[Cite as *Home S. & L. Co. of Youngstown v. Great Lake Plaza, Ltd.*, 2012-Ohio-3420.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THE HOME SAVINGS & LOAN COMPANY OF YOUNGSTOWN, OHIO	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-168,**
- vs -	:	**2011-L-169,** **2011-L-170,** **and 2011-L-171**
GREAT LAKES PLAZA, LTD., et al.,	:	
Defendants-Appellants.		

Civil Appeals from the Lake County Court of Common Pleas, Case Nos. 2011 CV 1891, 2011 CV 1892, 2011 CV 1893, and 2011 CV 1894.

Judgment: Affirmed.

Richard J. Thomas and *Jerry R. Krzys*, Henderson, Covington, Messenger, Newman & Thomas, 6 Federal Plaza Central, Suite 1300, Youngstown, OH 44503 (For Plaintiff-Appellee).

Richard A. Baumgart and *Patrick A. Hruby*, Dettelbach, Sicherman & Baumgart, 1100 Amtrust Bank Center, 1801 East Ninth Street, Cleveland, OH 44114-3169 (For Defendants-Appellants).

MARY JANE TRAPP, J.

{¶1} Great Lakes Plaza, Ltd., Richard M. Osborne, McKay Real Estate Corporation, and Richard M. Osborne, Trustee, aka Richard M. Osborne, Trustee, Richard M. Osborne Trust under Restated Agreement dated January 12, 1995 ("Osborne Entities"), appeal from four *nunc pro tunc* judgment entries of the Lake County Court of Common Pleas, which entered judgments upon cognovit complaints

filed by The Home Savings & Loan Company of Youngstown, Ohio ("Home Savings"). The Osborne Entities argue that the trial court erred in determining that a clerical error had occurred in the earlier judgment entries, and in correcting the error pursuant to Civ.R. 60(A). Because we find that the trial court did not substantively change the nature of its judgments, Civ.R. 60(A) was the proper vehicle for correcting the judgment entries, and the judgments of the Lake County Court of Common Pleas are affirmed.

Substantive Facts and Procedural History

{¶2} On July 25, 2011, Home Savings filed four complaints on cognovits notes in the Lake County Court of Common Pleas ("Cognovit Actions"). On the same day, answers were filed via a warrant of attorney to confess judgment in each of the Cognovit Actions, and the trial court entered judgment in favor of Home Savings against the applicable Osborne Entities in each of the actions ("Cognovit Judgments"). The trial court found the Osborne Entities in default and entered judgments, stating that Home Savings was entitled to recover "the sum of * * *, **plus** interest at the daily default rate of * * * from July 21, 2011, unpaid late charges and other costs and expenses recoverable under the Note, Modification Agreement, amendment and Contribution Agreement, and also for costs of suit, taxed and to be taxed." (Emphasis added.) The judgment entries signed by the judge were prepared and submitted by the bank's counsel.

{¶3} After entry of the Cognovit Judgments, blanket attachments or orders of garnishment were issued to multiple garnishees in each of the Cognovit Actions. The Osborne Entities filed Motions to Dismiss or Strike Garnishments/Attachments, alleging that the Cognovit Judgments were not final judgments because they were silent as to

attorney fees and other costs potentially recoverable under the notes; thus, other claims remained pending.

{¶4} Home Savings filed Responses to the Motions to Strike, and, in the alternative, Motions to Correct Cognovit Judgment Entries Pursuant to Civ.R. 60(A), arguing that neither the complaints nor the judgment entries requested or included a specific award of attorney fees. The bank also argued that nothing extrinsic to the record was needed to calculate the "unpaid late charges" and "other costs and expenses," inasmuch as those amounts were already **included** in the sum certain stated in the judgment entries. The bank stipulated that the "plus" language utilized in the original judgment entries could be deleted, and submitted new entries for the court's signature. (Emphasis added.)

{¶5} The Osborne Entities responded with briefs in opposition to the proposed *nunc pro tunc* judgment entries, arguing that Civ.R. 60(A) was not the proper vehicle for what they alleged was the correction of a legal, and not clerical, error in the Cognovit Judgments.

