L. Reichert's July 14, 2010, Motion for Order Confirming Sale
3. Plaintiff's July 21, 2010, Memorandum in Opposition to Motion for Order Confirming Sale
4. Jennifer L. Reichert's July 14, 2010, Notice of Invalidity of Attempted 41(A) Dismissal
5. Plaintiff's July 21, 2010, Motion to Strike Intervenor-Applicant's Notice of Invalidity

The plaintiff filed this foreclosure action on February 27, 2009. On April 14, 2009, after service on the defendants, the plaintiff filed a motion for default judgment. This court granted default judgment on May 14, 2009. On May 20, 2009, the plaintiff filed a praecipe for order for sale, however, on May 18, 2009, Defendant Michael P. Nichpor, the signer of the subject promissory note, had filed a Chapter 7 Bankruptcy petition in the United States Bankruptcy Court and an automatic stay was imposed on this case pursuant to 11 U.S.C. § 362. On June 10, 2009, the plaintiff in this case therefore moved this court to vacate the order for sale and withdraw the property from sale. On June 16, 2009, this court vacated the order for sale and withdrew the property from sale. On July 24, 2009, this matter was reinstated to this court's active docket after the bankruptcy court annulled the stay and directed the bankruptcy trustee to abandon the property.

Also on July 24, 2009, the plaintiff filed its alias praecipe for order for sale. The sheriff's sale was scheduled for October 1, 2009 at 10:00 am. On September 29, 2009, the plaintiff again moved to vacate the order for sale and withdraw the property from sale, this time "to provide borrowers additional time to prevent a foreclosure sale". On September 29, 2009, this court granted the motion and again withdrew the property from sale. On April 29, 2010, the plaintiff filed its pluries praecipe for order of sale. A sheriff's sale was scheduled for July 1, 2010 at 10:00 am. The sale was conducted as scheduled and Jennifer L. Reichert was the successful bidder on the property. That same day, July 1, 2010, the plaintiff filed its Motion to Vacate Sheriff Sale, arguing that local counsel for plaintiff had been instructed to cancel the sheriff's sale but that for the reasons stated in the memorandum in support of the motion, local counsel had not cancelled the sale nor successfully communicated to the plaintiff's counsel of record that he was unable to cancel the sale. The plaintiff supplied a proposed journal entry with its motion to vacate the sale but when it appeared that this court would allow time for other parties or interested persons to respond to the motion, the plaintiff, on July 12, 2010, filed its notice of dismissal, pursuant to Civ.R. 41(A). On July 14, 2010, the purchaser, Jennifer L. Reichert, filed a motion to intervene so that she could move the court to confirm the sale. Contemporaneous therewith, Jennifer L. Reichert filed her motion to confirm the sale and her "notice of invalidity of attempted voluntary dismissal pursuant to Civ.R. 41(A)". The plaintiff then moved to quash or strike the foregoing notice and opposed the purchaser's motion to intervene. This court allowed the purchaser to intervene so that it could consider her motion to confirm the sale. On July 16, 2010, the plaintiff re-filed its dismissed case and it was designated by the clerk of courts as Wood County Case 2010CV0680 and assigned to the undersigned, pursuant to Local Rule 4.02(B).

In *NOIC v Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658, (Wood County Case 2005CV0219), the Sixth District Court of Appeals reversed the undersigned for ruling that a

plaintiff in a foreclosure action may not dismiss its case pursuant to Civ.R. 41(A)(1)(a) after an innocent purchaser has successfully bid on the property at a sheriff's sale. According to Civ R. 41(A)(1)(a), a plaintiff may dismiss a case "at any time before the commencement of trial". When this court refused to allow the plaintiff in *Yarger* to dismiss its case after the sheriff's sale had taken place, it was acting on the premise that a "trial" had in fact occurred and that the notice of dismissal had therefore not been timely filed. R.C. 2311.01 defines a "trial" as "a judicial examination of the issues, whether of law or of fact, in an action or proceeding". In *Yarger*, this court was acting under the belief that the matter had been "tried" when the court examined and decided the motion for default judgment. This court disagrees with the view that a decision on a motion for default judgment in a foreclosure case is not a trial for the purposes of Civ.R. 41(A)(1)(a). This court further believes that allowing a plaintiff to dismiss a foreclosure action after a sheriff's sale has occurred is an abuse of the civil rules. Nevertheless, this court is required to follow the law of the district, as articulated by the court of appeals.

Accordingly, the plaintiff's notice of dismissal, filed July 12, 2010, terminated case 2009CV0215. Therefore, all pending motions herein are moot and any motions that have been ruled upon in this matter since the filing of the plaintiff's notice of dismissal should not have been, including this court's granting of intervenor status to Jennifer L. Reichert. The sale, unfortunately, cannot be confirmed.

This matter is deemed dismissed, without prejudice, at plaintiff's costs, as of plaintiff's July 12, 2010, notice of dismissal.

So Ordered.

Judge Alan R. Mayberry

CLERK TO FURNISH TO ALL COUNSEL OF RECORD AND UNREPRESENTED PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR WITH A COPY OF THIS ENTRY INCLUDING THE DATE OF ENTRY ON THE JOURNAL

JOURNALIZED

AUG 03 2010

Vol 491 Pg 913

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

FIFTH THIRD MORTGAGE COMPANY, Plaintiff, v. **PREFERRED BUILDERS OF SOLON, et al.,** Defendants.	CASE NO. 2008 CV 1934 JUDGE JOHN A. ENLOW MAGISTRATE KENT M. GRAHAM **MAGISTRATE DECISION AND JOURNAL ENTRY**

***

I. INTRODUCTION

This matter is before the Magistrate for hearing upon motion of Intervening Party Joseph R. Brady ("Bidder") to require Plaintiff Fifth Third Mortgage Company ("Fifth Third") to show cause why a sale of certain property at a Sheriff sale should not be confirmed by this Court. In response, Fifth Third moves to set aside the Sheriff sale.

