[Cite as *2-J Supply, Inc. v. Garrett & Parker, L.L.C.*, 2015-Ohio-2757.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

2-J SUPPLY, INC.,	:	Case No. 13CA29
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
GARRETT & PARKER, LLC, ET AL.,	:	
	:	**RELEASED: 7/1/2015**
Defendants-Appellees.	:	

APPEARANCES:

Thomas B. Talbot, Jr., Talbot & Ducker, Dayton, Ohio, for appellant.[1]

Harsha, J.

{¶1} The trial court granted a default judgment in favor of 2-J Supply, Inc. ("2-J") on its claim for goods sold to Garrett & Parker, LLC ("Garrett & Parker") under the terms of a credit account application and the personal guarantees of Lawrence E. Parker and Patrick B. Garrett, the owners of Garrett & Parker, LLC. However, the trial court denied 2-J's claim for attorney fees under the parties' agreement because no statute authorized the recovery of these fees.

{¶2} In its sole assignment of error 2-J asserts that the trial court erred in denying an award of attorney fees. The trial court did not acknowledge that one of the well-recognized exceptions to the general rule that a prevailing party may not recover attorney fees is an enforceable contract provision providing for an award of attorney fees. Therefore, it erred in denying the requested award. The trial court made no finding and there is no evidence that the attorney fee provisions in the parties' contract

[1] Appellees have not filed a brief or otherwise appeared in this matter.

were ambiguous, the product of compulsion or duress, or unequal bargaining power. Because persons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced, we sustain 2-J's sole assignment of error, reverse the judgment of the trial court, and remand the cause for the trial court to determine the reasonable amount of attorney fees owed by appellees.

I. FACTS

{¶3} Garrett & Parker is a limited-liability company that purchased materials from 2-J under the terms of a credit account application signed and personally guaranteed by its owners, Patrick Garrett and Larry Parker. Garrett & Parker agreed to pay attorney fees incurred by 2-J if they defaulted on their invoices for goods sold to them:

> It is agreed that the buyer will pay all invoices in accordance with stated terms. Interest will be assessed on delinquent invoices at the rate of 2% per month, (24% apr) together with any court costs, attorney's fees and cost of collection the seller may incur in enforcing the terms of this agreement. If legal action becomes necessary by either seller or buyer it is also agreed that this or any contemporaneous or subsequent agreement will be governed as to validity, interpretation, construction, effect and in all other respects by the laws of the State of Ohio.

{¶4} Garrett and Parker also individually agreed to personally guarantee that their company would pay any reasonable attorney fees incurred by 2-J to enforce the parties' credit agreement:

> I hereby absolutely and unconditionally PERSONALLY GUARANTEE the FULL and punctual payment of any obligation of the company and I hereby bind myself to pay you on demand any sum, including all cost of collection and reasonable attorney's fees, which may become due you by the company where the company shall fail to pay same. It is understood that this guarantee shall be continuing and irrevocable and indemnity for such indebtedness of the company. * * *

{¶5} Garrett & Parker failed to pay invoices for goods sold and delivered by 2-J and under the parties' credit account agreement they owed $16,215.38 plus interest, attorney fees, and costs. 2-J filed a complaint in the Highland County Court of Common Pleas against Garrett & Parker and its members, Garrett and Parker, in their individual capacities. 2-J requested judgment against the defendants in the amount owed with interest at the contractual rate, plus attorney fees, and costs.

{¶6} After the defendants failed to timely respond to its complaint, 2-J filed a motion for default judgment, which included a request for attorney fees under the parties' contract in the amount of $3,835.54. 2-J later filed a supporting memorandum in which argued that of R.C. 1319.02(C),[2] which authorizes an award of attorney fees "only if the total amount owed on the contract of indebtedness at the time of the contract exceeds one hundred thousand dollars" was inapplicable.

{¶7} The trial court entered default judgment in favor of 2-J against the defendants, jointly and severally, in the amount requested, plus interest. The trial court also awarded costs to 2-J against the defendants. Because 2-J cited no "statutory authority that allows the Court to make an award of attorney fees," the trial court denied that request because "the law allows the Court to award attorney fees only when authorized by statute." This appeal ensued.[3]

II. ASSIGNMENT OF ERROR

{¶8} 2-J assigns the following error for our review:

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[2] 2-J cited former R.C. 1301.21(C) in its memorandum even though it had been recodified as R.C. 1309.02(C) in 2011.

