[Cite as *First Natl. Bank of Bellevue v. NE Port Invests., L.L.C.*, 2015-Ohio-558.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

First National Bank of Bellevue

Appellee/Cross-Appellant

v.

NE Port Investments, LLC, et al.

Defendants

[Gene F. & Mary E. Molnar—Appellants/ Cross-Appellees]

Court of Appeals No. OT-14-027

Trial Court No. 13 CV 020E

DECISION AND JUDGMENT

Decided: February 13, 2015

* * * * *

Barry W. Fissel and Jared J. Lefevre, for appellee/cross-appellant.

Kenneth R. Resar, for appellants/cross-appellees.

* * * * *

JENSEN, J.

{¶ 1} This case is before the court on cross-appeals filed by defendants-appellants/cross-appellees, Gene F. Molnar, Trustee, and Mary E. Molnar, Trustee, ("the Molnars"), and plaintiff-appellee/cross-appellant First National Bank of Bellevue ("the bank"). For the reasons that follow, we find the Molnars' first assignment of error well-taken and reverse the trial court's judgment granting attorney fees to the bank.

A. Background

{¶ 2} On August 29, 2008, NE Port Investments, LLC ("NE Port"), executed a cognovit promissory note in favor of the bank in connection with its purchase of a $2 million marina in Port Clinton, Ohio. The note was personally guaranteed by Russell White, Betty Oprian, David Barsan, and Anita Barsan. As security, NE Port granted the bank a mortgage on the property in the amount of the note. The Molnars financed the remaining $800,000 and NE Port granted them a second mortgage.

{¶ 3} NE Port ultimately defaulted on its payments to both the bank and the Molnars. The bank sued on the note and personal guaranties in the Summit County Court of Common Pleas. On March 27, 2012, it obtained a cognovit judgment in the amount of $1,174,669.11, plus interest, against NE Port and the guarantors. It filed collection proceedings against the guarantors through which it garnished funds totaling $387,387.13, deposited with the Summit County Clerk of Courts. Following an unsuccessful attempt by NE Port and the guarantors to vacate the cognovit judgment, final judgment was entered on October 10, 2012, and the garnished funds were released to the bank and applied against its judgment. NE Port and the guarantors took no action to satisfy the remainder of the judgment.

{¶ 4} The Molnars initiated discussions with the bank about possibly purchasing the bank's mortgage and the underlying cognovit note. Although they signed a letter of intent in October of 2012, they never signed a purchase agreement.

{¶ 5} On January 16, 2013, the bank filed a complaint for foreclosure against NE Port in the Ottawa County Court of Common Pleas, naming as defendants all persons who may have an interest in the property, including the Molnars, William Brown, Bree Brown, and the Ottawa County Sanitary Engineering Department. It requested that a receiver be appointed to manage the property; that all defendants assert any purported claim in the property; that the defendants' equity of redemption be foreclosed; that all liens be marshaled in accordance with their priority; that the bank be found to have a valid and subsisting lien for the amount owed on its judgment; that the property be appraised, advertised, and sold and the sale proceeds applied to the amount due on its judgment; and that it be granted "such other relief as the Court deems just and equitable."

{¶ 6} NE Port failed to answer the complaint and the bank moved for a default judgment, praying "for the relief requested in the Complaint pursuant to Civ.R. 55(A)." The court granted the motion on April 16, 2013 and ordered as follows:

> 1. The Bank's Motion for Default Judgment against the NE Port is proper in all respects and is hereby granted;
>
> 2. The Mortgage is the first and best lien on the Property, subject only to the lien of unpaid real estate taxes, assessments, and penalties;
>
> 3. The Mortgage is foreclosed;
>
> 4. Unless, within three (3) days from the date of filing this entry, the Bank is paid the amount found due, together with the costs and expenses of this action, then the equity of redemption of all defendants in the Property

is forever barred and foreclosed and the Property shall be sold free and clear of all claims or interests of all parties;

5. An order of sale shall be issued for the Property directing the Sheriff of Ottawa County, Ohio, to appraise and advertise the Property for sale in a paper of general circulation within Ottawa County, Ohio, to sell the Property free and clear of all claims, interests, liens and encumbrances of all of the parties to this action, and to report his proceedings to the Court for further order, all according to law; and

6. After deducting the Receiver's fees and expenses, the Bank's costs and expenses, court costs and fees provided by law, and the real estate taxes, assessments and penalties then due and payable with respect to the Property, the proceeds of the sale of the Property shall be paid to the Bank, with the balance of the sale proceeds, if any, paid to the Clerk of this Court for further determination.

