[Cite as *Auto Loan, Inc. v. Sisler*, 2022-Ohio-3282.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

AUTO LOAN, INC., Plaintiff-Appellee, - v - SARAH R. SISLER, Defendant-Appellant.	**CASE NO. 2021-P-0099** Civil Appeal from the Municipal Court, Kent Division Trial Court No. 2020 CVF 01082 K

O P I N I O N

Decided: September 19, 2022
Judgment: Affirmed in part, reversed in part, and remanded

Tracee D. Hilton-Rorar, 80 Thorlone Avenue, Akron, OH 44312 (For Plaintiff-Appellee).

Jason M. Rebraca, Johnson & Johnson Law Firm, 12 West Main Street, Canfield, OH 44406; *Michael L. Berler, Ronald I. Frederick,* and *Michael L. Fine,* Frederick & Berler LLC, 767 East 185th Street, Cleveland, OH 44119 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Sarah R. Sisler, appeals the September 10, 2021 order of the Portage County Municipal Court, Kent Division, adopting the Magistrate's Decision granting the motion to dismiss filed by appellee, Auto Loan, Inc. For the reasons set forth herein, the judgment is affirmed in part, reversed in part, and remanded.

{¶2} In September 2020, Auto Loan, Inc. filed a small claims action against Ms. Sisler alleging she owed it approximately $4,000 plus interest as a result of a breach of the Retail Installment Contract and Security Agreement Ms. Sisler signed. Ms. Sisler filed

an answer, a counterclaim, and a motion to transfer the matter to the general division of the municipal court. The court granted the motion to transfer.

{¶3} Auto Loan, Inc. filed a motion to dismiss Ms. Sisler's counterclaim; Ms. Sisler filed a class action counterclaim, which Auto Loan, Inc. moved to strike and the court denied. The class action counterclaim was amended, and Auto Loan, Inc. moved to dismiss it and a motion to transfer to small claims court.

{¶4} The matter was heard before a Magistrate who ordered, inter alia, that the motion to transfer to small claims court be denied. It also found that Auto Loan, Inc. did not improperly file actions in the small claims division of the municipal court because it is not an assignee pursuant to R.C. 1925.02(A)(2)(ii) and it did not file complaints exceeding the small claims division monetary jurisdictional limits. It also found that a declaratory judgment was not the proper method to determine if prior judgments have been properly adjudicated. In so finding, the Magistrate granted Auto Loan, Inc.'s motion to dismiss the First Amended Class Action Counterclaim.

{¶5} Upon review, the municipal court adopted the magistrate's decision as part of its judgment. Ms. Sisler now appeals the dismissal of her class action counterclaim, assigning three errors for our review. The first states:

> **{¶6}** The Trial Court erred in finding that Auto Loan, Inc. is not an "assignee" under R.C. § 1925.02(A)(2)(ii) because it received its assignment of rights before a legal cause of action accrued with respect to those rights.

{¶7} Ms. Sisler argues this court should review the dismissal pursuant to Civ.R. 12(B)(6) de novo, while Auto Loan argues that because Ms. Sisler did not provide a transcript of the hearings to the trial court which reviewed the magistrate's findings, both this court and the trial court must accept all the magistrate's factual findings as true and

review only for plain error. It is undisputed that Ms. Sisler did not provide the trial court with a transcript of the hearing; she maintains, however, that she only raised questions of law, making the inclusion of a transcript unnecessary. Conversely, inherent in Auto Loan's argument is its belief that the matter of whether Auto Loan is an assignee as contemplated by R.C. 1925.02(A)(2)(ii) is a question of fact.

{¶8} This court had previously stated "whether one is an assignee is a question of fact to be determined by the trier of fact * * *." *Lakeside Utilities Corp. v. Detrick*, 11th Dist. Ashtabula No. 1093, 1982 WL 5796, *4 (June 25, 1982), citing *Smith v. Barrick*, 151 Ohio St. 201 (1949). Accordingly, without the transcript of the hearing before the magistrate, the trial court was required to accept the factual findings, including the finding that Auto Loan was not an assignee, as true. *Estate of Stepien v. Robinson*, 11th Dist. Lake No. 2013-L-001, 2013-Ohio-4306, ¶28, citing *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730 (1995) ("When a party fails to file a transcript of the evidence presented at the magistrate's hearing, the trial court, when ruling on the objections, is required to accept the magistrate's findings of fact and to review only the magistrate's conclusions of law based on those factual findings."). Similarly, our review on this finding of fact is reviewed for plain error. *State ex rel. Pallone v. Ohio Court of Claims*, 143 Ohio St.3d 493, 2015-Ohio-2003, ¶11; *see also DiNunzio v. DiNunzio*, 11th Dist. Lake No. 2006-L-106, 2007-Ohio-2578, ¶16. "'Plain error' is often construed to encompass 'error[s] of law or other defect[s] evident on the face of the magistrate's decision,' which prohibit the adoption of a magistrate's decision even in the absence of objections." *Id.* quoting Civ.R. 53(D)(4)(c). "[A]n appellate court will only reverse if it finds the trial court adopted the magistrate's decision when there was clear error of law or other

defect on its face." *Smith v. Treadwell*, 11th Dist. Lake No. 2009-L-150, 2010-Ohio-2682, ¶25.

{¶9} The face of the contract clearly shows the agreement was assigned to Auto Loan. However, the Magistrate found that Auto Loan was not an assignee as was intended by the drafter of R.C. 1925.02(A)(2)(a)(ii). On appeal, Auto Loan contends that the intent behind the general prohibition of assignee use of small claims court actions is to prevent collection agencies from using small claims court to bring such actions. However, there is no indication of this intent in the Ohio legislative history.

{¶10} "Unambiguous statutes are to be applied according to the plain meaning of the words used * * *." *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81 (1997). Black's Law Dictionary defines assignee as "[s]omeone to whom property rights or powers are transferred by another." ASSIGNEE, Black's Law Dictionary (11th ed. 2019). The drafters of R.C. 1925.02 could have limited the prohibition on assignments to, for example, assignments that occurred after the cause of action accrued. The statute includes no such limiting language but wholly excludes claims brought by assignees. The language of R.C. 1925.02(A)(2) unambiguously excludes assignees from the small claim court's jurisdiction. Courts must apply the plain meaning of statutes, without inserting or deleting words. *Burrows, supra.*

{¶11} Accordingly, we find the magistrate committed plain error by finding that Auto Loan was not an assignee. Ms. Sisler's first assignment of error has merit.

{¶12} Her second states:

> **{¶13}** The Trial Court erred in finding that claims for interest that accrued prior to the filing of a Small Claim Action are not included in calculating the $6,000 jurisdictional limit under R.C. § 1925.02(A)(1).

{¶14} Ms. Sisler's argument under this assigned error is that because the Municipal Court lacks subject-matter jurisdiction over cases seeking over $15,000 exclusive of post-judgment interest, the small claims court is likewise limited. Auto Loan asks us to give R.C. 1925.02(A)(1) it's plain meaning.

{¶15} R.C. 1901.17 governs the monetary limit of the Municipal Court and states, in pertinent part:

> **{¶16}** A municipal court shall have original jurisdiction only in those cases in which the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed fifteen thousand dollars * * *.
>
> **{¶17}** Judgment may be rendered in excess of the jurisdictional amount, when the excess consists of interest, damages for the detention of personal property, or *costs accrued after the commencement of the action*. (Emphasis added.)

{¶18} Stated differently, the monetary limit for the Municipal Court is $15,000 including interest accrued *before* the commencement of the action. Ms. Sisler asks us to apply this standard to the small claims court. However, the statute governing the monetary limit of the small claims court, R.C. 1925.02, contains no such language. R.C. 1925.02(A)(1) states:

> **{¶19}** Except as provided in division (A)(2) of this section, a small claims division established under section 1925.01 of the Revised Code has jurisdiction in civil actions for the recovery of taxes and money only, for amounts not exceeding six thousand dollars, *exclusive of interest and costs*. (Emphasis added.)

{¶20} The drafters of R.C. 1925.02(A)(1) chose to remove the language regarding interest "accrued after the commencement of the action" and instead excluded all interest and costs. The language of R.C. 1925.02(A)(1) is clear and unambiguously excludes

interest. Since Auto Loan claimed less than the statutory limit, not including interest, the court did not lack subject-matter jurisdiction over the case.

{¶21} Accordingly, Ms. Sisler's second assignment of error is without merit.

{¶22} Her third states:

{¶23} The Trial Court erred in ruling that Appellant failed [to] state a claim for declaratory relief.

{¶24} "A declaratory judgment action is a civil action, and provides a remedy in addition to other legal and equitable remedies available. * * * It is well-settled that the trial court's decision to grant or deny declaratory relief will not be overturned on appeal absent a finding of abuse of discretion." (Citations omitted.) *Gotel v. Ganshiemer*, 11th Dist. Ashtabula No. 2008-A-0070, 2009-Ohio-5423, ¶10.

{¶25} "In order to properly plead a complaint seeking declaratory relief, the plaintiff must demonstrate that (1) the action is within the scope of the Declaratory Judgment Act; (2) a justiciable controversy exists between adverse parties; and (3) speedy relief is necessary to preserve rights that may otherwise be impaired. A complaint seeking declaratory relief under R.C. Chapter 2721 must be dismissed where it does not meet any of those requirements." (Citations omitted.) *Tabbaa v. Lexpro*, L.L.C., 8th Dist. Cuyahoga Nos. 109690 and 109691, 2020-Ohio-5514, ¶5.

{¶26} The Magistrate determined that while the municipal court has jurisdiction to enter declaratory judgments, "declaratory judgments are an improper method to determine if prior judgment has been properly adjudicated," that Auto Loan was not an assignee, which implies a finding that there is no justiciable controversy, and that Ms. Sisler did not show that speedy relief was necessary to preserve rights that may otherwise be impaired.

{¶27} First, we note that the magistrate's determination that declaratory judgments are an improper method to determine if a prior judgment has been properly adjudicated is generally, but not universally, true. For example, the notes related to Civ.R. 60 state, "[t]he vacation of a void judgment might be brought in the form of a motion or perhaps in the form of a procedural device such as a declaratory judgment action." Civ.R. 60. See also *Old Meadow Farm Co. v. Petrowski*, 11th Dist. Geauga No. 2000-G-2265, 2001 WL 209066, fn. 3 (Mar.2, 2001) ("[A] party wishing to contest a court's jurisdiction should either file a simple motion to vacate, or in the alternative, file a declaratory judgment action.")

{¶28} This is precisely what Ms. Sisler is seeking in this case. Contrary to Auto Loan's contention, Ms. Sisler is not arguing the prior judgments are voidable; she is arguing they are already inherently void for lack of subject-matter jurisdiction.

{¶29} Auto Loan cites *Tabbaa, supra,* in support of their argument that declaratory judgment is inappropriate to collaterally attack the validity of the judgment. However, *Tabbaa* dealt with a collateral attack on the validity of a judgement of a different court. Here, Ms. Sisler is not collaterally attacking the validity of the judgment rendered by another court; instead, she argues that the prior judgments by the small claims court are void for lack of subject-matter jurisdiction.