[3] After 2-J notified this court that Parker had filed a voluntary petition in bankruptcy, we placed it on the inactive calendar, but reinstated it regarding the remaining defendants after 2-J notified us that Parker received a discharge in bankruptcy.

1. The Trial Court erred in denying an award of attorney fees to the Plaintiff-Appellant.

III. STANDARD OF REVIEW

{¶9} We generally review a trial court's decision on a request for attorney fees for an abuse of discretion. *See, e.g., Hamilton v. Ball*, 1014-Ohio-1118, 7 N.E.3d 1241, ¶ 78 (4th Dist.). "Although the abuse of discretion standard usually affords maximum [deference] to the lower court, no court retains discretion to adopt an incorrect legal rule or to apply an appropriate rule in an inappropriate manner. Such a course of conduct would result in an abuse of discretion." *See Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals*, 2013-Ohio-5610, 5 N.E.3d 694, ¶ 16, citing Harsha, William, H., *The Substance of Appeals*, 17 Ohio Lawyer, No. 6, 17. This case presents the legal issue of whether the trial court erred in refusing to apply a rule of law concerning the availability of attorney's fees. We make this determination as with other questions of law on a de novo basis. *Id*. at ¶ 16.

{¶10} In addition, our review is guided by the fact that appellees have not participated in this appeal. Because appellees did not file a brief or otherwise appear, we may accept 2-J's statement of facts and issues as correct and reverse the judgment if its brief "reasonably appears to sustain such action." App.R. 18(C); *see also Sheridan v. Hagglund*, 4th Dist. Meigs No. 13CA6, 2014-Ohio-4031, ¶ 3.

IV. LAW AND ANALYSIS

{¶11} In its sole assignment of error 2-J asserts that the trial court erred in denying its request for an award of attorney fees under the parties' contract.

{¶12} In general Ohio follows the "American rule" for the recovery of attorney fees: a prevailing party in a civil action cannot recover attorney fees as part of the costs

of the litigation. *State ex rel. Varnau v. Wenninger*, 131 Ohio St.3d 169, 2012-Ohio-224, 962 N.E.2d 790, ¶ 23. However, well-recognized exceptions to this general rule authorize an award of attorney fees when: (1) a statute requires it; (2) an enforceable contract provides for it; or (3) the prevailing party demonstrates bad faith on the part of the unsuccessful litigant. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7; *Nithiananthan v. Toriac*, 12th Dist. Warren Nos. CA2014-02-021 and CA2014-02-028, 2015-Ohio-1416, ¶ 57; *Wells Fargo Bank, NA v. Vasquez*, 9th Dist. Medina No. 13CA0086-M, 2015-Ohio-717, ¶ 12; *Forsthoeffel v. Altier*, 4th Dist. Athens No. 06CA15, 2006-Ohio-7106, ¶ 18.

{¶13} The trial court denied 2-J's request for attorney fees because it found that 2-J did not have any statutory authority for an award of fees. We agree with 2-J's argument that R.C. 1319.02(C) is inapplicable to the parties' credit account agreement. That statute provides that "[a] commitment to pay attorney's fees is enforceable under this section only if the total amount owed on the contract of indebtedness at the time the contract was entered into exceeds one hundred thousand dollars." R.C. 1319.02(A)(1) defines a "contract of indebtedness" as "a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other written evidence of indebtedness, other than indebtedness incurred for purposes that are primarily personal, family, or household."

{¶14} The statutorily enumerated types of transactions "involve obligations relating to a specified amount of debt created at the time the debt instrument is executed, i.e., traditional financing arrangements between a creditor-debtor." (Citations omitted.) *Columbus Truck & Equip. Co., Inc. v. L.O.G. Transp., Inc.*, 10th Dist. Franklin

No. 12AP-223, 2013-Ohio-2738, ¶ 14. The credit account agreement between 2-J and Garrett & Parker did not create a debt at the time of its execution. Consequently, R.C. 1319.02(C) is inapplicable.

{¶15} Nevertheless, after agreeing with 2-J that the statute did not apply, the trial court ignored 2-J's argument that it was entitled to an award of attorney fees under the parties' contract. Instead, the trial court reasoned that 2-J was not entitled to an award of attorney fees because "the law allows the Court to award attorney fees only when authorized by statute." By ignoring the well-recognized contract exception to the general rule prohibiting a prevailing party in a civil action from recovering for its attorney fees, the trial court abused its discretion.