At hearing, Fifth Third was represented by Charles R. Janes and the Bidder represented by attorney Frank J. Cimino.

II. FINDINGS OF FACT

On March 16, 2009, Fifth Third was granted default judgment for foreclosure upon certain premises located at 4703 Winchell Road, Mantua, Ohio ("Premises"). When foreclosure was first granted, the Premises did not yet have a street number for an address, but was known as sublot "B" of a housing development. Fifth Third's counsel's firm identified the Premises as "S/L B Winchell Road, Mantua, Ohio."

On March 25, 2009, Fifth Third filed a Praecipe for Order of Sale of the Premises, identifying it as "S/L B Winchell Road, Mantua, Ohio." The Premises was appraised at $140,000.00, which established a minimum bid of $93,334.00. The appraisal took into account that the residence on the property was generally finished on the outside, but largely unfinished on the inside. As shown in the photographs offered at hearing, the interior of the residence was just studs, rough stairs, some mechanical items such as the furnace, and incompletely wired. A local, experienced builder who later inspected the residence concluded that it would cost $148,870.00 to complete the home. The Bidder's mother, a local realtor, testified that the lot itself without the unfinished residence was worth about $60,000.00.

By the time the Sheriff published the sale beginning on May 14, 2009, the Premises had been given an actual street number. The new address was "4703 Winchell Road, Mantua, Ohio." The Sheriff then replaced the original identifier of "S/L B" with the actual street number "4703." The Sheriff used the address of "4703 Winchell Rd., Mantua, OH" in publishing the first Sheriff sale in a local newspaper five times from May 14 through June 11, 2009, published that month's schedule of Sheriff sales on the internet, and mailed written notice of the sale to Fifth Third's counsel. Fifth Third received the Sheriff's notice which used the "4703" street number and was aware of the June 15 sale date. Fifth Third's counsel sent Notice of Sale to the other parties identifying the sale date as being June 15, 2009. The morning of

sale Fifth Third's counsel withdrew the Premises from sale.

On June 19, Fifth Third filed another Praecipe for Sale, still identifying the Premises as "S/L B." The Sheriff's notice of sale again used the address of "4703 Winchell Road" in publishing the August 17 Sheriff sale in a local newspaper five times from July 16 through August 13, 2009, publishing that month's schedule of Sheriff sales on the internet, and again mailing a written notice of the sale to Fifth Third's counsel, just as the Sheriff had done for the June 15 sale. Fifth Third's counsel received the August 17 Sheriff sale publication and mailed Notice of Sale to the parties.

The Sheriff sale went forward as announced on August 17, 2009. Bidder came to the Sheriff sale. Fifth Third did not attend. Bidder offered the minimum bid of $93,334.00. As there were no other bidders, Bidder's bid was accepted. Shortly afterward Bidder posted the required deposit. The Sheriff completed and mailed the Order of Sale to Fifth Third on August 26, 2009.

Bidder immediately set out to obtain a sufficient equity line of credit to post the remaining bid amount. After waiting some time for confirmation, Bidder telephoned the Sheriff a number of times to have the sale confirmed and was told to contact Fifth Third's counsel. After his contacts with Fifth Third's counsel failed to have the sale confirmed, Bidder filed a motion to show cause against Fifth Third as to why the sale should not be confirmed and a Sheriff's deed be delivered to Bidder. On November 4, 2009, Fifth Third responded with a motion to set aside the Sheriff sale.

The testimony at trial established that certain personnel in Fifth Third's counsel's law firm used a computer system to track Fifth Third's foreclosed properties. This tracking included internal information on foreclosed properties and internet searches. The tracking personnel reviewed written notices of foreclosure sales coming to the law firm and internet postings of Sheriff sales in the region to determine sale dates for its foreclosed properties. This tracking system was based upon street names and address numbers. Apparently, the computer system had not been updated with the current "4703" address of the Premises, but rather was still using the outdated "S/L B" address designation.

III. CONCLUSIONS OF LAW

Confirmation of foreclosure sales of real property is governed by R.C. 2329.31(A), which provides, in pertinent part, as follows:

"Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer making the sale, if the court of common pleas finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code, it shall, within thirty days of the return of the writ, direct the clerk of the court of common pleas to make an entry on the journal that the court is satisfied of the legality of such sale and that the attorney who filed the writ of execution make to the purchaser a deed for the lands and tenements."

Whether to confirm or set aside a sheriff sale is within the

sound discretion of the trial court. *Ohio Savings Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 55; *Atlantic Mortgage & Investment Corp. v. Sayers*, 11th Dist. No. 2000-A-0081, 2002-Ohio-844, at 2. In exercising this discretion, a trial court must consider, among other things, the primary purposes of a judicial sale. These include: (1) protecting the interest of the mortgagor-debtor; (2) protecting the unpaid debts of the secured creditors; and (3) promoting the general policy of granting a certain degree of finality to judicial sales. *Ohio Savings Bank v. Ambrose, supra,* at 56; *Society National Bank v. Wolff* (Apr. 26, 1991), Sandusky App. No. S-90-13, unreported. But where there is no irregularity in the proceedings, the sale should generally be confirmed. *Bank One Dayton, N.A. v. Ellington* (1995), 105 Ohio App. 3d 13, 16; *Merkle v. Merkle* (1961), 116 Ohio App. 370, 371; 64 Ohio Jurisprudence 3d, 100, *Judicial Sales*, Section 91.