{¶30} Moreover, as discussed under her first assignment of error, the Magistrate's determination that Auto Loan was not an assignee as contemplated by R.C. 1925.02, which served as a basis for denying Ms. Sisler's counterclaim, was erroneous. Accordingly, the court's implicit determination that there was no justiciable controversy between the parties was erroneous.

{¶31} Finally, Ms. Sisler was also required to show that speedy relief was necessary to preserve rights that may otherwise be impaired. Ms. Sisler argues that she made a prima facie case for speedy relief by noting that Auto Loan's actions are habitual, persistent, vexatious, regularly filed, and that they are likely to continue these practices. However, allegations of future errors that may or may not involve her as a party do not show the need for speedy relief.

{¶32} Nevertheless, Ms. Sisler seeks relief from a judgment against her, and others like her, which she argues is void for lack of subject-matter jurisdiction. We conclude that seeking relief from a void judgment inherently shows the necessity of speedy relief because the person against whom the void judgment is entered is either subject to a judgment erroneously entered against them or risks the consequences of non-compliance with the judgment which has not yet been deemed void.

{¶33} Accordingly, because there was a justiciable controversy, and Ms. Sisler showed the necessity of speedy relief, we find her declaratory judgment was erroneously denied.

{¶34} Accordingly, Ms. Sisler's third assignment of error has merit.

{¶35} In light of the foregoing, the judgment of the Portage County Municipal Court, Kent Division, is affirmed in part, reversed in part, and remanded.

MATT LYNCH, J., concurs,

JOHN J. EKLUND, J., concurs in judgment only.

[Cite as *Kemba Fin. Credit Union v. Jackson on High Condominium Assn.*, 2022-Ohio-3247.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kemba Financial Credit Union,	:	
Plaintiff-Appellee,	:	
v.	:	No. 21AP-408 (C.P.C. No. 20CV-5340)
The Jackson on High Condominium Association et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
[Columbus Living, LLC,	:	
Defendant-Appellant].		

D E C I S I O N

Rendered on September 15, 2022

On brief: *Cole Kirby & Associates*, and *William S. Cole*, for appellee Springhills of Gallipolis, LLC.

On brief: *Doucet Gerling Co., L.P.A.*, and *Andrew J. Gerling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Columbus Living, LLC ("Columbus Living"), appeals from the July 15, 2021 decision and order entered by the Franklin County Court of Common Pleas denying its motion for summary judgment, granting the motion for reconsideration

filed by plaintiff-appellee, Kemba Financial Credit Union ("Kemba"),[1] and granting in part and denying in part Kemba's motion for summary judgment. For the following reasons, we reverse.

{¶ 2} This litigation involves a lien priority dispute regarding property located at 1147 North High Street, Columbus, Ohio ("the property"). The pertinent facts are undisputed. On December 20, 2017, the property owners, Short North Fitness, LLC, Rebecca Evans, and Bradley A. Howe (collectively "Short North Fitness"), executed a $240,000 promissory note payable to Kemba. The note was secured by an open-end mortgage and assignment of rents and leases on the property (together "mortgage"). Kemba recorded its mortgage on December 21, 2017.

{¶ 3} On May 8, 2018, Short North Fitness executed a $150,000 promissory note payable to Columbus Living, Albert McAloon, Wenjing Zhang, and Xin Gao (collectively Columbus Living). The note was secured by a mortgage on the same property. That mortgage was recorded on May 10, 2018. Columbus Living was aware of Kemba's mortgage prior to recording its own mortgage.

{¶ 4} On July 18, 2019, The Jackson on High Condominium Association ("Jackson on High") filed a complaint for foreclosure on the property in Franklin C.P. No. 19CV-5850. ("FCCP case No. 19CV-5850").[2] Kemba and Columbus Living, among others, were named as defendants; both filed answers.

{¶ 5} On July 20, 2020, Kemba executed a "Release, Satisfaction and Discharge" ("release") of its mortgage. The release provided that "for valuable consideration, the receipt of which is hereby acknowledged, [Kemba] does hereby certify that a certain Open-end Mortgage and Assignment of Leases and Rents, in the original amount of $240,000.00 executed by Short North Fitness LLC, filed for record on December 21, 2017 * * * has been fully satisfied." The release was signed by Don Guilbert, Kemba's "Director of CS,"[3] and acknowledged by a notary public.

---

[1] On October 4, 2021, Springhills of Gallipolis, LLC, filed in this court a notice of substitution as successor-in-interest to Kemba. However, because the trial court record exclusively references "Kemba," we likewise do so in this decision.

[2] In 2018, Jackson on High filed a certificate of lien against the property.

[3] The release does not define the abbreviation "CS."

{¶ 6} On July 28, 2020, the trial court issued a judgment entry and decree of foreclosure in FCCP case No. 19CV-5850. The court found that Kemba held the first mortgage on the property and ordered the balance of the funds from the sale of the property to be held by the clerk of courts pending a further order.[4]

{¶ 7} On August 12, 2020, Kemba recorded the release of its mortgage. The next day, August 13, 2020, Kemba filed a complaint for declaratory judgment against Short North Fitness, Columbus Living, and 12 additional defendants.[5] Kemba alleged that the release had been executed in error and that the debt underlying its mortgage had not been paid in full. Kemba further alleged that it remained the holder of the note and that Short North Fitness had defaulted on the note. Kemba sought a declaration that: (1) the release was void and ineffective to terminate its mortgage; (2) its mortgage be judicially reinstated; and (3) an equitable lien or constructive trust be imposed with lien priority under the theory of equitable subrogation.

{¶ 8} On September 25, 2020, Kemba filed a combined motion for default judgment and motion for summary judgment. Kemba argued that it had "inadvertent[ly]" released its mortgage, and, as such, it was entitled to reinstatement of its first-priority lien as against each of the named defendants. (Sept. 25, 2020 Combined Mot. for Default Jgmt. and Mot. for Summ. Jgmt. at 2.) Kemba noted that no intervening liens were recorded in the one-day period between the mistaken release of its mortgage and its filing of the lawsuit to reinstate it; thus, a judicial order voiding the release and reinstating its mortgage would essentially place Kemba and all defendants in the same position as before the release was recorded. Kemba alternatively argued that it was entitled to the imposition of an equitable lien or constructive trust with lien priority via equitable subrogation. Kemba supported its motion with copies of the note, mortgage, and release, along with an affidavit from Andrew O'Connor, the Senior Vice President for Cooperative Business Services, LLC, Kemba's loan

---

[4] The trial court vacated the decree of foreclosure in an order dated January 12, 2021.

[5] Kemba's complaint names the following additional defendants: Jackson on High; McAloon; Zhang; Gao; Avenue Strategic, dba TLOA of OH, LLC ("Avenue Strategic"); Columbus Income Tax Division; Franklin County Treasurer; Ohio Department of Taxation ("Ohio DOT"); The Huntington National Bank ("Huntington"); TLOA of OH, LLC ("TLOA"); Springhills of Gallipolis, LLC ("Springhills"); and Adair Asset Management ("Adair"). Kemba alleged that the named defendants may have an interest in the property pursuant to various judgment liens, certificates of lien, and mortgages. In September 2020, Columbus Living, Ohio DOT, Jackson on High, and Adair filed answers to Kemba's complaint.

servicer. O'Connor attested that no consideration was paid to Kemba for execution of the release, that the release was executed and recorded in error, and that Kemba did not intend to release its security interest in the property.

{¶ 9} On October 8, 2020, Columbus Living filed a memorandum contra, arguing that Kemba's release of its mortgage extinguished its first-priority lien; thus, Columbus Living was now entitled to first-priority lien status pursuant to the May 10, 2018 recordation of its mortgage. Kemba filed a reply in support of its motion, to which Columbus Living filed a surreply.[6]

{¶ 10} On January 25, 2021, the trial court issued a decision and order finding that Kemba was not entitled to reinstatement of its previous first-priority lien status. The court reasoned that under R.C. 5301.23, Kemba originally had first priority when it recorded its mortgage on December 20, 2017; however, that placement was lost pursuant to R.C. 5301.28 when it released the mortgage on July 20, 2020. At that point, Columbus Living moved to first-priority lien status pursuant to its mortgage recorded on May 10, 2018. In so ruling, the court found "particularly persuasive" the Sixth District Court of Appeals' decision in *Croghan Colonial Bank v. Olena Food Farm, Inc.*, 6th Dist. No. H-13-006, 2013-Ohio-4520. The trial court further declined Kemba's request that its first-priority lien position be reinstated under the theory of equitable subrogation. Accordingly, the trial court denied Kemba's motion for summary judgment as to defendants Columbus Living, Ohio DOT, Huntington, Jackson on High, and Adair. The trial court concluded that Kemba "is not entitled to judgment as a matter of law on declaratory judgment because issues of material fact remain on lien reinstatement and equitable subrogation." (Jan. 25, 2021 Decision & Order at 13.)

{¶ 11} In the same decision and order, the trial court granted Kemba's motion for default judgment against non-answering defendants Short North Fitness, McAloon, Zhang, Gao, Columbus Income Tax Division, Franklin County Treasurer, TLOA, and Springhills. In addition, the court determined that because service had not been perfected on Avenue

[6] No other defendant responded to Kemba's combined motion for default judgment and motion for summary judgment.

Strategic, neither summary judgment nor default judgment was appropriate; accordingly, the court denied both motions as to Avenue Strategic.[7]

{¶ 12} On May 19, 2021, Columbus Living filed a motion for summary judgment, urging adherence to the court's previous conclusion that Kemba was not entitled to reinstatement of its first-priority lien status. On May 26, 2021, Kemba filed a combined memorandum in opposition to Columbus Living's motion for summary judgment and a motion for reconsideration of the trial court's January 25, 2021 decision and order. Kemba argued that the trial court misapplied *Croghan* and that a proper interpretation of *Croghan* actually supported its position that its mortgage should be reinstated as against Columbus Living and the other lienholders. On June 9, 2021, Columbus Living filed a response to Kemba's combined memorandum contra and motion for reconsideration.

{¶ 13} On July 15, 2021, the trial court filed a decision and order concluding, after "another careful reading of *Croghan Colonial Bank*," that Kemba was entitled to declaratory judgment that (a) the release was void and ineffective to terminate Kemba's interest in the property via its mortgage, and (b) Kemba's mortgage on the property was reinstated effective as of the original filing date. (July 15, 2021 Decision & Order at 10.) As such, the court determined that Kemba was entitled to summary judgment regarding reinstatement of its first-lien priority position as applied to defendants Columbus Living, Ohio DOT, Huntington, Jackson on High, Adair, and Avenue Strategic. Given this result, the court granted Kemba's motion for reconsideration and denied Columbus Living's motion for summary judgment. The court adhered to its previous analyses regarding the inapplicability of equitable subrogation and the granting of Kemba's motion for default judgment against non-answering defendants Short North Fitness, McAloon, Zhang, Gao, Columbus Income Tax Division, Franklin County Treasurer, TLOA, and Springhills.

{¶ 14} In a timely appeal, Columbus Living assigns one error for review:

> The trial court erred when it reinstated Plaintiff-Appellee's first priority lien status in contravention of Ohio's recording statutes.