{¶ 7} The default judgment entry contained a Civ.R. 54(B) certification.

{¶ 8} The Molnars, who had cross-claimed against NE Port, were also granted a default judgment when NE Port failed to answer and defend the case. Pursuant to that order, dated May 29, 2013, the Molnars were entitled to proceeds remaining after deducting the receiver's fees and expenses, the bank's costs and expenses provided by law, real estate taxes, assessments, and penalties, and the amount remaining due to the bank on its judgment.

{¶ 9} The property was appraised on July 29, 2013, for $2 million. The Molnars purchased the property for $1,333,334 at the sheriff's sale which took place on August 30, 2013. Before the property was sold, the four guarantors of the cognovit note moved to intervene in the foreclosure action. The trial court denied their motion on September 5, 2013 and we affirmed that decision on April 25, 2014. *First National Bank of Bellevue v. NE Port Investments, LLC*, 6th Dist. Ottawa No. OT-13-024, 2014-Ohio-1760. The sale was confirmed on November 22, 2013, and the proceeds were applied against the balance owed on NE Port's debt.

{¶ 10} On January 15, 2014, the bank filed a satisfaction of judgment in the Summit County Court of Common Pleas, representing that its judgment against NE Port and the four guarantors had been satisfied in full. Two weeks later, it filed a motion for attorney fees and expenses in the Ottawa County Court of Common Pleas, alleging that it was entitled to fees under section 18 of the mortgage which, it claimed, was enforceable under R.C. 1319.02. The bank requested fees of $53,045.90 and expenses of $9,144.47. It attached affidavits purporting to establish that the fees and the time billed were reasonable and customary.

{¶ 11} The Molnars challenged the bank's motion. They argued that a substantial portion of the requested fees and expenses were not incurred to protect the mortgaged property or in the direct prosecution of the foreclosure action; the bank failed to provide appropriate affidavits and documentation describing the services performed, the dates of services, the professionals providing services, the time expended for each service, and the

amount charged by each professional providing services; the affidavits submitted did not suffice to establish that the legal services provided were necessary and reasonable; the judgment obtained in Summit County, which had been paid in full, did not include any payment for attorney fees or expenses; the contract did not entitle the bank to legal fees and expenses; and the bank failed to properly assert its request for legal fees and expenses by omitting this claim from its complaint and motion for default judgment.

{¶ 12} In response, the bank insisted that the claimed fees and expenses were incurred in efforts to reduce the mortgage indebtedness. It indicated that it was willing to submit full invoices for in camera review and maintained that the documentation it provided in support of its attorney fees and expenses was competent, admissible evidence. It disputed that it had waived its right to fees by not pleading it with specificity in its complaint. It claimed that by pleading that it was "entitled to all remedies provided at law or equity upon NE Port's default," praying for "such other relief as the Court deems just and equitable," and attaching a copy of the mortgage to its complaint, it had properly asserted its claim for attorney fees. Even if the complaint was not clear, the bank argued, the motion and proposed order for default judgment explicitly stated that it was owed attorney fees. It referred to its reply brief in support of its proposed confirmation entry, where it explicitly stated that it would be filing a fee motion, and it reminded that its intention to move for fees from the deposited proceeds of the sale was discussed during a pretrial attended by the Molnars' counsel. It asserted that it would have been impractical to state with specificity the total amount due because damages

continued to accrue. Finally, the bank asked that it be allowed leave to amend its complaint under Civ.R. 15(B) if the court determined that the bank's fee request should have been expressly stated in its complaint.

{¶ 13} The bank later filed a supplemental memorandum increasing its request for legal fees and expenses to $77,802.41 and $14,122.20, respectively. It urged again that fees incurred in pursuing settlement and negotiating the sale should be recoverable. The Molnars responded by reiterating the arguments they previously made, focusing on the bank's failure to request attorney fees and expenses in its complaint.

