[Cite as *Capital One Bank, N.A. v. Harland*, 2009-Ohio-5890.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

CAPITAL ONE BANK	C.A. No. 09CA0010
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MOLLY HARLAND	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellee	CASE No. 08-CV-0679

DECISION AND JOURNAL ENTRY

Dated: November 9, 2009

Per Curiam.

{¶1} Plaintiff-Appellant, Capital One Bank, N.A. ("Capital One"), appeals from the judgment of the Wayne County Court of Common Pleas, dismissing its complaint against Defendant-Appellee, Molly Harland. This Court reverses.

I

{¶2} On September 8, 2008, Capital One filed a complaint against Harland based on her Capital One credit card account. In its complaint, Capital One sought "$991.24 plus accrued interest of $120.33, plus future interest at 25.00% after September 03, 2008 plus costs of this action." Although Harland signed the receipt of service for Capital One's complaint, she did not file a response. On October 21, 2008, Capital One filed a motion for default judgment. The trial court set the matter for a default hearing on January 13, 2009. It is unclear whether the hearing ever took place.

{¶3} Subsequently, the parties presented the court with an agreed judgment entry that both parties had signed. By the terms of the agreed entry, Harland agreed to make monthly payments to Capital One to satisfy a judgment "amount of $991.24, plus accrued interest of $207.34 through January 12, 2009, plus interest at 25.00% per annum from January 12, 2009, plus costs of this action." On February 9, 2009, the trial court issued the following judgment entry:

> "The Court has reviewed the Agreed Judgment Entry submitted to the Court and finds that the interest rate exceeds the legal limit for judgment. Therefore, the Agreed Judgment Entry is not approved and the Complaint is dismissed at [Capital One's] costs."

Capital One now appeals from the court's judgment and raises three assignments of error for our review. For ease of analysis, we rearrange and consolidate the assignments of error.

II

Assignment of Error Number Two

> "THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE ACTION INSTEAD OF SEEKING MODIFICATION TO THE ENTRY."

Assignment of Error Number Three

> "THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE ACTION SUA SPONTE WITHOUT NOTICE TO THE PARTIES[.]"

{¶4} In its second and third assignments of error, Capital One argues that the trial court erred by dismissing its complaint sua sponte without affording Capital One notice of its intention to do so. We agree.

{¶5} Initially, we must consider whether we have jurisdiction to hear this appeal. The Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments of lower courts. Section 3(B)(2), Article IV. As such, this Court is obligated to raise issues of jurisdiction sua sponte and to dismiss appeals that do not stem from final appealable orders.

Finley & Sons Builders, Inc. v. Cross, 9th Dist. No. 23738, 2007-Ohio-7037, at ¶5. In many instances a dismissal does not amount to a final appealable order. *Ward v. Summa Health Sys.*, 9th Dist. No. 24567, 2009-Ohio-4859, at ¶7. Civ.R. 41(B)(3) provides, however, that "any dismissal not provided for in this rule *** operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." As further discussed below, the trial court dismissed Capital One's complaint on grounds other than those specified in Civ.R. 41 or any other Civil Rule. The court did not specify in its order that the dismissal was to operate otherwise than on the merits. Therefore, the dismissal constituted an adjudication on the merits and is a final appealable order. Civ.R. 41(B)(3).

{¶6} We note that Harland did not file an appellate brief in this matter. Accordingly, "this Court may accept [Capital One's] statement of the facts and issues as presented in [its] brief as correct and reverse the judgment of the trial court if [its] brief reasonably appears to sustain such action." *Polen Implement, Inc. v. Toth*, 9th Dist. No. 07CA009280, 2008-Ohio-3211, at ¶8; App.R. 18(C).

{¶7} Absent particularized circumstances, a trial court is required to notify a plaintiff of its intention to dismiss a complaint sua sponte regardless of the basis for the dismissal. *MBNA America Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, at ¶7 (providing that, unless a complaint is frivolous or plaintiff cannot succeed upon facts as stated in the complaint, sua sponte dismissal pursuant to Civ.R. 12(B)(6) is only appropriate upon notice to parties); *Phoenix Boat Works, Inc. v. Pettit* (Feb. 17, 1999), 9th Dist. No. 2766-M, at *2 (providing that Civ.R. 41(B)(1) allows a court to dismiss sua sponte for failure to prosecute only if notice is given before the dismissal). "Sua sponte dismissals 'prejudice appellants as they deny any opportunity to respond to the alleged insufficiencies.'" *Canfora* at ¶14, quoting *McMullian v.*

Borean, 6th Dist. No. OT-05-017, 2006-Ohio-861, at ¶16. Moreover, "appellate review is frustrated when a trial court offers no explanation or reasoning for a sua sponte dismissal." *McMullian* at ¶16. When a trial court erroneously dismisses a complaint without explanation, a remand for further proceedings is an appropriate remedy. *Canfora* at ¶9; *Medina General Hosp. v. Lackey* (Feb. 20, 2002), 9th Dist. No. 3172-M, at *3.