In this case the mortgage-debtor had no interest in the Premises that he could protect. The mortgage-debtor made no appearance in this case, thus default judgment was granted to Fifth Third. Fifth Third's mortgage, interest, and expenses amounted to over $237,000.00. In addition to Fifth Third's lien, the Premises were also encumbered by judgment liens of Defendant FirstMerit Bank, N.A. ("FirstMerit") amounting to $1.44 million.

As far as protecting the secured creditors, the Sheriff's appraisal found the Premises' value to be $140,000.00 for this uncompleted residence. The bid accepted for the Premises was $93,334.00. Sheriff sales have been confirmed upon lesser bids.

See, e.g., *Chase Manhattan Mortgage Corp. v. Koan*, 6th Dist H-02-011, 2002-Ohio-6182, at 3.

Fifth Third maintains that if it had attended the Sheriff sale, it would have bid a higher, unspecified, price. But the testimony at hearing did not establish that a higher bid by Fifth Third would have ultimately staved off a financial loss. The accepted bid was $93,334.00. The cost of completion was estimated to be $148,870.00. The total expense to the Bidder, excluding loan fees and interest expense, would in all likelihood be around $242,204.00. This is more than double the appraised value of the Premises and even more than Fifth Third's mortgage. There is no evidence supporting the conclusion that Fifth Third would have ultimately sold the Premises for more than the bid accepted at Sheriff sale.

As far as the three other lienholders being protected, they had no hope of recovering anything from the sale of the Premises. One mechanic's lien had been filed January 28, 2006, amounting to $11,207.87, which was behind Fifth Third's $237,000 mortgage filed on July 26, 2005. FirstMerit's judgment liens filed March 5 and March 21, 2007, were also behind Fifth Third's mortgage. The other judgment lien amounting to $14,835.00 and filed September 24, 2007, was behind both Fifth Third's mortgage and FirstMerit's judgment liens.

Finally, the general policy affords judicial sales a certain degree of finality. There were no irregularities in the statutory requirements in the August 17 Sheriff sale. The sale was made in

conformity with R.C. 2329.01 through 2329.61, so it should be confirmed.

Fifth Third primarily claims excusable neglect for its failure to appear at the Sheriff sale. Fifth Third points to the Sheriff's change of address from "S/L B" to an actual street address of "4307" as the cause of its confusion. But there was only one "Winchell Road, Mantua, Ohio" property on the Sheriff sale schedules for both the June 15 and August 17 sales. A cursory review of the Sheriff's August 2009 posting of sales on the internet would have ready identified the Premises. In addition to internet publication, however, the Sheriff had sent written notice directly to Fifth Third's counsel. Fifth Third's counsel admitted that the notices would have been received, but may not have been directed to those persons tracking Sheriff sales.

Further, use of a numerical street address is the usual practice. It better identifies the premises and allows more interested bidders to inspect the foreclosed properties. R.C. 2329.23 actually requires that a numerical street address be published for premises located in municipalities. This is simply good policy.

Finally, but most importantly, Fifth Third never attempted to explain why it was fully aware of the June 15 Sheriff sale, but somehow unaware of the August 17 Sheriff sale. The exact same procedures were used by the Sheriff in both sales. In the June 15 Sheriff sale, Fifth Third was notified in exactly the same manner as the August 17 Sheriff sale. Fifth Third was aware of the June

15 Sheriff sale, but failed to appear at the August 17 sale.

As in the case of *Atlantic Mortgage & Investment Corp., supra,* Fifth Third's counsel's firm had been advised well in advance that the sale was to take place on August 17, but missed the opportunity to bid on behalf of Fifth Third. This does not constitute excusable neglect. *Id.*, at 2.

IV. CONCLUSION

Upon review and consideration of the motions and pleadings filed herein, exhibits, testimony, and affidavits admitted at hearing, and careful examination of the proceedings of the Sheriff sale, the Magistrate finds that the sale was made in all respects in conformity with R.C. 2329.01 through 2329.61. Thus, the Magistrate concludes that Fifth Third's motion to set aside the Sheriff sale is not well taken, but that the Bidder's motion to confirm the Sheriff sale is well taken.

IT IS THEREFORE ORDERED that the motion of Plaintiff Fifth Third Mortgage Company to set aside the Sheriff sale of premises located at 4703 Winchell Road, Mantua, Ohio, be and hereby is denied.

IT IS FURTHER ORDERED that the motion of Intervening Party Joseph R. Brady to confirm the Sheriff sale of the premises located at 4703 Winchell Road, Mantua, Ohio be and hereby is granted, and the sale of said Premises is hereby confirmed, and Bidder's counsel is hereby directed to prepare a confirmation entry and Sheriff deed for the Premises.

Costs taxed to Fifth Third.

The Clerk is directed to serve this decision upon all parties within three days of the date of filing in accordance with Civ.R. 53(D)(3)(a)(iii).

SO ORDERED.

Dated: May 28, 2010

KENT M. GRAHAM, MAGISTRATE
COURT OF COMMON PLEAS

STATE OF OHIO
PORTAGE COUNTY
I Linda K. Fankhauser, Clerk of the Court of Common Pleas, within and for said County hereby certify the foregoing to be a true copy of the Magistrate decision + journal entry filed in the foregoing case.
Linda K. Fankhauser, Clerk
By _____

cc: Charles R. Janes, Attorney for Fifth Third
Brian Green, Attorney for FirstMerit
Paul J. Kray, Attorney for Raymond Builders
Keith R. Kraus, Attorney for United Applicators
Theresa M. Scahill, Attorney for Treasurer
Frank J. Cimino, Attorney for Bidder

This Order or Decision was mailed by ordinary mail to attys/parties by the clerk on 6/3/10
Linda K. Fankhauser, Clerk of Courts
BY RLC Deputy Clerk

00069

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

FIFTH THIRD MORTGAGE COMPANY, Plaintiff, v. **PREFERRED BUILDERS OF SOLON, et al.,** Defendants.	CASE NO. 2008 CV 1934 JUDGE JOHN A. ENLOW **ORDER AND JOURNAL ENTRY**

***

This matter is before the Court to consider the objections to the Magistrate decision filed by Plaintiff Fifth Third Mortgage Company.