{¶ 14} In a decision file-stamped on June 17, 2014, the trial court granted the bank's motion for attorney fees and expenses, however, it awarded less than the full amount requested. The court held that the bank was entitled to recover attorney fees and expenses which were reasonably incurred to protect its interest in the mortgaged real property, which included the fees and expenses incurred in the action on the underlying note, the garnishment proceedings against the guarantors, and the prosecution of the foreclosure action. It found that the bank's right to recover attorney fees and expenses did not include fees and expenses incurred in its attempt to negotiate a resolution with the Molnars, in the attempted foreclosure action in Summit County, or in the proceedings to collect the fees and expenses. It found that the requested fees were reasonable and customary. The total amount that it awarded was $48,650.66.

{¶ 15} The Molnars appealed this decision and they assign the following errors for our review:

I. THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED THE PLAINTIFF/APPELLEE FIRST NATIONAL BANK OF BELLEVUE A MONETARY AWARD IN THE AMOUNT OF $48,650.66 FOR THE PAYMENT OF THE PLAINTIFF'S ATTORNEY FEES AND EXPENSES WHEN NO CLAIM FOR ATTORNEY FEES AND EXPENSES WAS SET FORTH IN THE BODY OF THE PLAINTIFF'S COMPLAINT OR IN THE PLAINTIFF'S PRAYER FOR RELIEF.

II. THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED THE PLAINTIFF/APPELLEE FIRST NATIONAL BANK OF BELLEVUE A MONETARY AWARD FOR ATTORNEY FEES AND EXPENSES INCURRED BY THE PLAINTIFF THAT WERE NOT SECURED BY THE PLAINTIFF'S MORTGAGE ON THE SUBJECT REAL PROPERTY AND ORDERED THE PAYMENT OF SAID AMOUNT FROM THE PROCEEDS RECEIVED UPON THE SALE OF THE PROPERTY.

III. THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED THE PLAINTIFF/APPELLEE FIRST NATIONAL BANK OF BELLEVUE A MONETARY AWARD FOR THE REIMBURSEMENT OF ATTORNEY FEES AND EXPENSES FOR AN UNREASONABLE AMOUNT.

{¶ 16} The bank filed a cross-appeal and it assigns the following errors for our review:

I. THE TRIAL COURT COMMITTED ERROR BY DENYING AN AWARD OF FEES INCURRED IN SETTLEMENT EFFORTS.

II. THE TRIAL COURT COMMITTED ERROR BY DENYING AN AWARD OF FEES INCURRED IN PROSECUTING THE MOTION FOR ATTORNEY FEES.

B. Law and Analysis

{¶ 17} We begin by addressing the Molnars' first assignment of error in which they claim that the bank failed to properly plead a claim for attorney fees. Ohio follows the "American Rule" with respect to attorney fees; that is, each party must pay its own fees, regardless of who prevailed. *Somerset Synfuel No. 1, L.L.C. v. Resource Recovery Internatl. Corp.,* 188 Ohio App.3d 368, 2010-Ohio-3463, 935 N.E.2d 497, ¶ 29 (11th Dist.) There are exceptions to this rule where a statute or an enforceable contract provides to the contrary. *Id.*

{¶ 18} In this case, the mortgage agreement, a copy of which was attached to the bank's complaint, contains the following provision:

18. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS. Except where prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of

> Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventory, audits, inspections or other examination by Lender in respect to the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Mortgage and Mortgagor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and is permitted by law.

{¶ 19} Under R.C. 1319.02(B), a provision such as this may be enforced as to commercial contracts of indebtedness exceeding $100,000. The statute provides:

> If a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment, to the extent that the commitment is enforceable under divisions (C) and (D) of this section.

{¶ 20} The question in this case is whether the bank properly asserted its request for attorney fees and expenses. The Molnars argue that in this case—where the bank obtained a default judgment—fees were not properly requested because they were not specifically demanded in the bank's original complaint. The bank argues that the challenge to its award of attorney fees is untimely because it was not filed within 30 days of the entry of default judgment. It also contends that it properly sought fees because it (1) attached the mortgage agreement containing the enforceable commitment to pay attorney fees as an exhibit to its complaint; (2) specifically alleged that it was entitled to "all remedies at law or equity;" and (3) requested all "relief as the Court deems just and equitable." It also urges that Civ.R. 15(B) would permit amendment of its complaint to explicitly pray for attorney fees.