{¶ 15} Columbus Living's assignment of error arises from the trial court's July 15, 2021 decision which both granted reconsideration of its previous denial of Kemba's motion

[7] Avenue Strategic filed its answer on January 28, 2021.

for summary judgment and denied Columbus Living's motion for summary judgment on Kemba's declaratory judgment complaint.

{¶ 16} A declaratory judgment action is a civil action and provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.,* 136 Ohio App.3d 677, 681 (10th Dist.2000). "The essential elements for declaratory relief are: (1) a real controversy exists between the parties; (2) the controversy is justiciable in character; and (3) speedy relief is necessary to preserve the rights of the parties." *Id.*, citing *Ohio Assn. of Life Underwriters, Inc. v. Duryee*, 95 Ohio App.3d 532, 534 (10th Dist.1994). R.C. 2721.02(A) provides, in part, "courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. * * * The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree."

{¶ 17} Appellate review of summary judgment is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶ 11 (10th Dist.), quoting *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.,* 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6.

{¶ 18} Further, "[a]n appellate court reviewing a trial court's decision on a motion for reconsideration of a grant or denial of summary judgment applies a de novo standard of review." *Crown Chrysler Jeep, Inc. v. Boulware*, 10th Dist. No. 15AP-162, 2015-Ohio-5084, ¶ 28, citing *Hogrefe v. Mercy St. Vincent Med. Ctr.,* 6th Dist. No. L-13-1265, 2014-Ohio-2687, ¶ 38 (further citations omitted). " 'Thus, we "afford no deference to the trial court's decision and independently review the record in the light most favorable to the non-movant to determine whether summary judgment is appropriate." ' " *Id.*, quoting *Hogrefe*, quoting *Dunn v. N. Star Resources, Inc.*, 8th Dist. No. 79455, 2002-Ohio-4570, ¶ 10.

{¶ 19} Columbus Living asserts that the trial court erred in reinstating Kemba's first-priority lien status after Kemba released its mortgage. Specifically, Columbus Living maintains that reinstatement contravenes Ohio's recording statutes governing priority of recorded mortgages and the release of recorded mortgages. We agree.

{¶ 20} R.C. 5301.23 establishes the general rule that the first mortgage recorded shall have priority over any subsequently recorded mortgage. R.C. 5301.23(A) ("The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference."). R.C. 5301.28 addresses the release of a recorded mortgage, providing in part: "[w]hen the mortgagee of property * * * receives payment of any part of the money due the holder of the mortgage, and secured by the mortgage, and enters satisfaction or a receipt for the payment, either on the mortgage or its record, that satisfaction or receipt, when entered on the record * * * by the county recorder, will release the mortgage to the extent of the receipt."

{¶ 21} It is undisputed that Kemba was first to record its mortgage; thus, under R.C. 5301.23, Kemba's mortgage had preference over Columbus Living's subsequently recorded mortgage. It is further undisputed that after Columbus Living recorded its mortgage, Kemba executed and recorded a release of its mortgage pursuant to R.C. 5301.28. Columbus Living argues that the recordation of a release of a mortgage pursuant to R.C. 5301.28 releases the mortgage by operation of law. According to Columbus Living, the natural consequence of releasing a mortgage is that junior lienholders move up in priority pursuant to R.C. 5301.23. Columbus Living maintains that "a court's equitable authority is limited by the express language of the statute. This flows from the well-established maxim that equity must follow the law." (Columbus Living's Brief at 12.) Kemba does not argue that its execution or recording of the release were defective in any way; rather, Kemba simply contends that because it mistakenly released the mortgage, the release should be disregarded and its first-priority lien status be reinstated.

{¶ 22} In support of its position, Columbus Living cites two common pleas court decisions—*GMAC Mtge. LLC v. Kiner*, Franklin C.P. No. 11 CVE-0-3799, 2012 Ohio Misc. LEXIS 1315 (Feb. 28, 2012), and *Spring Valley Bank v. Ah&A Properties, LLC*, Hamilton C.P. No. A1102762, 2012 Ohio Misc. LEXIS 182 (Aug. 23, 2012). In *Kiner,* the Kiners signed an open-end home equity credit agreement in favor of Telhio Credit Union ("Telhio") on

May 17, 2004, secured by a mortgage on real property. Telhio obtained a property report confirming there were no other mortgages or liens on the property. Accordingly, Telhio expected it had the first lien priority. Telhio recorded its mortgage on June 2, 2004.

{¶ 23} Two years later, the Kiners took out a loan with MERS, the predecessor to GMAC Mortgage LLC, ("GMAC") secured by a mortgage on the same property. MERS recorded the mortgage on September 27, 2006. On November 16, 2006, Telhio released its mortgage. However, the equity line was never closed and the Kiners did not authorize its termination. In November 2006, the Kiners resumed drawing money on the equity line. The draws continued for several months before Telhio realized it had mistakenly released its mortgage. Telhio attributed its mistake to an internal account number assignment error. Telhio then refiled its mortgage on December 30, 2010.

{¶ 24} The Kiners defaulted on both loans. GMAC filed a foreclosure action, asserting that it had the first lien on the property but naming Telhio as having a potential interest. The issue of lien priority was before the court on cross-motions for summary judgment. GMAC argued that its lien had priority over Telhio's interests because GMAC's lien was filed in September 2006 before Telhio re-recorded its lien in December 2010. Telhio argued it had priority over GMAC because it recorded its lien first in June 2004 and the borrowers never closed out the equity line; when it re-recorded the lien in December 2010, it revived the priority from its inception.

{¶ 25} The common pleas court agreed with GMAC:

> [T]he Court finds that as of November 16, 2006, when Telhio filed its Satisfaction of Mortgage, GMAC held the first and best lien. Assuming that the December 30, 2010 re-recording of the Telhio equity line was facially valid, it is second to GMAC's interest. The Court's decision rests on R.C. 5301.23. The Court finds no authority that permits the re-filing of a previously released mortgage. Moreover, even if it could be re-filed the revival of the previous priority is not supported by Ohio's priority statute. Telhio's argument regarding mistake is inapposite. * * * [T]he evidence in this case is anything but conclusive that filing the Satisfaction was a mistake.
>
> * * *
>
> [T]he Court finds that the general statutory rule of first in time applies. Telhio was first. GMAC was second. When Telhio vacated its record of mortgage, GMAC ascended to the priority post. The re-filing of the open-end mortgage could at best

> notice any potential third mortgagor of Telhio's interest protected in its re-filed mortgage.

Id. at *8-9.

{¶ 26} In *Spring Valley,* the plaintiff obtained a mortgage on the property at issue in October 2006 and properly recorded the mortgage in November 2006. The defendant obtained a mortgage on the property and properly recorded that mortgage in August 2007. In October 2009, the plaintiff obtained the deed to the property in lieu of foreclosure. After the transfer of the deed, the plaintiff recorded a release of the mortgage.

{¶ 27} The plaintiff claimed that it mistakenly released its mortgage and would not have done so had it known of the defendant's mortgage. The plaintiff filed for foreclosure, and sought relief from its mistake and reinstatement of its mortgage and reinstatement of its first priority in order to foreclose on the property. The defendant argued that the plaintiff could not be relieved from the mistake that amounted to negligence on the plaintiff's part.

{¶ 28} The court determined that the plaintiff was not entitled to relief from its mistaken release of its mortgage. The court found distinguishable the cases upon which the plaintiff relied, stating:

> In this case, the Plaintiff has not committed the types of mistakes from which courts have provided relief. These mistakes dealt with clerical errors or circumstances out of the control of the mortgagee, such as a returned check. Plaintiff's circumstances were not outside its control. Plaintiff could have searched the records on the property and obtained knowledge of Defendant's mortgage, and did not. The Plaintiff's predicament is a result of its lack of due care. Plaintiff cannot be relieved from mistake to regain its senior priority.

Id. at *4.

{¶ 29} Employing *Kiner* and *Spring Valley*, Columbus Living argues that "[u]nder the plain language of Ohio's Recording Statute, Kemba lost its lien priority when it recorded the Release. There was no defect with the Release. It contained all requirements of law. * * * The only explanation Kemba offered was the 'Release was executed and recorded in error.' * * * Kemba did not claim the recorder or a third party erroneously released the lien. Kemba did not present any evidence suggesting anything beyond its own negligence when it Released its mortgage. * * * The law does not support reinstating Kemba's negligently

released lien in contravention of the recording statutes and to the detriment of other creditors." (Columbus Living's Brief at 14-15.)

{¶ 30} For its part, Kemba relies primarily on *Croghan*, 6th Dist. No. H-13-006, 2013-Ohio-4520, the case the trial court analyzed and applied (with conflicting results) in both its original decision denying Kemba's motion for summary judgment and its subsequent decision granting Kemba's motion for reconsideration and denying Columbus Living's motion for summary judgment.

{¶ 31} In *Croghan,* the Cassidys, on September 22, 2005, executed a cognovit note payable to the Croghan National Bank ("the bank"). The note was secured by a mortgage on certain property; the bank recorded its mortgage on October 5, 2005. On April 13, 2009, the bank released the mortgage. On July 1, 2009, the Misseys executed a promissory note payable to the Cassidys, secured by a mortgage on the same property. The Cassidys recorded the mortgage on July 2, 2009. After the Cassidys' mortgage lien was recorded, the bank recorded an affidavit with the intent to reinstate its mortgage lien.

{¶ 32} On August 25, 2009, the bank filed a complaint for judgment on the cognovit note and foreclosure of the mortgage. In their answer and cross-claim, the Cassidys alleged that the Misseys were in default on the note and declared the note immediately due and payable. The Cassidys sought a judgment in their favor on the note and foreclosure of their mortgage, as well as a declaration that their mortgage was a valid first and best lien against the property because the bank's mortgage had been released on April 13, 2009 and was never re-recorded. The Cassidys asserted that there was no special provision under Ohio law for reinstatement of an improperly released mortgage by affidavit; thus, argued the Cassidys, their mortgage took precedence.

{¶ 33} The trial court ultimately approved and confirmed the sale of the property. The court deposited the balance of the sale proceeds with the clerk of courts for distribution to one of the parties upon resolution of the lien-priority issue. Following cross-motions for summary judgment, the trial court found that the bank's release of its mortgage was the result of its own negligence and while the bank was entitled to reinstatement of its mortgage, it could not do so at the expense of an intervening lienholder. Thus, determined the trial court, since the Cassidys' note and mortgage were filed before the bank reinstated its mortgage, the Cassidys' lien had first priority.

{¶ 34} On appeal, the bank argued that the reinstatement of its lien revived the lien, and its priority related back to the date the mortgage lien was originally recorded. The bank further argued that the Cassidys were not intervening lienholders, as they had testified during their deposition that they neither relied on the public record nor changed their position as a result of the public record and learned of the bank's lien only after the bank filed the foreclosure action.

{¶ 35} The Cassidys argued that the recording of their mortgage secured their lien as of the date of recording and, therefore, it ranked higher in priority than the bank's lien as a matter of law under R.C. 5301.23. The appellate court agreed with the Cassidys and affirmed the trial court.