Upon review and consideration of the Magistrate decision, the Court determines that there is no error of law or defect on the face of said decision. The Court further finds that the Magistrate decision contains sufficient findings of fact and conclusions of law to allow the Court to make its independent analysis of the issues and to apply the appropriate rules of law in making its final decision and judgment entry in this matter.

In reviewing the objections, the Court finds that said objections are not well taken. Therefore, notwithstanding said objections, the Court adopts the Magistrate decision and its conclusions, findings, and entry of judgment as the Court's own.

IT IS THEREFORE ORDERED that the motion of Plaintiff Fifth Third Mortgage Company to set aside the Sheriff sale of premises located at 4703 Winchell Road, Mantua, Ohio, be and hereby is denied.

IT IS FURTHER ORDERED that the motion of Intervening Party Joseph R. Brady to confirm the Sheriff sale of the premises located at 4703 Winchell Road, Mantua, Ohio be and hereby is granted, and the sale of said Premises is hereby confirmed, and Bidder's counsel is hereby directed to prepare a confirmation entry and Sheriff deed for the Premises.

Costs taxed to Fifth Third.

The Clerk is directed to serve upon all parties notice of this judgment and its date of entry upon the journal in accordance with Civ. R. 58(B).

SO ORDERED.

JOHN A. ENLOW
JUDGE, COURT OF COMMON PLEAS

STATE OF OHIO
PORTAGE COUNTY
I Linda K. Fankhauser, Clerk of the Court of Common Pleas, within and for said County hereby certify the foregoing to be a true copy of the
Order & Journal Entry
filed in the foregoing case.
Linda K. Fankhauser, Clerk
By

cc: Charles R. Janes, Attorney for Fifth Third
Brian Green, Attorney for FirstMerit
Paul J. Kray, Attorney for Raymond Builders
Keith R. Kraus, Attorney for United Applicators
Theresa M. Scahill, Attorney for Treasurer
Frank J. Cimino, Attorney for Bidder

1987 WL 8490
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Greene County.

Martin COATES, Plaintiff-Appellee,
v.
Louis NAVARRO, et al., Defendants-Appellants.

Nos. 86-CA-11 and 86-CA-18. | March 27, 1987.

Attorneys and Law Firms

Robert L. Seeley, Centerville, for Martin J. Coates.

Wayne H. Dawson of Turner, Granzow & Hollenkamp, Dayton, for appellants Louis Navarro, Irene Navarro and Mortgage One, Inc.

Lloyd H. O'Hara and Robert M. Curry of Smith & Schnacke, Dayton, for appellant, Catherine H. Hannaford.

Opinion

BROGAN, Judge.

*1 The present appeal involves two consolidated cases. The first action involved a claim brought by Martin Coates for the foreclosure of a judgment lien. The second action was maintained by Louis Navarro and others for a declaratory judgment. The causes were combined below and the trial was bifurcated so that the only issue to be determined by the court was the validity of the judgment obtained by Martin Coates and the certificate issued thereon against real estate located at 645 Wyckshire Court, Fairborn, Ohio.

I. *FACTS*

Essentially all of the pertinent facts concerning the validity of the judgment were stipulated below. Based on the stipulations and other evidence adduced at trial, the court made the following factual findings:

1. On August 30, 1979, Phillip C. Hannaford signed and delivered to Coates a cognovit promissory note in the original principal sum of $32,500.00.

2. On October 1, 1979, Phillip C. Hannaford and Coates entered into a Land Installment Contract in which Phillip C. Hannaford agreed to purchase from Coates the Centerville Property for a total purchase price of $92,500.00.

3. At sometime after October 1, 1979, Phillip C. Hannaford did reside in a residential home located at 8890 Wells Spring Point, Centerville, Ohio (the "Centerville Property") which was constructed as a single-family residence and which was owned by Coates.

4. The cognovit note was executed and delivered to Coates as the down payment for the land contract.

5. On April 24, 1984, Coates filed a Petition in Case No. 84-1092 in the Common Pleas Court of Montgomery County, Ohio, to obtain a Cognovit Note Judgment in the sum of $49,257.83 together with interest thereon at 11.25% per annum from

March 30, 1984, against Phillip C. Hannaford for failure to pay the principal and interest which had become due and payable on the cognovit note.

6. On April 24, 1984, an Answer was filed on behalf of Phillip C. Hannaford in Case No. 84-1092 in the Common Pleas Court of Montgomery County, Ohio, in which John R. Wykoff confessed judgment against Phillip C. Hannaford upon the cognovit note by virtue of the warrant of attorney annexed to the cognovit note.

7. On April 24, 1984, a Judgment Entry was entered by the Common Pleas Court of Montgomery County, Ohio, in Case No. 84-1092 in which the Common Pleas Court of Montgomery County, Ohio, entered judgment in favor of Coates and against Phillip C. Hannaford upon a cognovit note in the sum of $49,257.83 together with interest thereon at 11.25% per annum from March 30, 1984, and Coates' cost of action in the sum of $30.00.