{¶16} In *Wilborn*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶ 8, the Supreme Court of Ohio explicitly acknowledged the rule that agreements to pay another's attorney fees are normally enforceable and not void as against public policy because it recognizes the fundamental right to contract:

> When the right to recover attorney fees arises from a stipulation in a contract, the rationale permitting recovery is the "fundamental right to contract freely with the expectation that the terms of the contract will be enforced." *Nottingdale* [*Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32,] at 36, 514 N.E.2d 702 [1987]. The presence of equal bargaining power and the lack of indicia of compulsion or duress are characteristics of agreements that are entered into freely. See id. at 35, 514 N.E.2d 702. In these instances, agreements to pay another's attorney fees are generally "enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." *Id*. at syllabus. See also *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238, 241–243, 513 N.E.2d 253 (an indemnity agreement requiring the payment of qualified legal expenses arising from free and understanding negotiation is enforceable and not contrary to Ohio's public policy).

{¶17} The Supreme Court acknowledged its prior cases holding certain contractual provisions requiring the payment of attorney fees to be unenforceable in *Wilborn*. However, it noted that these cases were limited to its specific holdings that "a provision in a mortgage or promissory note that awards attorney fees upon the enforcement of the lender's rights when the borrower defaults, such as a foreclosure action that has proceeded to judgment, is unenforceable," which in turn were premised upon the general rule that "contracts for the payment of attorney fees upon the default of a debt obligation are void and unenforceable." *Id.* at ¶ 10, 14, construing *Miller v. Kyle*, 85 Ohio St. 186, 97 N.E. 372 (1911), syllabus, and *Leavens v. Ohio Natl. Bank*, 50 Ohio St. 591, 34 N.E. 1089 (1893), syllabus. These cases are distinguishable from the agreement here because the credit account agreement did not create a debt at the time of its execution. This case involves neither a promissory note nor a mortgage.

{¶18} Moreover, the record is bereft of evidence or even argument by appellees that the attorney fee provisions in the parties' credit account agreement were ambiguous, the product of compulsion or duress, or resulted from the parties having unequal bargaining power. In fact, this case involves a commercial contract in which Garrett & Parker is a limited liability company, rather than an uninformed consumer.

{¶19} Likewise, in *Clean Wood Recycling, Inc. v. Tony's Landscaping, Inc.*, 6th Dist. Lucas No. L-14-1074, 2014-Ohio-5280, ¶ 14-17, the Sixth District Court of Appeals recently reaffirmed its precedent by upholding the enforceability of an attorney fee provision in a similar credit account agreement for a company's purchase of materials from another company:

> In this case, each appellee agreed to pay reasonable attorney fees. Again, Tony's Landscaping agreed "to pay for [appellant's] costs in collecting over due

> [sic] invoices which includes actual costs and reasonable attorney fees." Likewise, Anthony Martin signed a "personal guarantee" which provides, in part,
>
> "As an inducement to [Clean Wood Recycling, Inc.] to grant credit * * * to Tony's Landscaping, hereinafter referred to as the "Customer" * * * [Anthony Martin] shall pay [Clean Wood Recycling, Inc.] promptly when due, or upon demand thereafter, * * * including interest * * * together with al [sic] expenses of collection and/or reasonable counsel fees incurred by [Clean Wood Recycling, Inc.] by reason of the default of the Customer."
>
> The trial court denied enforcement of the above provisions as a consequence for, what the court called, appellant's "unresponsiveness" prior to trial. Importantly, however, the lower court made no finding that the attorney fee provisions were ambiguous, or the product of compulsion or duress, or that the parties had unequal bargaining power. Moreover, this court has reviewed the record and found no such factors that, if present, could have supported the trial court's decision not to enforce an otherwise valid attorney fee provision.
>
> "[P]ersons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. * * * Government interference with this right must therefore be restricted to those exceptional cases where intrusion is absolutely necessary, such as contracts promoting illegal acts." *Nottingdale*, 33 Ohio St.3d at 36, 514 N.E.2d 702. We find no evidence in this case warranting the trial court's interference with the lawful agreement of the parties. In other words, while the trial court has discretion to determine the amount of the award, it may not refuse to enforce their agreement. *Painters Supply & Equip. Co.* [*v. Wagner*], 6th Dist. Lucas No. L–07–1320, 2008–Ohio–258, ¶ 17. (Trial court erred in refusing to enforce attorney fee agreements set forth in credit application and personal guarantee in successful breach of contract action by supplier.).
>
> The record contains evidence of an enforceable contract between the parties for the payment of reasonable attorney's fees. The trial court erred in refusing appellant's request for payment of those fees. We find appellant's assignment of error is well-taken.