{¶ 36} The court noted that in cases where a first-priority lien was erroneously released by a recorder or third-party, courts generally apply equitable principles to reinstate the priority of the first lien recorded. *Id.* at ¶ 12, citing *Farmers S. & L. Co. v. Kline*, 92 Ohio App. 406, 409 (7th Dist.1951) (court set aside the recorder's mistakenly recorded cancellation of mortgage where the defendant would not be damaged); *Commercial Bldg. & Loan Co. v. Foley*, 25 Ohio App. 402, 405 (4th Dist.1927) (the great weight of authority supported the right of the first lienholder to have its lien reinstated after the recorder erroneously released it, even though a subsequent bona fide purchaser had no notice or knowledge of the erroneously released first lien). The court further noted that the same analysis has been applied in cases involving mistaken releases by the lender where no intervening interest was obtained. *Id.* at ¶ 14, citing *First Natl. Bank of Pennsylvania v. Pollock Inn Restoration Assn.*, 7th Dist. No. 96 CA 98, 1999 Ohio App. LEXIS 2956 (June 22, 1999) (equitable reinstatement of first mortgage permitted after the lender mistakenly filed a satisfaction of mortgage because the second mortgage specifically acknowledged the priority of the first mortgage and there was no harm caused by reinstatement).

{¶ 37} The court recognized, however, that where there has been an intervening interest recorded, courts have ordered equitable reinstatement of the first lien and its priority only when the intervening lienholder had actual or constructive notice of the first lien and either did not detrimentally rely upon the erroneous release or were not prejudiced by revival of the first lien. *Croghan* at ¶ 15, citing *Fifth Third Mtge. Co. v. Fillmore*, 5th

Dist. No. 12 CAE 04 0030, 2013-Ohio-312, ¶ 53 (generally "equity follows the law," but if the rights of the parties are not clearly delineated, application of "broad equitable principles of fairness" is appropriate); and *Interstate Adviser, LLC v. McCalla,* Conn.Super. No. HHDCV106014396S, 2012 Conn.Super. LEXIS 2693 (Nov. 1, 2012) (a "court should not in equity permit a lienor, who has not been prejudiced thereby, to acquire priority when that was not the intent of the parties").

{¶ 38} Based on the foregoing, the court concluded that "[w]hile the Cassidys did not rely upon a clear record when they filed their mortgage lien, they certainly relied upon the recording system to assure that their lien would have priority as of July 9, 2009." *Croghan*, 6th Dist. No. H-13-006, 2013-Ohio-4520, at ¶ 24. Further, while the Cassidys did not know about the bank's lien, there was evidence that the bank had knowledge of the relevant recordings and liens. *Id.* The court also stated that the "issue of equity requires us to focus on the [b]ank's position and not the knowledge or actions of the Cassidys." *Id.*

{¶ 39} In the present case, in its original decision and order filed January 25, 2021, the trial court, relying on *Croghan,* stated:

> After considering the law and equities of the case, while the Court is sympathetic to Kemba's mistake, the law compels this Court to deny Kemba's summary judgment request to reinstate its lien to its previous first priority position. * * * *Croghan* states equitable principles can apply to restore first-priority lien status when erroneously released by a "recorder or third party." *Croghan* at ¶ 13. Here, neither a recorder nor a third party erroneously released the mortgage, but instead, Kemba did. Like the bank in *Croghan,* Kemba mistakenly released its mortgage lien on July 20, 2020, and attempted to correct that mistake by filing this lawsuit soon thereafter, which was August 13, 2020. Also like the Cassidys in *Croghan,* once Kemba released this lien, the other lienholders with interests in the Real Estate here such as Columbus Living, moved ahead of Kemba as to lien priority.
>
> Additionally, much like the Cassidys, the numerous lienholders with interests in the Real Estate, such as Columbus Living, likely relied on the normal functioning of the property recording system under R.C. [5301.23] and R.C. 5301.28. As detailed *supra,* the Real Estate is encumbered by a substantial number of liens, from judgments to mortgages. Kemba's request would require this Court to rule that Kemba's interest, despite its own negligence, should trump all these

> other lienholders. The Court does not find that fair to Columbus Living or the other lienholders that answered the complaint.
>
> Indeed, as *Croghan* provides, an equitable reinstatement of priority is only proper when 1) the intervening lienholder had actual or constructive notice of the first lien and 2) either did not detrimentally rely upon the erroneous release or was not "prejudiced by revival of the first lien." *Croghan* at ¶ 15. In this case, Columbus Living either knew, or should have known, Kemba's lien was initially higher in priority before the mistaken release, thereby permitting Kemba to fulfil the first prong. Even so, Kemba cannot satisfy the second prong because Columbus Living would be "prejudiced by revival" of Kemba's lien. As this Court mentioned *supra,* foreclosure proceedings were underway regarding the Real Property since 2019 in 19CV5850, which makes lien priority paramount for each party to enforce their various interests. Kemba, as a defendant, answered in 19CV5850 on July 21, 2019, so it should have been aware of the importance of protecting its own mortgage interest. It is unclear what led Kemba to mistakenly release its lien, but the Court declines to set dangerous precedent that would permit a party to recover from its own negligence when it harms other innocent parties.
>
> This conclusion is further supported by *First Nat'l Bank* [*v. Adams*, 10th Dist. No. 2003-Ohio-6651], which only permits equitable reinstatement when there is no harm caused by doing so. Kemba argues that "mistakes are correctable," but unfortunately, in contrast to *First Nat'l Bank,* in this case, they are not because Columbus Living and other lienholders-Ohio DOT, Huntington, Jackson on High, and Adair—would be harmed. *See First Nat'l Bank*, 1999 Ohio App. LEXIS 2956, * 7.

(Jan. 25, 2021 Decision & Order at 10-12.)

{¶ 40} However, in its July 15, 2021 decision and order granting Kemba's motion for reconsideration, the trial court concluded that *Croghan* supports Kemba's reinstatement claim:

> First, Kemba is correct that Columbus Living is not an "intervening lienholder" as envisioned by *Croghan Colonial Bank*. As Kemba aptly argues, an intervening lienholder is one whose interest would be perfected <u>after</u> an inadvertent release. This situation occurred in *Croghan Colonial Bank,* but did not happen here. *In Croghan Colonial Bank,* the

> Cassidys recorded their mortgage after the bank inadvertently released a mortgage. In the case at bar, Columbus Living did not record their mortgage after Kemba released their mortgage, but instead recorded it before. In contrast to this Court's prior interpretation, "intervening lienholder" does not mean the mere movement of [a] lienholder's priority interest that operates by default through the recording statutes, R.C. § 5301.23 and R.C. § 5301.28. Instead, to become an intervening lienholder under *Croghan Colonial Bank,* Columbus Living would have had to record their mortgage between August 12, 2020 and August 13, 2020, which is the very short period of time from when Kemba mistakenly release the Open-End Mortgage and then filed this lawsuit to reinstate it. This is not what occurred in this case, however; Columbus Living recorded their mortgage years before on May 10, 2018. Thus, Columbus Living is not an intervening lienholder.
>
> Second, Kemba is also correct that Columbus Living did not detrimentally rely upon the erroneous release and was not prejudiced by revival of the first lien as envisioned by *Croghan Colonial Bank*. Because the Court has already ruled that Columbus Living is not an intervening lienholder, and accordingly there is no intervening interest recorded, the Court need not analyze the second aspect, but it will do so to clarify the record. In *Croghan Colonial Bank*, the Cassidys would have been prejudiced by the revival of the bank's mortgage because they relied on the property records as accurate when they recorded their own lien. Columbus Living did not face that situation here. Instead, Columbus Living was a passive party who would have received a higher priority windfall in foreclosure proceedings by benefiting from Kemba's inadvertent mistake. Columbus Living was not entitled to the windfall in the first place because it is not an intervening lienholder, and therefore there is no prejudice to Columbus Living in reviving Kemba's Open-End Mortgage. The Court's prior analysis interpreted "prejudice" too broadly; the narrower confines of *Croghan Colonial Bank's* definition is warranted instead. While the inadvertent release has certainly caused confusion and litigation for Columbus Living, it is not prejudiced.

(Emphasis sic.) (July 15, 2021 Decision & Order at 10-11.)

{¶ 41} We note that the cases upon which the parties principally rely—*Kiner, Spring Valley,* and *Croghan*—are not binding on this court.[8] However, we find persuasive the legal analysis set forth in *Kiner, Spring Valley* and the trial court's January 25, 2021 decision interpreting *Croghan* and apply it in adopting Columbus Living's contention that a court's equitable authority is limited by the express language of the recording statutes.

{¶ 42} "The function of equitable relief is to supplement the law where the law is insufficient to remedy a wrong." *In re Barone*, 11th Dist. No. 2004-G-2575, 2005-Ohio-4479, ¶ 17. A court of equity is authorized to render an award "on the principle that it may exercise its equitable jurisdiction to the extent of administering full relief which the case demands." *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 276 (1984). A court does not, however, have unfettered discretion to award equitable relief. *Barone* at ¶ 18. Various long-standing maxims, such as "equity follows the law," limit a court's application of equity. "When the rights of parties are clearly defined and established by law (especially when the source of such definition is through constitutional or statutory provision) the maxim 'equity follows the law' is usually strictly applied." *Civ. Serv. Personnel Assn., Inc. v. Akron*, 48 Ohio St.2d 25, 27 (1976) Thus, "while it may be tempting to decide [a] case on subjective principles of equity and fundamental fairness, [a] court has a greater obligation to follow the law." *State ex rel. Schwaben v. School Emps. Retirement Sys.*, 76 Ohio St.3d 280, 285 (1996).

{¶ 43} As Kemba argues, equitable principles can apply to restore first-priority lien status upon the erroneous recording of a release by entities other than the mortgagee or in circumstances beyond the control of the mortgagee. Kemba does not argue that another entity erroneously released its mortgage or that circumstances beyond its control resulted in the release of its mortgage. Indeed, the record establishes that Kemba provided a written, signed, notarized, and recorded release of its mortgage. It took deliberate, intentional and formal action to release its first-lien position. Kemba simply states that it released the mortgage by mistake, without further explanation. While we recognize the equitable principles involved in this case, we cannot use these concepts to override the clear statutory language of R.C. 5301.23 and 5301.28. Further, Columbus Living and other

[8] There is no subsequent appellate history for either *Kiner* or *Spring Valley,* and no other appellate court has adopted or cited *Croghan*.

lienholders would be harmed by the reinstatement of Kemba's first lien priority position. Finally, as Columbus Living points out, the release did not extinguish Short North Fitness's underlying debt. Rather, the release served only to alter Kemba's status from a secured creditor to an ordinary creditor, and Kemba remains free to pursue all other remedies available to it against Short North Fitness.

{¶ 44} For the foregoing reasons, we find that the trial court erred when it granted Kemba's motion for reconsideration and denied Columbus Living's motion for summary judgment. Kemba was not entitled to judgment as a matter of law on its declaratory judgment complaint; rather, Columbus Living was entitled to judgment as a matter of law. Therefore, Columbus Living's assignment of error is sustained.

{¶ 45} Accordingly, the July 15, 2021 judgment of the Franklin County Court of Common Pleas is hereby reversed, and the matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

DORRIAN and McGRATH, JJ., concur.