{¶6} The trial court issued *nunc pro tunc* judgment entries in each of the Cognovit Actions ("*Nunc Pro Tunc* Judgments"), stating that the Cognovit Judgments had contained clerical mistakes. As previously noted, each of the original Cognovit Judgments stated that Home Savings was entitled to a sum certain particular to each of the notes, "**plus** interest at the daily default rate of * * * from July 21, 2011, unpaid late charges and other costs and expenses recoverable under the Note, Modification Agreement, Amendment and Contribution Agreement, and also for costs of suit, taxed and to be taxed." (Emphasis added.)

{¶7} The *Nunc Pro Tunc* Judgments each contained the exact same sum certain as the corresponding original Cognovit Judgment, but stated that the amount "**includes** * * * in principal, * * * in accrued interest, and * * * in unpaid late charges and other costs and expenses, plus interest at the daily default rate of * * *, from July 21, 2011, and also for costs of suit, taxed and to be taxed." (Emphasis added.)

{¶8} The Osborne Entities timely filed an appeal from the *Nunc Pro Tunc* Judgments and now raise the following assignments of error:

{¶9} "[1.] The trial court erred in determining that a clerical error occurred when the plaintiff-appellee failed to include a sum certain on the judgment entries that were entered on July 25, 2011, and granting the plaintiff-appellee's Civ.R. 60(A) motion to correct that alleged clerical error."

{¶10} "[2.] The trial court erred in granting relief under Civ.R. 60(A) on a *nunc pro tunc* basis when such relief caused the non-final judgment entries to become retroactively final."

{¶11} Because both assignments of error challenge the propriety of issuing *nunc pro tunc* orders to correct the Cognovit Judgments, we will address them together.

Standard of Review

{¶12} The application of a civil rule is a question of law, which we review *de novo*. *See Larson v. Larson*, 3d Dist. No. 13-11-25, 2011-Ohio-6013, ¶8, citing *Wedermeyer v. U.S.S. F.D.R. (CV-42) Reunion Assoc.*, 3d Dist. No. 1-09-57, 2010-Ohio-1502. *See also Gumins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-941, 2011-Ohio-3314, ¶11.

When May a Judgment Entry Be Corrected *Nunc Pro Tunc* ?

{¶13} Pursuant to Civ. R. 60(A): "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders."

{¶14} "The basic distinction between clerical mistakes that can be corrected under Civ.R. 60(A) and substantive mistakes that cannot be corrected is that the former consists of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought, it has decided to exercise its discretion in a different manner." *Kuehn v. Kuehn*, 55 Ohio App.3d 245, 247 (12th Dist.1988), citing *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir.1987) (interpreting Fed.R.Civ.P. 60(a)).

{¶15} Thus, a trial court is authorized by Civ.R. 60(A) to correct a clerical error via a *nunc pro tunc* order in order to reflect what the court actually decided or supply omissions in the exercise of clerical functions, but may not modify a prior judgment entry to reflect a modified or revised legal conclusion. *McKay v. McKay*, 24 Ohio App.3d 74 (11th Dist.1985). Specifically, a *nunc pro tunc* order may be used to "supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical errors." *State v. Greulich*, 61 Ohio App.3d 22, 24 (9th Dist.1988), citing *Jacks v. Adamson*, 56 Ohio St. 397 (1897).

{¶16} The Osborne Entities argue that the trial court made a legal mistake in the Cognovit Judgments and not a clerical mistake contrary to the specific finding presented by the trial court in the first line of the *Nunc Pro Tunc* Judgments. Our review of the

modification to the Cognovit Judgments, however, reveals that the trial court made no changes to the legal conclusions reached in the judgment entries. Instead, the trial court simply provided a breakdown and explanation of the sum certain it had ordered paid to Home Savings in each of the original Cognovit Judgments. It did so in order to clarify the fact that the amount of the judgment **included** amounts for late charges and other costs and expenses recoverable under the note, the guarantee, and the amendment to the note.

{¶17} No amounts were changed from the Cognovit Judgments, and the Osborne Entities were liable for the same amounts after the *Nunc Pro Tunc* Judgments as before. The trial court merely provided an explanation of the amounts owed on each note, identifying the amount of principal, versus accrued interest, versus unpaid late charges and other costs and expenses, plus interest; no revised or modified legal conclusion was made and, most importantly, no further judgment was exercised by the trial court. *Compare McKay*, *supra* (holding that a *nunc pro tunc* order was not the appropriate vehicle for modifying the distribution of assets between former spouses because it went "beyond supplying omissions" and "changed what the court actually decided").