8. On April 24, 1984, the Clerk of Courts of Montgomery County, Ohio, issued a Certificate of Judgment for a Lien upon Lands and Tenements against Phillip C. Hannaford and in favor of Coates in the sum of $49,257.83 together with interest thereon at 11.25% per annum from March 30, 1984, plus $30.00 costs.

9. On April 25, 1984, the Certificate of Judgment was filed in the Office of the Clerk of Courts of the Common Pleas Court of Greene County, Ohio, in Judgment Docket 84CJ0300.

*2 10. On April 25, 1984, Phillip C. Hannaford, and his former wife, Catherine H. Hannaford, were the fee simple owners of a single-family residential home located at 645 Wyckshire Court, Fairborn, Greene County, Ohio 45323 (the "Fairborn Property").

11. On May 4, 1984, Phillip C. Hannaford filed in the Common Pleas Court of Montgomery County, Ohio, in Case No. 84-1092 a Motion for Relief after Judgment pursuant to Rule 60B(3) of the Ohio Rules of Civil Procedure in which he sought to vacate the Judgment Entry which was entered against him by the Montgomery County Common Pleas Court on April 24, 1984.

12. On May 14, 1984, Coates filed his Memorandum in Contra to Phillip C. Hannaford's Motion for Relief from Judgment.

13. On May 18, 1984, Phillip C. Hannaford and Catherine H. Hannaford, in consideration of the sum of $99,000.00 paid by the Navarros, transferred and conveyed the Fairborn Property to the Navarros by General Warranty Deed. The General Warranty Deed was thereafter recorded on May 22, 1984, in Deed Volume 216 at page 744 of the Deed Records of Greene County, Ohio.

14. On June 1, 1984, a Decision and Entry was entered by the Common Pleas Court of Montgomery County, Ohio, in which the Common Pleas Court of Montgomery County, Ohio, overruled Phillip C. Hannaford's Motion for Relief from Judgment.

15. On July 12, 1984, Coates and his wife, Antoinette Coates, filed a Complaint in Case No. 84-1858 in the Common Pleas Court of Montgomery County, Ohio, to foreclose the Land Contract.

16. On October 18, 1984, Coates, and his wife, Antoinette Coates, filed a Motion for Summary Judgment in Case No. 84-1858 in the Common Pleas Court of Montgomery County, Ohio, to obtain a Summary Judgment upon their Complaint to foreclose the Land Contract.

17. On December 10, 1984, a Judgment Entry was entered by the Common Pleas Court of Montgomery County, Ohio, in Case No. 84-1858 in which the Common Pleas Court of Montgomery County, Ohio, entered judgment in favor of Coates and his wife, Antoinette Coates, and against Phillip C. Hannaford and awarded a judgment of foreclosure and cancellation of the Land Contract.

18. On March 1, 1985, the Sheriff of Montgomery County, Ohio, sold by public auction the Centerville Property to Coates for a purchase price of $86,000.00.

19. The foreclosure action filed by Mr. Coates on this same property in Montgomery County, Ohio, which went to judgment, now shows a dismissal order of record signed by Judge Kilpatrick and signed by Mr. Seely. And as of last Friday Mrs. Hannaford filed her motion to set aside that dismissal order as being improper since that judgment had been rendered.

That she has filed an answer in that case and a motion to intervene and those matters are pending.

(Note: Stipulation No. 19 made during trial of "validity" on September 30, 1985.)

20. On June 6, 1986, Catherine Hannaford's motion to intervene and vacate the dismissal filed in the land contract foreclosure action was overruled.

A non-jury trial was held on September 30, 1985 to determine the validity of Coates' cognovit note judgment and judgment lien. On November 18, 1985, the trial court rendered findings of fact and conclusions of law. The court held that the cognovit note judgment and the certificate of judgment issued thereon were valid. A final judgment entry was filed on January 16, 1986 and specifically noted that there was no just reason for delay in accordance with Civ.R. 54(B).

*3 On February 10, 1986, Louis and Irene Navarro filed a timely notice of appeal. Catherine Hannaford filed a timely notice of appeal on February 18, 1986. The parties appeal the trial court's judgment rendered below.

II. *ISSUES PRESENTED*

Appellants assert two assignments of error on appeal. Appellants' first assignment of error claims the trial court erred in finding that Revised Code Section 2323.13(E)(1), which prohibits the use of cognovit notes in consumer loan transactions, does not apply to real estate transactions.

The validity of a warrant of attorney to confess judgment is recognized by both statute and decision in Ohio. Cognovit notes are lawful and the entry of a judgment as authorized by a cognovit clause does not, per se, violate the due process guaranties of the Constitution. However, pursuant to R.C. Section 2323.13(E), a warrant of attorney to confess judgment is invalid in connection with consumer loans or consumer transactions.1 R.C. 2323.13(E) provides in pertinent part,

(E) A warrant of attorney to confess judgment contained in any instrument executed on or after January 1, 1974, arising out of consumer loan *or* consumer transaction, is invalid and the court shall have no jurisdiction to render a judgment based upon such a warrant. (Emphasis ours).

....

(1) 'Consumer loan' means a loan to a natural person and the debt incurred is primarily for a personal, family, educational, or household purpose. The term 'consumer loan' includes the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor; the creation of the debt by a credit to an account with the lender upon which the debtor is entitled to draw; and the forbearance of debt arising from a consumer loan.

In the present action, the trial court held as a matter of law that R.C. 2323.13(E) does not apply to real estate transactions. In reaching its decision, the court relied on *Vroman v. Halisak* (1984), 22 Ohio App.3d 14. In *Vroman,* appellants had executed a cognovit note for $20,000 as part consideration for the purchase of a house and farm. Appellants defaulted on the note and judgment was taken against them on a warrant of attorney. Appellants filed a Civ.R. 60(B) motion claiming the judgment was void under R.C. 2323.13(E). The trial court overruled the motion.