[Cite as *Yemma v. Leber Real Estate, Ltd.*, 2022-Ohio-3289.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

DANIEL R. YEMMA, TREASURER, MAHONING COUNTY, OHIO,

Plaintiff,

v.

LEBER REAL ESTATE, LTD., ET AL.,

Defendants-Appellees,

and

GF CAPITAL,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0069

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CV 00094

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Scott R. Cochran, 19 East Front Street, Youngstown, Ohio 44503, for Defendant-Appellee Leber Real Estate, LTD and

Atty. David H. Wallace, Atty. William A. Doyle, Atty. Ashley M. Bailes, Taft Stettinius & Hollister LLP, 200 Public Square, Suite 3500, Cleveland, Ohio 44114, and *Atty. Daniel*

G. Keating, Keating Law Office, 170 Monroe Street NW, Warren, Ohio 44483, Defendant-Appellant GF Capital.

Dated: September 16, 2022

D'Apolito, J.

{¶1} Appellant, GF Capital, appeals the judgment entry of the Mahoning County Court of Common Pleas entering summary judgment on its cross-claims for breach of a promissory note and foreclosure in favor of Appellee, Leber Real Estate Ltd. and against Appellant, and entering summary judgment on Appellee's cross-claim for declaratory judgment in favor of Appellee and against Appellant. The trial court concluded that Appellant was not a holder of the promissory note at issue in this case ("Note"), and as a consequence, Appellant had no standing to enforce the Note. For the following reasons, the judgment entry of the trial court is affirmed.

{¶2} On January 13, 2020, the Mahoning County Treasurer ("Treasurer") initiated this foreclosure action against Appellee based on a tax lien on the property located at 5325 Seventy Six Drive, Austintown, Ohio 44515 ("Property"). Appellant was named in the suit as a party that had a potential interest in the Property, along with Wells Fargo Foothill and Wells Fargo Bank National Association, and several other parties that are not relevant to this appeal.

{¶3} Attached to the complaint was the statutorily-mandated judicial title report pursuant to R.C. 2329.191, which established the following relevant potential interests in the Property:

> Original Mortgage and Note for $1,250,000.00 from Appellee to Russell Gaines (Trustee) to and for the benefit of Southwest Guaranty, Ltd filed 12/27/2006;
>
> Transfer of Note and Lien from Southwest Guaranty Ltd. to Southwest Guaranty Partners, LLC filed 12/27/2006;
>
> Assignment of Leases and Rents from Appellee to Southwest Guaranty Ltd. filed 12/27/2006;

Collateral Assignment of Mortgage and Loan Documents from Southwest Guaranty Partners LLC to Wells Fargo Foothill, Inc. filed 12/27/2006;

Transfer of Note and Lien from Southwest Guaranty Partners LLC to Southwest Guaranty Investors Ltd. filed 12/9/2008;

Assignment of Promissory Note and Deed of Trust from Southwest Guaranty Investors Ltd to Wells Fargo Bank, National Association filed 12/9/2008;

Transfer of Note and Lien from Southwest Guaranty Investors Ltd to Appellant filed 8/22/2013;

Release of Assignment of Promissory Note and Deed of Trust by Wells Fargo Bank, National Association filed 8/22/2013.

{¶4} The supporting documentation for each of the assignments and transfers was included within the title report, including a document captioned, "Transfer of Note and Lien," transferring the Note and mortgage to Appellant.

{¶5} The Treasurer's complaint was amended on September 9, 2020, and again on September 18, 2020. On October 14, 2020, Appellee filed an answer to the second amended complaint as well as the cross-claim against Appellant for seeking a declaratory judgment, which is currently before us on appeal, in which Appellee argued that Appellant had no interest in the Property. On November 16, 2020, Appellant filed an answer to the second amended complaint, as well as the cross-claims against Appellee for breach of the Note and foreclosure currently before us on appeal.

{¶6} Appellant attached a copy of the original Note to its answer and cross-claim. The Note contains two indorsements: The first reads, "[p]ay to the Order of Southwest Guaranty Partners LLC" without recourse or warranties from a representative of Southwest Guaranty, Inc. The second reads, "[p]ay to the Order of Wells Fargo Foothill, Inc." and was executed by a representative of Southwest Guaranty Partners LLC. The copy of the Note does not contain an indorsement to Appellant and no allonge is affixed to the Note.

{¶7} The Note is captioned "Exhibit A-1" and is attached to the answer and cross-claim. "Exhibit A-2" is the assignment of leases. "Exhibit A-3" is the waiver of priority/subordination of mortgage" from Port Petroleum Company, Inc. "Exhibit A-4" is the assignment of the promissory note and mortgage from Southwest Guaranty, Ltd. to Southwest Guaranty Partners, LLC. filed with the County Recorder on December 20, 2006. "Exhibit A-5" is the Transfer of Note and Lien from Southwest Guaranty Partners, LLC to Southwest Guaranty to Southwest Guaranty Investors, Ltd. filed on December 9, 2008. "Exhibit A-6" is the Transfer of Note and Lien from Southwest Guaranty Investors, Ltd. to [Appellant] filed on August 22, 2013. "Exhibit A-7" is the allonge from Southwest Guaranty Investors, Ltd. to Appellant dated July 23, 2013.

{¶8} On January 5, 2021, the Treasurer filed a motion for summary judgment seeking foreclosure and a determination of the parties that had an interest in the Property. Neither party to this appeal opposed the foreclosure motion. The Treasurer also sought default judgments against Wells Fargo Foothill and the other entities that had failed to assert an interest in Property.

{¶9} On April 16, 2021, the trial court issued an order granting a motion for leave to withdraw filed by Appellant's counsel, and ordered Appellant to obtain new counsel and notify the Court of new counsel within 30 days. The trial court also set a non-oral hearing on the foreclosure motion for June 28, 2021. No notice was provided to the trial court by Appellant as required and new counsel did not file an appearance within the required time.

{¶10} On May 21, 2021, Appellee filed a motion for summary judgment on its cross-claim against Appellant and on Appellant's cross-claims for breach of contract and foreclosure. Appellee predicated its motion on the judicial title report and the documents incorporated into the pleadings by Appellant, and argued that Appellant could not demonstrate an unbroken chain of title to the Note.

{¶11} Appellee argued that Wells Fargo Foothill, Inc. and Wells Fargo Bank National Association did not release their interests in the Note prior to the transfer to Appellant. Contrary to Appellee's argument, Wells Fargo Bank National Association released its interest on the same day that the Note was transferred to Appellant. Appellee

did not advance any argument in its motion for summary judgment with respect to the missing allonge.

{¶12} On June 28, 2021, the date of the non-oral hearing, new counsel for Appellant filed an appearance and sought leave to file a response to Appellee's motion for summary judgment. The trial court did not rule on the request for leave on the record, but Appellant filed its response brief on July 2, 2021.

{¶13} In the response brief, Appellant argued that the various assignments of the Note did not invalidate Appellant's status as a holder in due course because there was no evidence in the record that the Note had been in the possession of any party other than Appellant.

{¶14} The affidavit of Scott Lissoy, President of Appellant, is attached to Appellant's opposition brief. Documents attached to the affidavit are authenticated and incorporated. The Note has the same indorsements as the copy of the Note incorporated into the Appellant's answer and cross-claims and also a stamp that reads "original." The Lissoy affidavit reads, in pertinent part, "[Appellant] is in physical possession of all of the Loan Documents and, if called upon, could present them." (Lissoy Aff., ¶ 23.) In paragraph nine of his affidavit, Lissoy defines the phrase "loan documents" as " 'the Mortgage,' collectively with the Note."

{¶15} Parroting the requirements of R.C. 1303.32, captioned "Holder in due course," Lissoy avers that: (1) the Note bears no evidence of forgery or alteration that is so apparent, or is not otherwise so irregular or incomplete as to call into question its authenticity; and (2) Appellant took the Note for value and in good faith, without notice that the instrument contains an unauthorized signature or has been altered, without notice of any claim to the instrument as described in section 1303.36 of the Revised Code, and without notice that any party has a defense or claim in recoupment described in division (A) of section 1303.35 of the Revised Code. (*Id.*, ¶ 19.)

{¶16} Lissoy further avers that the Note is indorsed to Appellant. He cites an allonge dated July 23, 2013. (*Id.*, ¶ 21.) Relevant to the current appeal, the copy of the Note bears staple marks, but the copy of the allonge does not. Although Lissoy avers that Appellant is in physical possession of the Note, he does not aver that the allonge was attached or affixed to the Note.

{¶17} The allonge reads, in relevant part:

ALLONGE

> Allonge to that one certain Note dated December 20, 2006, in the prinicipal amount of $1,250,000, executed by LEBER REAL ESTATE, LTD., and originally made payable to the order of SOUTHWEST GUARANTY, LTD.
>
> Pay to the order of [APPELLANT].

The allonge is signed by the president of Southwest Guaranty Investors, Ltd. The signature is dated July 23, 2013.

{¶18} Appellee filed a reply brief on July 6, 2021. Appellee argued that Appellant failed to demonstrate that it was the holder of the note due to the failure to offer any evidence that the allonge was affixed to the note.

{¶19} In the decree of foreclosure and judgment entry issued on July 14, 2021, the trial court summarily concluded that Appellant was not the holder of the Note and lacked standing to proceed on its breach of contract and foreclosure claims. The trial court further concluded that the other potential parties failed to establish any interest in the Property and that, after the superior interest of the Treasurer, Appellee was the only remaining party with an interest in the Property. As a consequence, the trial court granted the Treasurer's unopposed motion for summary judgment for foreclosure and Appellee's motion for summary judgment against Appellant on all claims.

{¶20} This timely appeal followed.

STANDARD OF REVIEW

{¶21} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) it appears from the evidence that reasonable minds can

come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶22} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id*. at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Doe v. Skaggs*, 7th Dist. No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

{¶23} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ANALYSIS

{¶24} Appellant advances a single assignment of error:

> **THE TRIAL COURT ERRED IN GRANTING [APPELLEE'S] MOTION FOR SUMMARY JUDGMENT AND IN FAILING TO ENTER SUMMARY JUDGMENT FOR [APPELLANT].**

{¶25} Within the single assignment of error, Appellant asserts several sub-arguments: (1) the trial court erred in concluding that Appellant is not a holder of the Note with standing to foreclose on the Property; (2) Appellee lacks standing to challenge the

assignment of the Note to Appellant because Appellee suffered no injury as a result of the assignment (raised for the first time on appeal); (3) Appellee is estopped from asserting that Appellant has no interest in the Note based upon its past payments to Appellant (raised for the first time on appeal); (4) Appellant holds the superior lien on the Property, but for the Treasurer's lien; and (5) based on the uncontroverted evidence in the record, the trial court should have entered summary judgment in favor of Appellant, despite the fact that Appellant did not file a motion for summary judgment.

{¶26} "It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court." *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41. Standing is jurisdictional, and therefore, we review the trial court's dismissal of Appellant's cross-claim for lack of standing de novo.