{¶20} The trial court erred in finding that only statutes could authorize an award of attorney fees to the prevailing party in a civil case. Precedent, including cases upholding attorney fees provisions in credit account applications and personal guarantees contained there, recognizes the enforceability of these provisions.

V. CONCLUSION

{¶21} Thus, 2-J's unopposed brief reasonably appears to sustain reversal under App.R. 18(C). Consequently, we sustain 2-J's assignment of error, reverse the judgment denying its request for attorney fees, and remand the cause to that court to determine the reasonable amount of attorney fees owed by appellees.

JUDGMENT REVERSED
AND CAUSE REMANDED.

Hoover, P.J.: dissenting

{¶ 22} I respectfully dissent from the principal opinion to affirm the judgment of the trial court. I concur with the principal opinion that R.C. 1319.02(C) is inapplicable to the credit account here. However, I find the provision directing Garrett & Parker LLC to pay 2-J's attorney fees to be to be against public policy and unenforceable.

{¶ 23} The Ohio Supreme Court has previously held that "contracts for the payment of attorney fees upon default of a debt obligation are void and unenforceable." *Wilborn* at ¶10. In *Leavans v. Ohio Natl. Bank*, 50 Ohio St. 591, 34 N.E. 1089 (1893) the Court held:

> A stipulation in a mortgage to the effect that, in case an action should be brought to foreclose it, a reasonable attorney fee, to be fixed by the court, for the services of the plaintiff's attorney in the foreclosure action, should be included in the decree, and paid out of the proceeds arising from the sale of mortgaged property, is against public policy and void.

Id. at syllabus.

This rule was later affirmed in *Miller v. Kyle*, 85 Ohio St. 186, 97 N.E. 372 (1911). There the Court held: "It is the settled law of this state that stipulations incorporated in promissory notes for the payment of attorney fees, if the principal and interest be not paid at maturity, are contrary to public policy and void." *Id.* at syllabus. "The rationale for this rule as articulated in *Leavans* and reaffirmed in *Miller*, is that 'the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation.' " *Wilburn* at ¶

14 quoting *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 242, 513 N.E.2d 253 (1987).

{¶ 24} The Supreme Court of Ohio has established an exception to the rule that a prevailing party may not recover attorney's fees. *See generally Wilburn*; *Nottingdale*, 33 Ohio St.3d 32, 34, 514 N.E.2d 702 (1987); *Worth*. In *Nottingdale,* 33 Ohio St.3d 32, 33–34, 514 N.E.2d 702 (1987), the Court ruled that a provision contained with a declaration of condominium ownership and /or condominium by-laws requiring that a defaulting unit owner be responsible for the payment of attorney fees incurred by the unit owners association in either a collection action or a foreclosure action against the defaulting unit owner for unpaid common assessments are enforceable and not void as against public policy so long as the fees are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case. *Id* at paragraph one of the syllabus.

{¶ 25} The Court in *Nottingdale* distinguished *Miller* because the case before them involved a "specific contractual provision that was assented to in a non-commercial setting by competent parties with equal bargaining positions and under neither compulsion nor duress." In *Worth*, released a month before *Nottingdale*, the Court enforced an indemnitor's express agreement to indemnify an indemnitee for qualified legal expenses. The Court reasoned, "there is nothing to suggest that these agreements were negotiated in any other context other than one of free and understanding negotiation." *Id.* at 241. In its dicta, the Court noted:

> When a stipulation to pay attorney fees is incorporated into an ordinary contract, lease, note or other debt instrument, it is ordinarily included by

> the creditor or a similar party to whom the debt is owed and is in the sole interest of such party. In the event of a breach or other default on the underlying obligation, the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation. In those circumstances, the promise to pay counsel fees is not arrived at through free and understanding negotiation.

Id. at 242-43.

The Court also concluded: "Consequently, our decision today leaves undisturbed our holding in *Miller v. Kyle*, *supra*, and like cases." *Id*. at 243.