{¶ 21} Civ.R. 55 and 54(C) govern the award of damages on a default judgment. *Bransky v. Shahrokhi*, 8th Dist. Cuyahoga No. 84262, 2005-Ohio-97, ¶ 12. Civ.R. 55(C) provides that "in all cases a judgment by default is subject to the limitations of Rule 54(C)." Under Civ.R. 54(C), "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Unlike the initial decision to grant a default judgment, which we review under an abuse of discretion standard, we review de novo a trial court's award of damages on a default judgment. *Bransky* at ¶ 12. *See contra Henry v. Richardson*, 193 Ohio App.3d 375, 2011-Ohio-2098, 951 N.E.2d 1123, fn. 1 (12th Dist.) (applying abuse-of-discretion standard of review).

{¶ 22} Civ.R. 54(C) is "clear on its face." *Bishop v. Grdina*, 20 Ohio St.3d 26, 28, 435 N.E.2d 704 (1985) (applying previous version of rule). It prohibits a judgment by default that is different in kind from or exceeds that which was demanded. Civ.R. 54(C). "The primary purpose of Civ.R. 54(C)'s limitation on default judgment is to 'ensure that defendants are clearly notified of the maximum potential liability to which they are exposed, so that they may make an informed, rational choice to either: (1) enable a default judgment by not responding, or (2) invest the time and expense involved in defending an action.'" (Internal citations omitted.) *State ex rel. DeWine v. A & L Salvage*, 2013-Ohio-664, 987 N.E.2d 307, ¶ 28 (7th Dist.). Subjecting a defendant to an additional, unpled monetary liability as a consequence of failing to answer a complaint would violate both the civil rules and fundamental due process. *Masny v. Vallo*, 8th Dist. Cuyahoga No. 84983, 2005-Ohio-2178, ¶ 18.

{¶ 23} We applied these principles in *Fors v. Beroske*, 6th Dist. Fulton No. F-12-001, 2013-Ohio-1079. In *Fors*, the plaintiff brought an action to partition the parties' interests in a resort timeshare. In her complaint, plaintiff demanded partition, appointment of a commissioner to facilitate sale of the property, appraisal, advertisement and sale of the property, and distribution of the proceeds of sale, in addition to attorney fees, litigation expenses, and costs. *Id.* at ¶ 13. As part of the relief granted following entry of default judgment, the trial court awarded monetary damages of $6,500 and ordered the defendant to hold plaintiff harmless from all debts and obligations associated with the mortgage loan and other expenses related to the property. *Id.* at ¶ 2. Because

the plaintiff's complaint did not include a request for monetary damages or indemnity, we held that the trial court erred in making such an award. *Id.* at ¶ 18. We explained that the plaintiff was entitled only to what she demanded in her complaint.

{¶ 24} The bank, in its complaint, prayed for the following relief:

> A. That a Receiver be appointed over NE Port and to manage the Property;
>
> B. That the defendants named herein be required to answer and set up any claim that they may have in the Property or be forever barred;
>
> C. That the equity of redemption of all defendants in the Property be foreclosed;
>
> D. That all liens on the Property be marshaled in accordance with their priority;
>
> E. That the Bank be found to have a valid and subsisting lien on the Property for the amount owed on the Judgment;
>
> F. That the Property be ordered appraised, advertised, and sold according to law, and that from the sale proceeds the Bank be paid the amount due it; and
>
> G. For such other relief as the Court deems just and equitable.

{¶ 25} It did not specifically pray for attorney fees and expenses. The bank claims that paragraph (G) is broad enough to encompass a request for fees and expenses, and it points out that in paragraph 16 of its complaint, it alleged that it was "entitled to all

remedies provided at law or equity upon NE Port's default of payments on the Note." It urges that under Civ.R. 8(E)(1), which does not require technical forms of pleading, and Civ.R. 8(F), which requires pleadings to be construed in order to do substantial justice, its claim for attorney fees should be recognized. It also argues that it "plainly" requested attorney fees in its motion for default judgment and that its request was granted in the entry of default judgment. We conclude, however, that the complaint was not sufficiently worded to put the defaulting defendant on notice that a judgment awarded against it would include attorney fees and expenses. We also conclude that the bank did not, and could not, assert its demand for attorney fees for the first time in its motion for default judgment or in the entry of default judgment. We reach these conclusions based on the following.