{¶27} "Under Ohio law, the right to enforce a note cannot be assigned; rather, the note must be negotiated in conformity with Ohio's version of the Uniform Commercial Code." *HSBC Bank USA v. Brinson*, 9th Dist. No. 28783, 2018-Ohio-3467, 118 N.E.3d 1140, ¶ 11, quoting *Wells Fargo Bank, N.A. v. Byers*, 10th Dist. Franklin No. 13AP-767, 2014-Ohio-3303, 2014 WL 3740328, ¶ 16, citing *In re Wells*, 407 B.R. 873, 880 (N.D.Ohio 2009). Generally, an assignment of a note creates a claim to ownership, not a transfer of the right to enforce the note. *HSBC* at ¶ 11; *Byers* at ¶ 16.

{¶28} However, a note may be transferred by negotiation under R.C. 1303.21(A). *Id.* "Negotiation" is the transfer of possession of the note "to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. R.C. 1303.21(B). If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. The "transfer" of an instrument occurs when the note is physically delivered "for the purpose of giving the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A).

{¶29} An allonge is a "slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *Fed. Natl. Mtge. Assn. v. Brown*, 7th Dist. Columbiana No. 16 CO 0008,

2017-Ohio-9237, ¶ 51. R.C. 1303.24, captioned "indorsements," requires that indorsements be on an instrument, or in papers "affixed to the instrument," and reads in relevant part:

> (A)(1) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for any of the following purposes:
>
> (a) To negotiate the instrument;
>
> (b) To restrict payment of the instrument;
>
> (c) To incur the indorser's liability on the instrument.
>
> (2) Regardless of the intent of the signer, a signature and its accompanying words is an "indorsement" unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

{¶30} The current version of the Uniform Commercial Code, codified as R.C. 1303.24(A)(2), allows allonges even where room exists on the note for further indorsements. However, the paper must be affixed to the instrument in order for the signature to be considered part of the instrument. *HSBC Bank USA v. Thompson*, 2d Dist. Montgomery No. 23761, 2010-Ohio-4158, 2010 WL 3451130, ¶ 66.

{¶31} The Eighth District recently held that, where a claim is filed on a lost note, and the separate allonge is attached to a note after the note is found, the transfer of the note is ineffectual. The allonge must be attached to the note at the time the claim is filed. *Id.* at ¶ 48. *SMS Financial XXVI, L.L.C. v. Waxman Chabad Ctr.*, 8th Dist. No. 110374, 2021-Ohio-4174, 180 N.E.3d 730, ¶ 46.

{¶32} Likewise, in *HSBC Bank USA*, *supra,* the Second District concluded that an allonge presented on "separate, loose sheets of paper, with no explanation as to how they may have been attached" to the note, were insufficient to establish holder status.

Similarly, in *In re Weisband,* 427 B.R. 13, (Bankr.D.Ariz. 2010), the bankruptcy court concluded that GMAC was not a "holder" and did not have ability to enforce a note, where GMAC failed to demonstrate that an allonge indorsement to GMAC was affixed to a note. The bankruptcy court noted that the indorsement in question was on a separate sheet of paper, and there was no evidence that it was stapled or otherwise attached to the rest of the Note. *Id.* at 19.

{¶33} Appellant cites several Ohio cases for the proposition that "when a party is in possession of a note and allonge, it is " 'not required to aver that the allonge was physically attached to the note in order to establish [its] holder status' ." Appellant's Brf. at p. 2, quoting *Wilmington Trust, N.A. v. Boydston*, 8th Dist. Cuyahoga No. 105009, 2017-Ohio-5816, ¶ 25. However, the note in *Boydston* was indorsed in blank. Appellant likewise cites *MorEquity, Inc. v. Gombita*, 2018-Ohio-4860, 125 N.E.3d 300, ¶ 37 (8th Dist.). Like the *Boydston* note, the *MorEquity* note was indorsed in blank.

{¶34} Appellant also cites *U.S. Bank N.A. v. O'Malley*, 2019-Ohio-5340, 150 N.E.3d 532 (8th Dist.) for the same proposition. However, the Eighth District relied on the following evidence in the record in that case to conclude the allonges were physically attached to the note at the time the case was filed:

> A promissory note and two allonges were attached to the 2015 complaint and U.S. Bank's motion for summary judgment. The note and allonges attached to the 2015 complaint and motion for summary judgment were identical. While the Syphus affidavit attached to U.S. Bank's motion for summary judgment referenced the note as Exhibit A — and did not mention the allonges — both the note and allonges were included as Exhibit A to the affidavit. Likewise, the promissory note and allonges were attached together as Exhibit A to the 2015 complaint. We can reasonably infer that when Syphus referenced the note he was referring to the note and the two allonges that were provided as one exhibit.

Id. at ¶ 36.

{¶35} Here, the Note, attached at Exhibit A-1 to the Lissoy affidavit, does not have the allonge attached or affixed to it. Instead, a copy of the allonge was provided separate and apart from the Note at Exhibit A-7 to the Lissoy affidavit. Further, the copy of the Note (stamped "original") bears staple marks, but the copy of the allonge does not. Therefore, *O'Malley* is distinguishable based on the facts.

{¶36} Accordingly, we find that Appellant is not a holder of the Note. In order to be a holder of the Note in this case, Appellant must be an identified person that is the person in possession. The Lissoy affidavit establishes that Appellant is in possession of the Note. Appellant relies on the allonge to establish that it is the "identified person." However, in Ohio, the allonge must be affixed to the Note. Lissoy does not aver that the allonge was attached to the Note. Further, we cannot conclude based on the record in this case, where the allonge is attached as a separate exhibit to the Lissoy affidavit, that the allonge was attached to the Note. Therefore, we find that Appellant does not have standing to enforce the Note.

{¶37} Next, Appellant asserts that Appellee lacks standing to challenge the assignment of the Note to Appellant because Appellee suffered no injury as a result of the assignment. Appellant further argues that Appellee is estopped from asserting that Appellant has no interest in the Note based upon its past payments to Appellant. Both arguments are raised for the first time on appeal. However, a party cannot raise a new issue in support of summary judgment for the first time on appeal. *Rice v. Columbiana Cnty. Bd. of Commrs*., 7th Dist. Columbiana No. 20 CO 0031, 2022-Ohio-2078, ¶ 44.

{¶38} Finally, Appellant asserts that it owns a superior lien in this case but for the Treasurer's lien. Appellant cites *Wells Fargo Bank, N.A. v. Byers*, 10th Dist. Franklin No. 13AP-767, 2014-Ohio-3303, for the proposition that an invalid assignment cannot negate a valid negotiation of a note. Insofar as Appellant's argument is predicated upon its alleged status as a holder, the argument is meritless.

CONCLUSION

{¶39} For the foregoing reasons, the entry of summary judgment on Appellant's cross-claims for breach of a promissory note and foreclosure in favor of Appellee, and the

entry of summary judgment on Appellee's cross-claim for declaratory judgment against Appellant are affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Dye v. J.J. Detweiler Ents., Inc.*, 2022-Ohio-3250.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES DYE, ET AL.

Plaintiffs-Appellants/Cross-Appellees

-vs-

J.J. DETWEILER ENTERPRISES, INC., ET AL.

Defendants-Appellees/Cross-Appellants

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2022 CA 00012

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2017 CV 02475
JUDGMENT:	Affirmed in part; Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	September 15, 2022

APPEARANCES:

For Plaintiffs-Appellants	For Defendants-Appellees
JON A. TROYER JON A. TROYER, ATTORNEY AT LAW 5619 Tyro Street, NE Canton, Ohio 44721	JAMES J. COLLUM LAW OFFICE OF JAMES J. COLLUM, LLC 4618 Dressler Road, NW Canton, Ohio 44718

Wise, J.

{¶1} Plaintiffs-Appellants, James Dye, Andralett Dye, and J.B.A. Estate Liquidators, LLC ("Appellants"), appeal from the December 22, 2021, Judgment Entry by the Stark County Court of Common Pleas. Defendants-Appellees are Jennifer L. Lile, Executor of the Estate of Joseph J. Detweiler and J.J. Detweiler Enterprises, Inc. ("Appellees"). The relevant facts leading to this appeal are as follows.

STATEMENT OF THE FACTS AND CASE

{¶2} The dispute between Appellants and Appellees arose from monies owed by Appellants on a cognovit note and past due rent for warehouse storage. Complaints were filed in 2014 and 2015 and assigned to the Honorable John G. Haas. The parties entered into a settlement agreement in December 2015, and the cases were dismissed.

{¶3} According to the settlement agreement Appellants were to auction off their property stored at the warehouse ("disputed property") to pay the amount owed ($54,079.57) ("the Debt"). The auctions would be conducted by Kaufman Realty & Auctions, LLC ("Kaufman"). The unsold portion of the disputed property would remain at the warehouse until the amount owed was paid off. After the first auction only generated $3,127.20, a dispute arose over the settlement agreement. Appellant refused to let the auctioneer conduct any more live auctions. Sometime thereafter oral modifications were made to the settlement agreement.

{¶4} The verbal modification of the settlement agreement permitted Appellants to auction the property themselves. The modification also included that if the agreed amount was not paid in full to Appellees by June 30, 2016, Appellees would receive the property.

{¶5} On July 27, 2016, Appellants filed a complaint against Appellees alleging breach of contract, conversion, and tortious interference, and sought punitive damages. This case (No. 2016CV01730) was originally assigned to Judge Haas, but transferred to the Honorable Frank G. Forchione due to a conflict of interest.

{¶6} On September 5, 2016, Appellee Joseph Detweiler passed away, and the executor of his estate was substituted as a party.

{¶7} On June 26, 2017, the parties jointly dismissed their claims.

{¶8} On June 27, 2017, Appellants refiled their complaint, adding a claim for theft (Case No. 2017CV01298).

{¶9} On July 20, 2017, Appellants amended their complaint to add a claim for civil conspiracy.

{¶10} On February 9 and 26, 2018, Appellants filed responses to motions with attached affidavits from their attorney, Jon Troyer, wherein he claimed during the conversation between counsel and Judge Haas, he relied on certain representations from Appellees' then counsel to the detriment of his clients.

{¶11} On March 9, 2018, Appellees moved to disqualify Appellants' attorney as he may be called as a necessary witness based upon statements he made in his affidavits. On April, 26, 2018, the trial court held a hearing on the matter.

{¶12} On May 7, 2018, the trial court denied the motion to disqualify counsel, but ordered Appellants to obtain co-counsel for the trial in the event Appellants' attorney was called to testify.

{¶13} On October 12, 2018, Appellants moved for reconsideration of the trial court's May 7, 2018 decision.

{¶14} On October 15, 2018, the trial court denied the motion for reconsideration, again ordering Appellants to obtain co-counsel.

{¶15} Appellants' claim the co-counsel they hired backed out shortly before trial, and the trial court dismissed the case on October 16, 2018.

{¶16} On December 21, 2018, Appellants refiled their amended complaint (Case No. 2018CV02475).

{¶17} On December 11, 2019, Appellees filed a response and counterclaim.

{¶18} On March 31, 2020, Appellants moved to continue the April 7, 2020 trial date.

{¶19} On April 3, 2020, the trial court granted the motion and again ordered Appellants to obtain co-counsel.