On appeal to the Cuyahoga Court of Appeals, Judge Jackson commented on the applicability of R.C. 2323.13(E),

These provisions are unambiguous. In defining a "consumer loan" and a "consumer transaction," the statute obviously refers to personalty, goods, services, and intangibles. No reference is made to a transaction which involves real estate. Consequently, we hold that R.C. 2323.13(E)(1) does not apply to real estate transactions. In reaching this decision, it is appropriate to quote from a recent decision of the Ohio Supreme Court:

" * * * [I]t is well-settled that when a statute is free from ambiguity this court will not, under the guise of judicial interpretation." * * * delete words used or * * * insert words not used [within a statute].' Columbus-Suburban Coach Lines v. Pub. Util. Comm. (1969), 20 Ohio St.2d 125, 127 [49 O.O.2d 445]; Wheeling Steel Corp. v. Porterfield (1970), 24 Ohio St.2d 24, 28 [53 O.O.2d 13]; Bernstfini v. Bd. of Edn. (1979), 58 Ohio St.2d 1, 4 [12 O.O.3d 1]; Dougherty v. Torrence (1982), 2 Ohio St.3d 69, 70; Ohio Assn. of Pub. School Emp. v. Twin Valley Local School Dist. Bd. of Edn. (1983), 6 Ohio St.3d 178, 181." State, ex rel. Molden v. Callander Cleaners Co. (1983), 6 Ohio St.3d 292, 294.

*4 *Id.* at 17-18.

Although the *Vroman* case is instructive, we decline to follow the line of reasoning adopted by the Cuyahoga Court of Appeals. The critical issue presented is not whether the loan was incurred to purchase real estate, but rather whether the debt incurred was primarily for a personal, family, educational, or household purpose.

The statute provides a two step test to determine whether a party is entitled to protection under R.C. 2323.13(E). First, the loan must be made to a natural person. Clearly, appellant satisfies this portion of the test. The second requirement necessitates that the debt incurred is primarily for a personal, family, educational or household purpose. The *Vroman* court unduly restricted the provisions of the statute by finding it referred only to personalty, goods, services, and intangibles, and not to transactions involving real estate. The purchase of a personal residence is admittedly one of the most significant obligations a consumer will ever incur. No distinction is made in R.C. 2323.13(E)(1) between a debt incurred for personal property as opposed to one incurred for real property.

In reaching a decision under this section, the trial court must inquire into the party's primary purpose for incurring the obligation. A transaction need only be entered into *primarily* for a personal purpose, not exclusively personal, to be within the scope of the statute.

The court below refused to enter a particular finding on the question of Mr. Hannaford's primary purpose for incurring the obligation. In light of the conflicting evidence in the record, we would normally remand this issue for further consideration by the court below. However because of our resolution of the second assignment, a remand for resolution of this factual issue would serve no useful purpose. Appellants' first assignment of error is well taken.

Before considering appellants' second assignment of error, a review of several pertinent facts is necessary:

1) April 24, 1984, Appellee-Coates obtained judgment on the cognovit notes, a certificate of judgment was issued thereon.

2) April 25, 1984-certificate of judgment was filed in Greene County resulting in lien on Fairborn property.

3) July 12, 1984-Coates filed complaint to foreclose land installment contract on Centerville property.

4) December 10, 1984-Judgment entry declares Centerville property foreclosed and land installment contract terminated.

5) December 11, 1984-Coates filed foreclosure action in Greene County on Fairborn property seeking to recover on cognovit note judgment.

6) July 19, 1985-Dismissal entry filed in action foreclosing Centerville property.

Preliminarily, we must consider the effect of the dismissal entry filed in the Centerville foreclosure action. Appellee claims that because the foreclosure action was dismissed, the matter stands as if the case was never commenced. He reasons therefore, that appellants' second assignment of error is moot because R.C. 5313 has no applicability unless and until action is brought on the land installment contract.

*5 A review of the record in the Centerville foreclosure proceeding reveals that a "judgment entry" was filed on December 10, 1984 which declared a judgment against Phillip C. Hannaford of foreclosure, cancellation of the land contract and an order of sale. Further filings in the matter evidence an appraisal of the property, advertisements of sheriff sale, an order of sale and report of sheriff which stated the property had sold to appellee for $86,000. Thereafter, the dismissal entry is of record.

Although the sale was apparently never confirmed, a judgment for the vendor operates to cancel the land contract as of the date specified by the court. *See,* R.C. 5313.09. The decree of foreclosure and order of sale on December 10, 1984 was binding on appellee and was subject only to change by being vacated in accordance with Civ.R. 60(B). It was irregular for the court below to grant appellee a voluntary dismissal of the matter. The consequence of carrying the foreclosure proceeding to judgment was that appellee made an election of his remedy as provided for in R.C. Chapter 5313. The fact that the sale was never confirmed bears no relationship to the initial election to foreclose. Accordingly, the issue of whether R.C. 5313.10 prohibited appellee's action to foreclose the Fairborn property is properly before this court.

Revised Code Section 5313.10 provides,

The election of the vendor to terminate the land installment contract by an action under section 5313.07 or 5313.08 of the Revised Code is an exclusive remedy which bars further action on the contract unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee's use. In such case the vendor may recover the difference between the amount paid by the vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use.

