[Cite as *Evanston Acquisitions, L.L.C. v. STAG II Dayton, L.L.C.*, 2017-Ohio-5755.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

EVANSTON ACQUISITIONS, LLC

Plaintiff-Appellees

v.

STAG II DAYTON, LLC, et al.

Defendants-Appellant

Appellate Case No. 27480

Trial Court Case No. 2015 CV 04528

[Civil Appeal from Common Pleas Court]

DECISION AND FINAL JUDGMENT ENTRY
June 22, 2017

PER CURIAM:

{¶ 1} This appeal arises out a 2015 purchase and sale agreement between Evanston Acquisitions, LLC ("Evanston") as buyer, and STAG II Dayton, LLC ("STAG") as seller. In August 2015, Evanston filed suit against STAG, alleging a breach of contract and seeking money damages and declaratory judgment. Evanston also named Fidelity National Title Insurance Company, which was holding the earnest money at issue in the

case.

{¶ 2} STAG filed counterclaims against Evanston, also asserting a breach of contract and seeking money damages and declaratory judgment. The parties filed cross motions for summary judgment, which were referred to a magistrate. In their original pleadings and motions for summary judgment, both parties asserted a right to attorney fees under the agreement.

{¶ 3} The Magistrate's Decision recommended granting STAG's motion for summary judgment and overruling Evanston's motion. The magistrate specifically discussed the law with respect to attorney fees, and said the following about damages:

> Summary Judgment and Declaratory Judgment is GRANTED in favor of Defendant Stag II Dayton, LLC and against Plaintiff Evanston Acquisitions, LLC in the amount of $300,000.00 plus interest at the statutory rate, plus costs, plus *attorney fees to be determined at a hearing* before the undersigned Magistrate set after the Court's adoption of this Decision.

(Emphasis added.) Evanston filed objections to the Magistrate's Decision.

{¶ 4} On January 27, 2017, the trial court sustained in part, and overruled in part, Evanston's objections. The court then sustained Evanston's motion for summary judgment, and overruled STAG's motion, the opposite of what the magistrate had recommended. The trial court also ordered the following:

> 5) Plaintiff is awarded the $300,000 in Earnest Money described in the PSA plus attorney's fees; and
>
> 6) Defendant Fidelity National Title Insurance Company is ORDERED to release *forthwith to Plaintiff* the $300,000 held in escrow under the PSA.

This is a final appealable order.

(Emphasis in original.) The trial court did not otherwise specify the amount of attorney fees, and did not certify that there was no just reason for delay. *See* Civ.R. 54(B).

{¶ 5} STAG appealed the January 27 Decision. Evanston promptly moved to dismiss the appeal, arguing that the order on appeal is not yet final and appealable because the amount of attorney fees is undetermined. In response, STAG explained that "[i]n an abundance of caution, appellant chose not to ignore [the court's statement that the order "is a final appealable order"], even though the order did not contain "no just reason for delay" language under Civ.R. 54(B)." For the following reasons, we agree that the order is not final and appealable and dismiss the appeal.

{¶ 6} An appellate court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶ 7} The Supreme Court of Ohio has held that "[w]hen attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just reason for delay, is not a final, appealable order." *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, paragraph 2 of the syllabus. A decision that awards attorney fees but does not specify the amount is likewise not final and appealable without a Civ.R. 54(B) certification. *Reed Elsevier, Inc. v. Nunn*, 2d Dist. Montgomery No. 26625, 2015-Ohio-

3914, ¶ 12.

{¶ 8} We recognize that some courts "have limited the application of *Vaughn* by holding that the mere mention of attorney's fees in * * * the complaint does not rise to the level of a separate claim for relief preventing a judgment from becoming a final appealable order." *Bank of New York Mellon Trust Co. v. Zeigler*, 5th Dist. Richland No. 11-CA-25, 2011-Ohio-4748, ¶ 19-31 (citing cases from the 4th, 7th and 9th appellate districts). These courts are "concerned that an overly broad application of the *Vaughn* holding would require the dismissal of practically every civil appeal on jurisdictional grounds because most complaints contain a pro forma request for attorney's fees and this request is usually ignored by the trial court when final judgment is rendered." *Id*.

{¶ 9} However, these courts also recognize that "this reasoning does not apply when a trial court in its order discusses 'the attorney fee issue and defers its adjudication, or (2) awards attorney fees and defers the determination of the amount of fees.' " *Knight v. Colazzo*, 9th Dist. Summit No. 24110, 2008-Ohio-6613, ¶ 9, quoting *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, 4th Dist. No. 07CA34, 2008-Ohio-1365, at ¶ 10. It also would not apply "if the request for attorney's fees was made pursuant to an express statute rather than as vague, unspecified or unsubstantiated request for attorney's fees." *Zeigler* at ¶ 31. "In these limited situations, the appeal should be dismissed for lack of a final appealable order" under *Vaughn*. *Knight* at ¶ 9.

{¶ 10} In this case, the trial court recognized Evanston's request for attorney fees, and granted it. The court did not specify the amount of attorney fees awarded, perhaps, as indicated in the Magistrate's Decision, leaving such a determination to the magistrate after the trial court resolved Evanston's objections. In any event, the trial court had not yet

entered judgment on the claim for attorney fees.

{¶ 11} The trial court did, however, indicate that its decision was "final and appealable." That particular statement is not determinative. *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas,* 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 16; *Goering v. Schille*, 1st Dist. Hamilton Nos. C-110525, C-110604, 2012-Ohio-3330, ¶ 9 ("[s]imply stating that an order is final and appealable does not make it so"). According to the Supreme Court of Ohio, the specific language, "no just reason for delay," is mandatory for the order to be appealable. *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989). The dispositive factor in this case is whether the January 27 Decision contains the required language from Civ.R. 54(B). It does not, and is therefore not final pursuant to *Vaughn*.

{¶ 12} This court lacks jurisdiction to review orders that are not final and appealable. *Gen. Acc., supra,* at 20. Accordingly, we SUSTAIN the motion to dismiss. This appeal, Montgomery Appellate Case No. 27480, is DISMISSED.

{¶ 13} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

JEFFREY E. FROELICH, Judge

JEFFREY M. WELBAUM, Judge

MICHAEL L. TUCKER, Judge

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