{¶20} On April 22, 2020, Appellees moved to dismiss for Appellants' failure to obtain co-counsel.

{¶21} On May 19, 2020, the trial court ordered Appellants to obtain co-counsel by June 1, 2020.

{¶22} On June 2, 2020, Appellants moved for reconsideration of the trial court's order to obtain co-counsel.

{¶23} On June 8, 2020, Appellants filed their response to Appellees' counterclaim.

{¶24} On June 17 2020, the trial court denied Appellants' motion for reconsideration and dismissed the case with prejudice.

{¶25} Appellants appealed the dismissal of cases 2018CV02475 and 2017CV01298.

{¶26} In *Dye v. J.J. Detweiler Enterprises, Inc.*, 5th Dist. Stark No. 2020CA00101, 2021-Ohio-1393, this Court found the trial court abused its discretion by dismissing the case with prejudice. The matter was reversed and remanded to the trial court.

{¶27} On April 28, 2021, the trial court set the trial date for October 19, 2021.

{¶28} On October 7, 2021, Appellants submitted a Jury Demand.

{¶29} On October 12, 2021, Appellees filed a Motion to Strike Plaintiff's Jury Demand.

{¶30} On October 14, 2021, Appellants responded to the Motion to Strike.

{¶31} On October 15, 2021, the trial court denied Appellants' Jury Demand.

{¶32} On October 22, 2021, the trial commenced.

{¶33} On October 27, 2021, Appellants attempted to serve a subpoena on former Judge John Haas. Appellees filed a Motion in Limine to Exclude Judge John Haas's testimony. The trial court granted the Motion in Limine.

{¶34} Appellants called Robert Braybon to testify at trial. Mr. Braybon has some experience in estate purchases and antique sales. Appellants requested the trial court certify Mr. Braybon as an expert in estate purchases and antique sales. However, during his testimony, Mr. Braybon stated, "I'm not an expert[.]"

{¶35} Next, Scott Zurakowski testified that the parties had modified the settlement agreement allowing Appellants to conduct auctions of the disputed property instead of Kaufmans. The modification also included the term that if the disputed property was not sold by June 30, 2016, Appellees would take ownership of the disputed property.

{¶36} On December 22, 2021, the trial court issued its final Judgment Entry. In that entry, the trial court found the parties entered into an oral modification of a settlement

agreement. The modification allowed Appellants to auction off the property themselves; however, if the amount owed was not paid off by June 30, 2016, the Appellees would take ownership of the property as settlement of the Debt. The trial court also found to the extent the value of the seized disputed property was in excess of the Debt, Appellees converted that property. In the calculation of damages, the trial court instituted its own methodology for the calculation of damages awarding $92,293 to Appellants.

ASSIGNMENTS OF ERROR

{¶37} Appellants filed a timely notice of appeal and herein raise the following seven Assignments of Error:

{¶38} "I. THE TRIAL COURT ERRED BY REFUSING TO ALLOW PLAINTIFFS TO CALL A WITNESS OF THEIR CHOOSING AND BY ITS OWN CONDUCT RELATED THERETO.

{¶39} "II. THE TRIAL COURT ERRED IN NOT ALLOWING PLAINTIFFS A TRIAL BY JURY.

{¶40} "III. THE TRIAL COURT ERRED IN FINDING THE PARTIES ORALLY MODIFIED THE WRITTEN SETTLEMENT AGREEMENT TO ALLOW DEFENDANTS TO TAKE ALL OF PLAINTIFFS' PROPERTY.

{¶41} "IV. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS BREACHED THE SETTLEMENT AGREEMENT.

{¶42} "V. THE TRIAL COURT ERRED IN HOW IT CALCULATED PLAINTIFFS' DAMAGES.

{¶43} "VI. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION AT TRIAL OF A SELF-SERVING STATEMENT OF A DECEASED DEFENDANT MADE

AFTER THE FACT TO HIS ATTORNEY WHILE AT THE SAME TIME EXCLUDING OTHER EVIDENCE THAT CONTRADICTS THAT STATEMENT AND SUPPORTS PLAINTIFFS' CLAIM INSTEAD.

{¶44} VII. THE TRIAL COURT ERRED IN FINDING PLAINTIFFS' EXPERT TO NOT BE AN EXPERT AND BY THE COURT'S OWN CONDUCT RELATED THERETO."

{¶45} Appellees herein raise the following two Cross-Assignments of Error:

{¶46} "I. THE TRIAL COURT ERRED IN FINDING APPELLEES CONVERTED THE PROPERTY IN EXCESS OF THE AGREED AMOUNT.

{¶47} II. THE TRIAL COURT ERRED IN FINDING DAMAGES COULD BE ESTABLISHED WITH A REASONABLE DEGREE OF CERTAINTY."

{¶48} In an effort to extrapolate some organization from the convolution of issues, we address the assignments of error and the cross-assignments of error out of order.

Assignment of Error II

{¶49} In Appellants' second Assignment of Error, Appellants argue the trial court erred by denying Appellants' Jury Demand. We disagree.

{¶50} "The right to a trial by jury shall be inviolate[.]" Section 5, Article I, Ohio Constitution. However, this constitutional guarantee still permits the legislature or courts to set the procedure by which the right to a jury trial is obtained and to declare that failing to conform to such procedure constitutes waiver. *See Cincinnati v. Bossert Mach. Co.* (1968), 16 Ohio St.2d 76, 79, 243 N.E.2d 105; *Cassidy v. Glossip* (1967), 12 Ohio St.2d 17, 19, 231 N.E.2d 64.

{¶51} In order to invoke the right to a jury trial, a party must take affirmative action. *Soler v. Evans, St. Clair & Kelsey* (2002), 94 Ohio St.3d 432, 437, 763 N.E.2d 1169. "Any

party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue." Civ.R. 38(B). Failure to timely serve and file a demand for a jury trial constitutes a waiver of the right to a trial by jury. Civ.R. 38(D).

{¶52} Civ.R. 7(A) defines "pleadings" as: "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

{¶53} In the case *sub judice*, Appellants filed their complaint on December 21, 2018. Appellees filed a response and counterclaim on December 11, 2019. On June 8, 2020, Appellants filed their response to Appellees' counterclaim. On October 7, 2021, Appellants filed a jury demand, outside of the fourteen-day window set forth in Civ.R. 38(D).

{¶54} Appellants claim that in Case No. 2017CV01298 they filed the jury demand promptly. Case No. 2017CV01298 was dismissed and refiled under Case No. 2018CV02475. Case No. 2018CV02475 was then dismissed with prejudice. Appellants filed an appeal on both Case Nos. 2017CV01298 and 2018CV02475. This Court in *Dye v. J.J. Detweiler Enterprises, Inc.*, 5th Dist. Stark No. 2020CA00101, 2021-Ohio-1393, reversed and remanded the matter. In the opinion, this Court held that the trial court

"abused its discretion in granting appellees' motion to dismiss the complaint with prejudice[.]" *Id*.

{¶55} Appellants argue that because they put both case numbers on the appeal, a Jury Demand properly filed in Case No. 2017CV01298 should carry over to the case *sub judice*. However, Appellants cite no statute, case law, rules of civil procedure, or learned treatise from this or any other jurisdiction to support their argument. Appellants also fail to provide the record to Case No. 2017CV01298 to this Court to review factual claims.

{¶56} A refiled case represents a new controversy before the court. *Williams v. Thamann*, 1st Dist. No. C-060632 & C-060633, 173 Ohio App.3d 426, 2007-Ohio-4320, 878 N.E.2d 1070, ¶10. The original case is no longer before the trial court. Appellants did not precede in any way on Case No. 2017CV01298, and did not appeal Case No. 2017CV01298 in the current appeal. Therefore, as Appellants started a new case and failed to precede with on Case No. 2017CV01298, the trial court did not err when it denied Appellants request for a Jury Demand.

{¶57} Accordingly, Appellants' second Assignment of Error is overruled.

Assignment of Error I

{¶58} In Appellants' first Assignment of Error, Appellant argues the trial court erred by excluding the testimony of Judge Haas. We disagree.

{¶59} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake County*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). The appellate court must limit its review of the trial court's

admission or exclusion of evidence to whether the trial court abused its discretion. *Id*. The abuse of discretion standard is more than an error of judgment; it implies the court ruled arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶60} Ohio Evid.R. 103(A)(2) states: "In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

{¶61} "It is basic to appellate practice that error in the form of excluded testimony is not reviewable unless there has been a proffer of the excluded testimony or the content of the testimony is apparent from the circumstances. *Franks v. Rogers*, 5th Dist. Licking No. 2009CA00130, 2010-Ohio-3586, ¶15, citing Evid.R. 103. If a proffer is not made, a reviewing court cannot determine whether a party suffers undue prejudice from any alleged error. *Id*. If the party is unable to proffer the substance of the excluded evidence, the error is deemed waived. *Campbell v. Johnson*, 87 Ohio App.3d 543, 551, 622 N.E.2d 717 (1993).

{¶62} The record does not show that Appellants deposed Judge Haas or proffered his testimony to the trial court. In fact, during the trial, the trial court inquired of Appellants: "[s]o you don't even know what Judge Haas is going to say; that is my understanding?" Day 2 trial trasc., pg. 16 lines 1-6. Appellants' counsel responded, "[t]hat is correct[.]" *Id*.

{¶63} As Appellants failed to proffer the substance of Judge Haas's evidence and it is not apparent to the trial court, this issue is deemed waived. As such the trial court did not abuse its discretion in excluding Judge Haas's testimony.

{¶64} Accordingly, Appellant's First Assignment of Error is overruled.

Assignment of Error VI

{¶65} In Appellants' sixth Assignment of Error, Appellants argue the trial court erred in failing to admit a deceased Appellee's statements and Appellants' police report. We disagree.

{¶66} Again, "a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake County*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). The appellate court must limit its review of the trial court's admission or exclusion of evidence to whether the trial court abused its discretion. *Id*. The abuse of discretion standard is more than an error of judgment; it implies the court ruled arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶67} Appellants summarily argue the trial court erred by failing to admit into evidence a police report and statements made by Appellee Detweiler referencing the judge's ruling or motions in the record.

{¶68} Appellants have the burden of demonstrating an error on appeal. *See*, App.R. 16(A)(7). "It is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Untied*, 5th Dist. Muskingum No. CT2006-0005, 2007-Ohio-1804, ¶141, quoting *State v. Taylor*, 9th Dist. Medina No. 2783-M, 1999 WL 61619 (Feb.9, 1999). *See*, *also*, App.R. 16(A)(7).

{¶69} Admissibility of evidence may be challenged on several bases, but we are not at liberty to make Appellants' arguments for them. "If an argument exists that can

support [an] assignment of error, it is not this court's duty to root it out." *State v. Romy*, 5th Dist. Stark No. 2020 CA 00066, 2021-Ohio-501, 168 N.E.3d 86, ¶35, citing *Thomas v. Harmon*, 4th Dist. Lawrence No. 08CA17, 2009-Ohio-3299, ¶14. Therefore, we may disregard assignments of error Appellants presented for review since they failed to identify in the record the error on which the assignment of error is based. App.R. 12(A)(2).