In *Dalton v. Acker* (1981), 5 Ohio App.3d 150, 151 the Court of Appeals for Ashland County stated that the prohibition of "further action on the contract" is plainly a bar to a deficiency judgment. In the event foreclosure and judicial sale are elected, the vendor is entitled to sale proceeds up to and including the unpaid balance on the land installment contract. In *Dalton,* the trial court granted plaintiffs a judgment of foreclosure on a land installment contract and $20,792.86 for the balance due on the contract. The appellate court reversed the personal money award finding it was a deficiency judgment.

When the sale proceeds are less than the unpaid balance, the vendor is limited to the sale amount plus the difference between the amount paid on the contract and the fair rental value plus deterioration or destruction of the property occasioned by the vender's use. R.C. 5310.10; *Dalton, supra, Kathera v. Stroupe* (Sept. 12, 1984) Summit App. No., 11693, unreported.

In *Good Shepherd Baptist Church Inc. v. City of Columbus* (1984), 20 Ohio App.3d 228, Douglas and Barb Kelley purchased premises on Cleveland Avenue for $31,000 on a land installment contract. In lieu of a cash down payment, the Kelley's executed and delivered to the vendor a note and mortgage for $3,000 on real estate located on East 15th Avenue in which Mr. Kelley owned a one-half interest. When the Kelley's defaulted on their Cleveland Avenue property payments, appellant filed an action to regain possession of the property and cancellation of the land contract. Appellant was granted the relief prayed for in February of 1982.

*6 Prior to appellant's judgment in November 1979, the first mortgage holder on the Fifteenth Avenue property, the North Central Mortgage Corporation, foreclosed its mortgage lien, and eventually that property was acquired by the appellee city of Columbus.

In January 1983, appellant brought an action seeking to foreclose the mortgage and seeking recovery of $3,000 from the appellee, city of Columbus, on the theory that, as the current owner of the premises upon which the Kelley mortgage exists, the city was liable for the indebtedness to appellant.

The trial court declared the mortgage void and cancelled of record and dismissed appellants' complaint. On appeal, the Franklin County court affirmed finding that, because appellant elected to terminate the land installment contract under R.C. 5313.08, he was barred from seeking the $3,000 down payment by foreclosing a mortgage given as additional security upon the Kelley's property. *Id.* at 229.

In the present action, appellee argues, and the court below agreed, that the note given as a down payment on the Centerville property was effectively separated and independent from the installments under the land contract. The court therefore found that appellee's action to foreclose the Fairborn property was not one for deficiency such that R.C. 5313.10 prohibited the proceeding. Appellants however contend that the down payment was part of the purchase price under the land contract and cannot be separated merely because a separate note was taken.

We find appellants' argument more persuasive. In lieu of a cash down payment, Mr. Hannaford, as a term of the land installment contract executed a note for $32,500. Title was reserved in appellee until the entire $92,500 purchase price was paid. All payments as a whole were the essence of the contract and indicate that the down payment note was not severable. *See generally,* 18 Ohio Jurisprudence 3d, 89 Contracts Sec. 191. The note was essentially an additional "installment" under the contract.

Having elected to foreclose on the Centerville property, appellee's proceeding to execute on the cognovit judgment was clearly prohibited by R.C. 5313.10. The *Good Shepherd* case is particularly instructive in the present situation. Appellee's action to foreclose the land installment contract was commenced and taken to judgment. Thereafter, appellee attempted to foreclose on real property which was subject to the lien obtained on the cognovit judgment. The fact that appellee obtained judgment on the note *prior* to the commencement of the foreclosure action on the Centerville property does not negate the applicability of R.C. 5313.10. The proceeding was nevertheless "further action on the contract."

Appellee argues that vendors who accept a note as a down payment instead of cash will be precluded from ever recovering the amount due under the note. We disagree. Upon foreclosure, appellee is entitled to the unpaid balance due on the land installment contract. Because the note was effectively incorporated into the land contract, the "unpaid balance" referred to in R.C. 5313.07 includes amounts owed on the note as well.

*7 Accordingly, we find appellants' second assignment of error is well taken.

In light of the foregoing, the judgment of the trial court is reversed and the cause is remanded for proceedings consistent with this opinion. (i.e. resolution of remaining claims).

WOLFF and FAIN, JJ., concur.

Footnotes

1 The parties concede that the present action does not involve a consumer transaction.

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Wood County.

The NORTHERN OHIO INVESTMENT COMPANY, Appellant
v.
Julie A. YARGER, et al., Appellee.

No. WD-06-025. | Decided Sept. 8, 2006.

Attorneys and Law Firms

Marvin A. Robon and Cynthia G. Tesznar, for appellant.

Opinion

PARISH, J.

*1 { ¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas which ordered stricken the appellant's voluntary notice of dismissal filed pursuant to Civ.R. 41(A)(1)(a). The trial court sua sponte declared the filing a nullity and ordered it stricken from the record. For the reasons set forth below, this court reverses the judgment of the trial court.

{ ¶ 2} Appellant, The Northern Ohio Investment Company ("NOIC") sets forth the following sole assignment of error:

{ ¶ 3} "The trial court erred in striking plaintiff's notice of dismissal which was filed before the sale was confirmed."

{ ¶ 4} The following undisputed facts are relevant to the issues raised on appeal. In March 2005, NOIC filed a complaint in foreclosure against Julie A. Yarger ("mortgagor"). Mortgagor did not appear in the foreclosure action and has not denied the amount due or order of foreclosure.

{ ¶ 5} On August 18, 2005, the trial court entered a judgment foreclosure and order of sale. A sheriff's sale of the underlying premises was scheduled for November 3, 2005. This initial sheriff's sale was subsequently canceled due to mortgagor's bankruptcy filing. NOIC secured relief from stay and the sheriff's sale was rescheduled to January 26, 2006.

