[Cite as *JP Morgan Chase Bank v. Belden Oak Furniture Outlet, Inc.*, 2010-Ohio-4444.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JP MORGAN CHASE BANK, N.A. Plaintiff-Appellant -vs- BELDEN OAK FURNITURE OUTLET, INC., et al. Defendants-Appellees	JUDGES: Hon. Julie A. Edwards, P. J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case No. 2010 CA 00049 O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 03869
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	September 20, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
KEITH A. KAVINSKY STEVEN K. DANKOF, JR. GALLAGHER & KAVINSKY 8740 Orion Place, Suite 200 Columbus, Ohio 43240	JONATHAN E. MORRIS REDINGER & MORRIS 116 Cleveland Avenue NW Suite 418 Canton, Ohio 44702

Wise, J.

{¶1} Plaintiff-Appellant JP Morgan Chase Bank, N.A. appeals the January 29, 2010, decision of the Stark County Court of Common Pleas granting Defendants-Appellees Belden Oak Furniture Outlet, Inc. and Susan Graber's Motion to Strike Claims and for Judgment on the Pleadings.

STATEMENT OF THE CASE AND FACTS

{¶2} The relevant facts are as follows:

{¶3} On or about May 11, 1999, Appellee Belden Oak Furniture, Inc. secured a loan in the amount of $50,000.00 from Bank One, N.A., JP Morgan's predecessor[1], secured by a Promissory Note executed by the company and a "Continuing Unlimited Guaranty" executed personally by Susan Graber.

{¶4} On October 8, 2009, Appellant filed a Complaint on the Note and Guaranty alleging that Appellee Belden Oak Furniture, Inc. had defaulted on the Note and that it owed $50,547.76, plus interest from September 15, 2009, at the rate of 4.5% per annum.

{¶5} The Complaint also alleges that Appellee Susan Graber was in breach of the Guaranty.

{¶6} The Complaint states that neither a copy of the promissory note manifesting the repayment terms and interest rate or the written guaranty was available at the time of filing, but that Appellant would supplement upon receipt of same.

{¶7} According to the Complaint, Defendants-Appellees are in breach of the Note and Guaranty, and the sum of $50,547.76 plus interest remains due and payable.

[1] Appellant JP Morgan Chase Bank is Bank One's successor by merger.

{¶8} On November 3, 2009, Appellees filed a Motion to Strike Claims and for Judgment on the Pleadings or For a Definite Statement.

{¶9} On November 30, 2009, Plaintiff-Appellant filed a Memorandum in Opposition to Appellees' Motion to Strike Claims and for Judgment on the Pleadings or for a Definite Statement.

{¶10} On December 9, 2009, Appellees filed a Reply to Appellees' Memorandum in Opposition.

{¶11} By judgment Entry filed January 29, 2010, the trial court granted Appellees' Motion to Strike Claims and for Judgment on the Pleadings. The trial court did not address Appellees' alternative request for a more definite statement

{¶12} Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶13} "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO STRIKE CLAIMS AND FOR JUDGMENT ON THE PLEADINGS."

I.

{¶14} In its sole assignment of error, Appellant asserts that the trial court erred in granting Appellee's motion to strike and for judgment on the pleadings. We agree.

{¶15} As set forth above, rather than file an Answer in this matter, Appellees filed a motion for judgment on the pleadings pursuant to Civ.R. 12(c), which provides:

{¶16} "(**C) Motion for judgment on the pleading**

{¶17} "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

{¶18} On appeal, the standard of review for a Civ.R. 12(C) motion is the same as the standard of review for a Civ.R. 12(B)(6) Motion. *Estate of Heath v. Grange Mutual Casualty Company,* 5th Dist. No. 02CAE05023, 2002-Ohio-5494, ¶ 8-9. "For either motion, the court must accept the factual allegations in the complaint as true and make all reasonable inferences in favor of the nonmoving party. Appellate review of the dismissal of a complaint based upon a motion for judgment on the pleadings requires an independent review of the complaint to determine if the dismissal was appropriate. Id. at ¶ 8. Judgment on the pleadings may be granted where no material factual issue exists and is restricted solely to the allegations contained in those pleadings. *Peterson,* supra; *Nelson v. Pleasant* (1991), 73 Ohio App.3d 479, 481, 597 N.E.2d 1137.

{¶19} Under the notice pleading requirements of Civ.R. 8(A)(1), the plaintiff only needs to plead sufficient, operative facts to support recovery under his claims. *Doe v. Robinson,* 6th Dist. No. l-07-1051, 2007-Ohio-5746, ¶ 17. Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions. See *DeVore v. Mut. of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38, 288 N.E.2d 202.

{¶20} The main difference between a Civ.R. 12(B)(6) motion and a Civ.R. 12(C) motion is timing and the material which may be considered. *N. Ohio Med. Specialists,* supra. A Civ.R. 12(B)(6) motion is ordinarily filed prior to the answer and consideration of the motion is limited solely to the complaint. Id. A Civ.R. 12(C) motion, however, is premature if advanced prior to the close of pleadings. Civ.R. 12(C) allows the court to consider both the complaint and the answer. *Id.*

{¶21} In that a motion for judgment on the pleadings can only be made "after the pleadings are closed", without an answer having been filed in the instant case, the pleadings were not closed. Thus, although a motion for judgment on the pleadings can raise failure to state a claim, a motion for judgment on the pleadings is not ripe where no answer has been filed. See, e.g., *State ex rel. Kaylor v. Bruening* (1997), 80 Ohio St.3d 142, 143, 684 N.E.2d 1228 (if all pleadings are not closed, a Civ.R. 12(C) motion is premature and cannot be considered by the trial court).

{¶22} Further, a motion that is not permitted to be made until after the pleadings are closed would not toll the time for filing an answer, which is the very document that closes the pleadings in most cases.

{¶23} Further, the proper procedure in attacking the failure of a plaintiff to attach a copy of a written instrument or to state a valid reason for his failure to attach same is to serve a motion for a more definite statement, pursuant to Civ.R. 12(E). *Marysville Newspapers, Inc. v. Delaware Gazette Co., Inc.*, Third Dist. App. No. 14-06-34, 2007-Ohio-4365. Had that motion been granted, as would have been proper in this case, Appellant could properly have been required to amend its complaint within 14 days after notice of the order sustaining the motion for a definite statement, and ordered to attach a copy of the written instrument or state a valid reason for the failure to attach same. In the event a party fails to obey the order of the court, the court may strike the pleading to which the motion was directed, or make any other orders as it deems just, which would include involuntary dismissal with prejudice pursuant to Civ.R. 41(B)(1).

{¶24} Based on the foregoing, we find that the trial court erred in granting Appellee's motion.

{¶25} Appellant's sole assignment of error is sustained.

{¶26} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is reversed and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Edwards, P. J., and

Gwin, J., concur.

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JUDGES

JWW/d 0825

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JP MORGAN CHASE BANK, N.A.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
BELDEN OAK FURNITURE OUTLET, INC., et al.	:	
Defendants-Appellees	:	Case No. 2010 CA 00049

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellees.

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JUDGES