{¶70} Appellants have not supported their general argument with citations to the record. Furthermore, Appellants' brief does not even disclose the statements, describe the substance of the statements, the contents of the police report, or where in the record the trial court denies the admission. Consequently, we find that Appellants have not presented an argument, but rely only upon the assertion of error, and we thus disregard this assignment of error.

{¶71} Accordingly, Appellants' sixth Assignment of Error is overruled.

Assignment of Error VII

{¶72} In Appellants' seventh Assignment of Error, Appellants argue the trial court erred in finding Robert Braybon's testimony to be that of a layman and not an expert. We disagree.

{¶73} Again, "a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake County*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). Ordinarily, "any decision concerning the admission or exclusion of expert testimony will not be disturbed absent an abuse of discretion." *State v. Burks*, 3d Dist. Shelby No. 17-10-27, 2011-Ohio-3529, ¶22. The appellate court must limit its review of the trial court's admission or exclusion of evidence to whether the trial

court abused its discretion. *Id*. The abuse of discretion standard is more than an error of judgment; it implies the court ruled arbitrarily, unreasonably, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶74} Evid.R. 702 governs the admissibility of expert testimony. It provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *

{¶75} Evid.R. 702(B) addresses the qualifications necessary to accord a witness "expert" status. Under the rule, a witness may qualify as an expert if the witness contains specialized knowledge, experience, skill, training, or education in to help determine a fact at issue. Evid.R. 702. However, this does not require the witness to have a college degree in order to be qualified as an expert. *State v. Mack* (1995), 73 Ohio St.3d 502, 511, 653 N.E.2d 329; citing *State v. Beuke* (1988), 38 Ohio St.3d 29, 43, 526 N.E.2d 274.

{¶76} Appellants called Robert Braybon to testify to the value of items converted by Appellees. Robert Braybon, a machinist by trade, testified that he has purchased and sold estate goods in the past, but he has never taken any classes or seminars on estate valuation, has never testified as an expert before, and stated on the record "I'm not an

expert[.]" Furthermore, the witness only looked at a sample of ten banana boxes out of an alleged 9,000 banana boxes to calculate an estimated value for the total seized disputed property. No evidence was in the record as to the uniformity of the disputed property in the seized banana boxes.

{¶77} Accordingly, Appellants' seventh Assignment of Error is overruled.

Assignments of Error III and IV

{¶78} In Appellants' third and fourth Assignments of Error, Appellants argue the trial court erred when it determined Appellants and Appellees orally modified the written settlement agreement, and that Appellants breached the modified Settlement Agreement. We disagree.

{¶79} "A contract can be modified when there is clear and convincing evidence of the parties' mutual intent to modify the contract through their course of dealing." *Third Fed. S. & L. Assn. of Cleveland v. Formanik*, 8th Dist. Cuyahoga Nos. 100562 & 100810, 2014-Ohio-3234, ¶13, citing *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 2012-Ohio-1942, 971 N.E.2d 967, ¶¶24-25 (8th Dist.); *see also Rotosolutions, Inc. v. Crane Plastics Siding, L.L.C.*, 10th Dist. Franklin Nos. 13AP-52, 2013-Ohio-4343, ¶19. "[E]ven contracts that are required by the statute of frauds to be in writing can be modified orally 'when the parties to the written agreement act upon the terms of the oral agreement.' " *Formanik* at ¶13, quoting *200 W. Apts. v. Foreman*, 8th Dist. Cuyahoga No. 66107, 1994 WL 505271 (Sept. 15, 1994); *see also 3637 Green Rd. Co. v. Specialized Component Sales Co.*, 8th Dist. Cuyahoga No. 103599, 2016-Ohio-5324, 69 N.E.3d 1083, ¶¶21-25, 30-35.

{¶80} "[S]ubsequent acts and agreements may modify the terms of a contract, and unless otherwise specified, neither consideration nor a writing is necessary. Oral agreements to modify a prior written agreement are binding if based upon new and separate legal consideration or, even if gratuitous, are so acted upon by the parties that a refusal to enforce the oral modifications would result in fraud to the promissee." *Corsaro v. ARC Westlake Village, Inc*., 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, ¶16.

{¶81} In the case *sub judice*, the trial court found that the parties orally modified the Settlement Agreement. The new terms of the contract allowed Appellants to conduct auctions; the proceeds of which would pay off the Debt. Appellants had until June 30, 2016, to sell enough merchandise to pay off the Debt, or Appellees would own enough of the disputed property to satisfy the Debt. These terms were testified to by Scott Zurakowski. To corroborate Zurakowski's testimony, Appellants conducted online auctions of the disputed properties. In accordance with the modified Settlement Agreement and after the passage of the June 30, 2016 deadline, Appellees moved the disputed property from the warehouse to a different location claiming ownership. While James Dye testified to a modification of the Settlement Agreement, he disagreed that such agreement included the term that if the Debt had not been satisfied as of June 30, 2016, Appellees could claim ownership over the disputed property. The trial court found Scott Zurakowski's testimony that the modified Settlement Agreement included the June 30, 2016 deadline to be credible. As such the trial court's decision that the Settlement Agreement was orally modified by Appellants and Appellees and that Appellants breached the Settlement Agreement by not selling enough of the disputed property to pay off the Debt is supported by competent, credible evidence.

{¶82} Accordingly, Appellants' third and fourth Assignments of Error is overruled.

Cross-Assignment of Error I

{¶83} In Appellees' First Cross-Assignment of Error, Appellees argue the trial court erred when it found that Appellees seizure of the disputed property was to satisfy the Debt. We disagree.

{¶84} Again, "[a] contract can be modified when there is clear and convincing evidence of the parties' mutual intent to modify the contract through their course of dealing." *Third Fed. S. & L. Assn. of Cleveland v. Formanik*, 8th Dist. Cuyahoga Nos. 100562 & 100810, 2014-Ohio-3234, 2014 WL 3700514, ¶13, citing *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 2012-Ohio-1942, 971 N.E.2d 967, ¶¶24-25 (8th Dist.); *see also Rotosolutions, Inc. v. Crane Plastics Siding, L.L.C.*, 10th Dist. Franklin Nos. 13AP-52, 2013-Ohio-4343, 2013 WL 5451702, ¶19. "[E]ven contracts that are required by the statute of frauds to be in writing can be modified orally 'when the parties to the written agreement act upon the terms of the oral agreement.' " *Formanik* at ¶13, quoting *200 W. Apts. v. Foreman*, 8th Dist. Cuyahoga No. 66107, 1994 WL 505271 (Sept. 15, 1994); *see also 3637 Green Rd. Co. v. Specialized Component Sales Co.*, 2016-Ohio-5324, 69 N.E.3d 1083, ¶¶21-25, 30-35 (8th Dist.).

{¶85} "[S]ubsequent acts and agreements may modify the terms of a contract, and unless otherwise specified, neither consideration nor a writing is necessary. Oral agreements to modify a prior written agreement are binding if based upon new and separate legal consideration or, even if gratuitous, are so acted upon by the parties that a refusal to enforce the oral modifications would result in fraud to the promissee." *Corsaro*

v. ARC Westlake Village, Inc., 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, 2005 WL 984502, ¶16.

{¶86} In the case *sub judice*, the trial court found the modified Settlement allowed Appellees to seize the disputed property to satisfy the Debt. Scott Zurakowski testified that the oral modification of the contract provided Appellants could auction the items themselves, but if the Debt was not paid by June 30, 2016, then the disputed property would become Appellees. The trial court found Scott Zurakowski's testimony regarding the transfer in ownership of the disputed property to be circumstantial evidence that it satisfies the Debt. As such the trial court's decision that the oral modification of the settlement agreement allowed Appellees to obtain the disputed property to satisfy the Debt is supported by competent credible evidence.

{¶87} Accordingly, Appellees first Cross-Assignment of Error is overruled.

Cross-Assignment of Error II

{¶88} In Appellees' second Cross-Assignment of Error, Appellees argue the trial court erred in finding damages could be established with reasonable certainty. We agree.

{¶89} In *Kavalec v. Ohio Express, Inc.*, 8th Dist. Cuyahoga No. 103410, 2016-Ohio-5925, 71 N.E.3d 660, ¶37, the Eighth District Court of Appeals stated:

> Damages cannot be based on a mere "guestimate." *Buckeye Trophy, Inc. v. S. Bowling & Billiard Supply Co.*, 3 Ohio App.3d 32, 443 N.E.2d 1043 (10th Dist.1982); *Bevens v. Wooten Landscaping, Inc.*, 4th Dist. Pike No.11CA819, 2012-Ohio-5137, 2012 WL 5391961, ¶17. Damages need not be calculated with mathematical certainty, but cannot be based on mere speculation and conjecture. *Marzullo v. J.D. Pavement*

> *Maintenance*, 2011-Ohio-6261, 975 N.E.2d 1, ¶40. Instead, a plaintiff must show its entitlement to damages in an amount ascertainable with reasonable certainty. *Id*., citing *Barker v. Sundberg*, 11th Dist. Ashtabula No. 92-A-1756, 1993 WL 489236 (Oct. 25,1993); *Glenwood Homes v. State Auto Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 72856 1998 WL 685493 (Oct. 1, 1998) (speculative damages are not recoverable).

{¶90} In *Kavalec*, Appellees could not produce receipts for the items converted, as some items were bought thirty to forty years ago, and Appellees guessed at values based upon similar items listed on craigslist and eBay. However, no corroborating evidence of online research was submitted. The Eighth District held that the evidence offered did not satisfy the standard.

{¶91} In the case *sub judice*, neither Appellants nor Appellees could produce a list specifying the property converted. Both submitted estimates of amount of “banana boxes” and other items. The evidence presented at trial was based upon an examination of a sample of ten “banana boxes” out of an estimated 9,000 total banana boxes. This sample was taken only from the unseized property. No items or values were presented from any unexamined “banana box”. No evidence was presented to corroborate the amount of “banana boxes.” No evidence was presented to show that the contents of all “banana boxes” were similar enough that a representative sample could be used to arrive at a reasonable estimated value.

{¶92} Appellants argue they could not supply business records because those were also seized by Appellees. However, Appellants have not shown where they

requested these documents in discovery or an accounting of the disputed property from Appellees.

{¶93} Evidence and testimony failed to present the age, condition, amount, or description of the disputed property obtained by Appellees. The lack of any meaningful description of the property seized and valuation based upon the age and condition of the property seized prevents damages from being ascertained with reasonable certainty. The damages Appellants suffered by Appellees conversion of the disputed property amount to nothing more than conjecture as they lack specificity in description, condition, age, and amount. Appellants failed to offer proof of their damages with reasonable certainty. As such, we find competent, credible evidence as to the value of damages incurred from the conversion of the disputed property to be absent from the record.

{¶94} Accordingly, Appellees' second Cross-Assignment of Error is well taken.

Assignment of Error V

{¶95} Based upon our disposition of Appellees' second Cross-Assignment of Error, we will refrain from addressing Appellant's fifth Assignment of Error.

{¶96} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed in part and reversed in part. The matter is remanded to the Stark County Court of Common Pleas for further proceedings consistent with this opinion.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/br 0831