{¶ 26} Courts "have interpreted *Nottingdale* as holding that contractual attorney fee provisions remain unenforceable in situations where there is unequal bargaining power, where the provision promotes litigation and illegal acts such as evading the usury laws, where the provision acts as a penalty, and where the terms of the provision are not freely negotiable." *Columbus Check Cashers, Inc. v. Rodgers*, 10th Dist. Franklin No. 08AP-149, 2008-Ohio-5498, ¶ 19 citing *First Capital Corp. v. G & J Industries, Inc.*, 131 Ohio App.3d 106, 113, 721 N.E.2d 1084 (8th.Dist.1999); *CitFed Mtge. Corp. of America v. Parish*, 10th Dist. Franklin No. 96APE07-909, 1997 WL 156616 (Apr. 3, 1997); *K & A Cleaning, Inc. v. Materni,* 6th Dist. Lucas No. L-05-1293, 2006-Ohio-1989, ¶ 10-11; *Motorist Ins. Cos. v. Shields,* 4th Dist. Athens No. 00CA26, 2001-Ohio-2387; *Vermeer* at 276-278.

{¶ 27} This Court has stated:

> Contractual attorney fee provisions are unenforceable, however, in the following situations: (1) when the parties do not share an equal bargaining position; (2) when the terms of the provision are not freely negotiable; (3) when the attorney fee provision promotes litigation or illegal acts; or (4) when the attorney fee provision acts as a penalty. See *First Capital Corp. v. G & J Industries, Inc.* (1999), 131 Ohio App.3d 106, 721 N.E.2d 1084; *STA Realty, Inc. v. Specialty Restaurants Corp.* (Aug. 31, 2000), Cuyahoga App. No. 76729, unreported. In contrast, a contractual attorney fee provision will be enforceable when: (1) the contract is entered into in a non-commercial setting; (2) when the parties share an equal bargaining position; (3) when the parties are of similar sophistication; (4) when the provision has been freely negotiated; and (5) when both parties had the opportunity to have counsel review the provision. *First Capital; STA Realty.*

Motorist Ins. Companies v. Shields, 4th Dist. Athens No. 00CA26, 2001-Ohio-2387, *4.

{¶ 28} In *HomEq Servicing Corp. v. Schwamberger*, 4th Dist. No. 07CA3146, 2008-Ohio-2478, a mortgage agreement contained a provision that allowed the borrowers to reinstate the mortgage if certain conditions were met. *Id.* at ¶ 4. In order for the borrowers to initiate the restatement, they had to reimburse the lender’s attorney’s fees. *Id.* This Court enforced this provision because the obligation to pay HomEq's attorney fees was based on the borrower’s election to reinstate their mortgage under the terms of the default forbearance agreement, instead of an obligation pay the attorney’s fees upon default. *Id.* at ¶ 32. Accordingly, the agreement to pay attorney’s

fees was not against public policy because the provision was not in the sole interest of the lender. *Id.* at ¶ 33. Also, the provisions there did not act as a "penalty against the borrower because the obligation to pay attorney fees is not default-based and only arises if the borrower elects to reinstate their mortgage." *Id*.

{¶ 29} Here, the affidavit of 2-J's credit manager establishes that 2-J had an account receivable for Garrett & Parker, LLC and the guarantors of said account were Garrett and Parker, individually. The agreement in this case is a form "Credit Account Application" with a sub title of "Credit Accounts for HVAC Contractors Only." Garrett and Parker, LLC filled out the application and "Pat Garrett" and "Larry Parker" were listed as "Owners/Officers." The attorney fee provision was contained in a paragraph on the second page of the form. 2-J has not set forth any evidence that the terms of the form were negotiated.

{¶ 30} While I recognize *Nottingdale* demonstrates an exception to the general "American Rule," under which attorney fees are not recoverable, the Court there also specifically distinguished an enforceable and unenforceable provision. The provision here differs from the situation in *Nottingdale*. The provision in 2-J's "Credit Account Application" operates as a penalty to the defaulting party and only benefits the creditor who provided the form agreement. It more closely resembles provisions discussed in *Miller*, *Worth*, *First Capital*, *Vermeer*, and *Rodgers* instead of a provision agreed upon by parties of equal bargaining power, created through free and understanding negotiation, and providing a benefit to both parties. *Compare Nottingdale* at 35 and f.n. 7; *Worth* at 243. The provision that Garrett and Parker, LLC pay 2-J's attorney's fees is

against public policy. Therefore, I find this provision to be unenforceable. I would overrule 2-J's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellees shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Plea to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, A.J.: Concurs in Judgment and Opinion.
Hoover, P.J.: Dissents with attached Dissenting Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.