{¶18} Here, the trial court had clearly intended the Cognovit Judgments to be final and had provided a sum certain owed on each of the notes. The trial court corrected an incorrect item via the *Nunc Pro Tunc* Judgments. The mistake was simply the use of the word "plus" rather than "including" in the original entries – this is apparent because the amounts set forth in the *nunc pro tunc* entries add up to the same amount

as the judgment set forth in the original entry. There was no legal decision or judgment involved in the correction.

{¶19} The Osborne Entities argue that the correction failed to address the issue of attorney fees. They suggest that the alteration of the judgment language took a non-final judgment, due to a lack of attorney fee determination, and impermissibly made it final by simply removing the issue of attorney fees. They would have us vacate the *Nunc Pro Tunc* judgments because, although the complaint sought, inter alia, attorney fees, the Cognovit Judgments failed to either award a sum certain for such fees or deny attorney fees. They argue that their appeal rights have been prejudiced, yet they have failed to demonstrate any prejudice in the record before us.

{¶20} While it is correct that "when 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 not just reason for delay is not a final appealable order," such is not the case here. *Internatl. Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.,* 116 Ohio St.3d 335, 2007-Ohio-6439, ¶17. "Courts have concluded that a request for attorney fees set forth in the complaint's prayer for relief should not be considered a separate and distinct claim * * *." *Scott v. Lyons*, 11th Dist. No. 2008-A-0032, 2009-Ohio-1141, ¶30, citing *Jones v. McAlarney Pools, Spas & Billiards, Inc*., 4th Dist. No. 07CA34, 2008-Ohio-1365, ¶12, and *Knight v. Colazzo*, 9th Dist. No. 24110, 2008-Ohio-6613, ¶9.

{¶21} Here, any request Home Savings may have made for attorney fees was contained within its general prayer for relief and was not laid out as a separate and distinct claim. Therefore, we construe any request for attorney fees as impliedly

overruled by the trial court. *See Jones* at ¶11 ("Thus, in the absence of specific statutory or rule authority invoked as a basis for an attorney fee request (which is not the situation in the instant case), a party is not entitled to an attorney fee award and we should treat the fee request as having been overruled *sub silento*.").

{¶22} We find, as the Eighth District found, that "[a]ppellants would have us hold that a trial court is without authority to enter judgment which varies in any manner from the answer confessing judgment. We decline to do so. Clearly, a court may alter incorrect items in a confession of judgment before entering judgment thereon[.] * * * To conclude otherwise would elevate form over substance." *Milstein v. Northeast Ohio Harness*, 30 Ohio App.3d 248, 252 (8th Dist.1986).

{¶23} Stated in another way, if a court may correct an incorrect item before entering judgment, it may also correct an incorrect item *nunc pro tunc* if it is a mistake that does not involve a legal decision or judgment. This court has even held that a *nunc pro tunc* order issued "merely to make the court's original judgment comply with Civ.R. 54(B)," and thus transform the judgment into a final and appealable order, is permissible. *Hughes v. Miner*, 15 Ohio App.3d 141, 143 (1984).

{¶24} We further note that "'[t]he purpose of a cognovit note is to allow the holder of the note to quickly obtain judgment, without the possibility of trial.' * * * If a debtor disputes a cognovit judgment entered against them, the debtor may pursue redress by filing a Civ.R. 60(B) motion for relief from judgment." *Cherol v. Sieben Investments*, 7th Dist. No. 05 MA 112, 2006-Ohio-7048, ¶23, quoting *Masters Tuxedo Charleston, Inc. v. Krainock*, 7th Dist. No. 02 CA 80, 2002-Ohio-5235, ¶6. Therefore,

any issues the Osborne Entities have with the Cognovit Judgments should have been addressed via a Civ.R. 60(B) motion and not a direct appeal.

{¶25} Therefore, assignments of error one and two are without merit and the judgments of the Lake County Court of Common Pleas are affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.