{ ¶ 6} Counsel for NOIC arrived a short time after 10:00 a.m. to discover the subject property had been the first offered for sale. A third-party bid had already been accepted in an amount of $58,000. This bid is equivalent to approximately half the value of the property. NOIC had been prepared to bid the $110,000 actual value at the sale. An informal attempt by NOIC to resolve the matter by offering the prospective purchasers $1,000 for their inconvenience was promptly rejected by them as insufficient and not "agreeable." On the contrary, the record shows the prospective purchasers engaged in passioned communications with the trial judge via correspondence and an "affidavit" to combat NOIC's legal challenge to completion of the sale. The letter and affidavit were dated and file-stamped January 31, 2006, evidencing personal delivery to the court. We carefully reviewed both documents and find they are not in any way rooted in law or authority relevant to this appeal.

{ ¶ 7} In this correspondence, the prospective purchasers zealously suggested to the judge that if the sale was not permitted to be completed he would somehow be "compromising the legitimacy of the auction format itself." The record contains no legal basis for such a hyperbolic claim.

{ ¶ 8} In addition, the "affidavit" of the prospective purchasers purports to give third party testimony ostensibly favorable to

affiant by a well known Wood County attorney. There was no affidavit or testimony in the record from the attorney. The purported testimony pertained to the exact amount of time counsel for NOIC was delayed in arriving late at the sale. That issue, as will be explained below, is wholly irrelevant to the legitimacy of appellant's notice of voluntary dismissal.

*2 { ¶ 9} On February 6, 2006, a week after appellant submitted the letter and affidavit to the judge, NOIC filed a motion to set aside the sale. It was denied. As the sale had not yet been confirmed or completed, NOIC filed a voluntary notice of dismissal pursuant to Civ.R. 41(A)(1)(a) on March 21, 2006. On March 27, 2006, the trial court sua sponte declared the notice of voluntary dismissal a nullity and ordered it stricken from the record. This appeal of that order was filed on March 31, 2006.

{ ¶ 10} In its sole assignment of error, appellant contends the trial court erred in its sua sponte striking of NOIC's voluntary notice of dismissal. In support, appellant argues the trial court lacked any basis in legal authority to declare the notice of dismissal a nullity and order it stricken. It was appellant's first voluntary notice of dismissal in the case. The case never proceeded to trial. The notice of voluntary dismissal was filed before the sheriff's sale was confirmed and before title to the property transferred.

{ ¶ 11} Civ.R. 41(A)(1)(a) establishes a plaintiff's unilateral right to voluntarily dismiss all claims asserted by the plaintiff. Civ.R. 41(A)(1)(a) states in relevant part:

{ ¶ 12} "Subject to the provision of Civ.R. 23(E), Civ.R. 23. 1, and Civ.R. 66, a plaintiff, *without order of the court,* may dismiss all claims asserted by that plaintiff against the defendant by doing either of the following:

{ ¶ 13} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant." (Emphasis added).

{ ¶ 14} Controlling case law establishes that a notice of voluntary dismissal, such as that underlying this action, is unilateral, self-executing, and effective regardless of court approval. *Murphy v. Ippolito,* 8th Dist. No. 80682, 2002-Ohio-3548, at ¶ 5. The Supreme Court of Ohio has consistently held a plaintiff may dismiss an action pursuant to Civ.R. 41(A)(1) without order of the court. *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 126.

{ ¶ 15} Case law makes clear a proper notice of voluntary dismissal filed pursuant to Civ.R. 41(A)(1) is fully effectuated upon its filing by the plaintiff. The act of filing the notice of voluntary dismissal automatically terminates the case. It requires no intervention by the court and is valid regardless of court approval. *Peyton v. Rehberg* (Apr. 14, 1997), 3rd Dist. No. 70964, at ¶ 6.

{ ¶ 16} In its judgment entry purporting to sua sponte strike plaintiff's notice of voluntary dismissal, the court offers no legal basis in support of its action. The court unilaterally concludes, "a plaintiff in a foreclosure action, however, may not dismiss the complaint pursuant to Civ.R. 41(A)(1)(a) after the property has been sold at sheriff's sale."

{ ¶ 17} In truth, the record shows there was not a completed sale of the property at the time of appellant's filing of voluntary dismissal. Rather, there had been an accepted bid. The sale had not been confirmed by the trial court. Title to the property had not been transferred to the prospective purchaser at the time of filing the notice of voluntary dismissal. There was neither a trial nor a completed sale.

*3 { ¶ 18} It was during the pendency of sale in which NOIC filed a self-executing notice of voluntary dismissal. We find no compelling or persuasive legal authority to suggest a unilaterally self-executing notice of voluntary dismissal is invalidated by an unconfirmed sheriff's sale.

{ ¶ 19} We review the trial court's actions in sua sponte striking the voluntary notice of dismissal pursuant to an abuse of discretion standard. The term an abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{ ¶ 20} We have thoroughly reviewed the record in this matter. Controlling case law dictates a proper notice of voluntary dismissal is self-executing upon its filing without court approval. This right of voluntary dismissal is absolute. The record has no evidence that NOIC's filing did not comport with Civ.R. 41(A)(1)(a). Given the propriety of NOIC's filing a notice of voluntary dismissal, we find the trial court judgment unreasonable and arbitrary. It was an abuse of discretion. The dismissal

was self-executing, fully effectuated upon its filing, and is hereby reinstated. Appellant's assignment of error is found well taken.

{¶21} On consideration whereof, the judgment of the Wood County Court of Common Pleas is reversed and remanded for execution of this court's judgment. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

MARK L. PIETRYKOWSKI, WILLIAM J. SKOW and DENNIS M. PARISH, JJ., concur.

Parallel Citations

2006 -Ohio- 4658

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