{¶ 26} First, R.C. 1319.02(B) specifically states that a person who has the right to recover attorney fees under the terms of a contract of indebtedness may do so "*at the option of that person.*" (Emphasis added.) The language of the statute suggests to us that while a contract of indebtedness may provide for the payment of attorney fees, the right to fees must be asserted. Neither the allegations contained in the bank's complaint nor the prayer for relief itself asserts the right to attorney fees and expenses.

{¶ 27} Second, the Summit County judgment that the bank sought to satisfy, attached as an exhibit to its complaint, awarded it only $1,1746,69.11 plus 8.5 percent interest per annum. It did not award attorney fees.

{¶ 28} Third, while it is true that the bank alleged in paragraph 16 of the complaint that it was entitled to "all remedies at law and equity," and asserted a broad, catch-all request in paragraph (G) of its prayer for relief, those allegations do not negate Civ.R. 54(C), which prohibits a default judgment that is different in kind from or exceeding the amount prayed for in the demand for judgment. *See Buckley v. Lucas*, 5th Dist. Perry No. 98CA14, 1999 WL 436838, *2 (June 8, 1999) (determining that language in the complaint demanding "such relief as may be just and equitable" did not entitle plaintiff to damages exceeding those specified in the complaint because it did not put the defaulting defendant on notice of her potential liability for such amounts). Civ.R. 54(C) reinforces our conclusion insofar as it provides that "*Except as to a party against whom a judgment is entered by default*, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings." (Emphasis added.) Although simply pleading that one is entitled to "all remedies at law and equity" or praying for "such relief as may be just and equitable" may ordinarily suffice to entitle a party to relief not specifically requested, we interpret that it does not suffice where relief is granted pursuant to the entry of a default judgment.

{¶ 29} Fourth, while the bank asserts that it made a "plain request for attorney fees" in its motion for default judgment, no such request appears. To the contrary, the motion makes no mention of attorney fees, and requests only "the relief demanded in the Complaint." We acknowledge that the proposed entry of default (submitted by the bank and ultimately adopted by the court), while failing to explicitly order fees, includes a

finding at paragraph four that attorney fees were owed pursuant to the mortgage. But Civ.R. 54(C) limits recovery to relief of the kind and amount prayed for in the demand for judgment. Under Civ.R. 8(A)(2), the demand for judgment must be made in the pleadings, defined by Civ.R. 7(A) to include a complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, third-party answer, and reply to an answer or a third-party answer. Motions and proposed orders are not "pleadings."

{¶ 30} We further note that the bank's conduct in (1) filing a notice of satisfaction of judgment in Summit County and (2) filing a *motion* for the award of attorney fees following confirmation of the sale of the marina, belies its contention that attorney fees were requested in the complaint and granted in the entry of default judgment.

{¶ 31} The bank argues that Civ.R. 15 would permit the trial court to grant it leave to amend its complaint to add a request for attorney fees. Although that may be true where a defendant has answered and participated in the proceedings, it would contravene the purpose of Civ.R. 54(C) to permit amendment after default judgment has been granted, the sale of the property has been confirmed, and the balance of the loan has been paid from the proceeds.

{¶ 32} Finally, we address the bank's argument that the Molnars' appeal of the attorney fees award is untimely. The bank contends that by reciting the standard of review for default judgments, the Molnars have implicitly conceded that the order they appeal is the April 16, 2013 default judgment entry. As such, it argues, under

CitiMortgage v. Roznowski, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, the Molnars were required to file their notice of appeal within 30 days of the default judgment entry—a deadline that has long passed. Because we find that attorney fees were not requested in the complaint and were not specified as being among the damages awarded in the entry of default judgment, there was no order from which to appeal until the trial court granted the bank's motion for attorney fees on June 17, 2014. Having said this, it is nevertheless appropriate to review the June 17, 2014 judgment under Civ.R. 54(C) because it is Civ.R. 54(C) that limits the damages available upon default. We, therefore, find *Roznowski* inapplicable, and conclude that the Molnars' July 15, 2014 notice of appeal was filed timely.

{¶ 33} Accordingly, we find the Molnars' first assignment of error well-taken.

III. Conclusion

{¶ 34} We find the Molnars' first assignment of error well-taken and reverse the June 17, 2014 order of the Ottawa County Court of Common Pleas. In light of this decision, we need not consider the remaining assignments of error identified in the Molnars' appeal and the bank's cross-appeal. The costs of this appeal are assessed to the bank pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

_____
JUDGE