{¶8} Harland never sought the dismissal of Capital One's complaint. Indeed, apart from signing the receipt of service, the only appearance that Harland made in the court below came in the form of her signature on the parties' agreed judgment entry. There is nothing in the record to suggest that Capital One failed to prosecute its case against Harland or otherwise failed to comply with the Civil Rules or an order of the court. Civ.R. 41(B)(1). Nor can we say that Capital One filed a frivolous complaint or otherwise would not have been able to succeed upon the facts stated in the complaint. *Canfora* at ¶7. The trial court did not specify which Civil Rule it employed to dismiss Capital One's complaint. Moreover, it dismissed the complaint without any prior notice to Capital One. Based on the foregoing, we must conclude that the trial court erred by dismissing Capital One's complaint. Compare *Lambdin v. Lambdin* (Jan. 30, 2002), 9th Dist. No. 3245-M, at *2 (concluding that the trial court did not err in dismissing the complaint where it ordered the parties to submit an agreed journal entry by a certain time, gave an extension, warned them of the dismissal, and the parties still failed to comply). Capital One's second and third assignments of error are sustained.

Assignment of Error Number One

> "THE TRIAL COURT ABUSED ITS DISCRETION BY RULING THAT AN INTEREST RATE STIPULATED TO IN AN AGREED JUDGMENT ENTRY EXCEEDED THE LEGAL LIMIT FOR JUDGMENT."

{¶9} In its first assignment of error, Capital One argues that the trial court abused its discretion by ruling that Capital One was not entitled to the 25% rate of interest set forth in the parties' agreed judgment entry. Because the trial court's order dismissed Capital One's complaint, however, no judgment as to the interest rate or Capital One's entitlement to its claimed monetary damages exists. Unless and until the trial court enters judgment on these issues, no justiciable issue exists. *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 177-78. Accordingly, we must conclude that Capital One's first assignment of error is not ripe for our review.

III

{¶10} Capital One's second and third assignments of error are sustained and its first assignment of error is unripe. The judgment of the Wayne County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

CARR, P. J.
BELFANCE, J.
CONCURS

WHITMORE, J.
CONCURS IN PART AND DISSENTS IN PART SAYING:

{¶11} I concur in the majority's resolution of Capital One's second and third assignments of error. Because I would address Capital One's first assignment of error on its merits, however, I respectfully dissent as to that assignment of error.

{¶12} In its first assignment of error, Capital One argues that the trial court erred by ruling that Capital One was not entitled to the 25% rate of interest set forth in the parties' agreed judgment entry. Specifically, Capital One argues that when parties enter into an agreed judgment entry that provides for a certain rate of interest, a creditor is statutorily entitled to that rate. For the foregoing reasons, I would conclude that the trial court did err by holding that the interest rate Capital One sought was illegal.

{¶13} The maximum statutory rate of interest in Ohio for any bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money is currently set at eight percent per annum. R.C. 1343.01(A). Unlike former versions of Chapter 1343, however, current Chapter 1343 permits contracting or settling parties to substitute a different interest rate,

which exceeds the statutory maximum. Compare *Merchants Finance Co. v. Goldweber* (1941), 138 Ohio St. 474, 476, quoting General Code § 8305 (providing that "when money becomes due and payable upon any *** note or other instrument of writing, *** or settlement between parties, *** the creditor shall be entitled to interest at the rate of six per cent per annum, and no more") with R.C. 1343.03(A). R.C. 1343.03(A) provides, in relevant part, as follows:

> "[W]hen money becomes due and payable upon any *** note[] or other instrument of writing, *** upon any settlement between parties, *** and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of *** a contract ***, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, *unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract*." (Emphasis added.)

As such, "a judgment creditor is entitled to a contractual interest rate instead of the statutory rate 'when (1) the parties have a written contract, and (2) that contract provides a rate of interest with respect to money that becomes due and payable.'" *John Soliday Fin. Group, LLC* at ¶7, quoting *First Bank of Ohio v. Wigfield*, 10th Dist. Nos. 07AP-561, 07AP-562, 2008-Ohio-1278, at ¶20. "The statutory rate is a default rate to be used when the parties have not otherwise stipulated to another rate in a written agreement." *John Soliday Fin. Group*, LLC at ¶7.

{¶14} Here, the trial court specifically rejected the parties' agreed entry because it found "that the interest rate exceeds the legal limit for judgment." The trial court did not explain what it meant by this statement and did not cite any law in support of its finding. While the 25% interest rate contained in the parties' agreed entry certainly exceeds the statutory rate of eight percent, both parties stipulated to the higher rate by signing the agreed entry. In the absence of any factual disputes, a trial court may sign a journal entry incorporating a settlement agreement reached outside of the presence of the court because such an agreement constitutes a contract between the parties. *Muckleroy v. Muckleroy* (Sept. 5, 1990), 9th Dist. No. 14443, at *2. See,

also, *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, 36-37. Here, both parties signed the agreed judgment entry that they submitted to the trial court and neither party raised any factual disputes. Accordingly, the parties' agreed journal entry constituted a contract between them. *Muckleroy*, at *2. Because the parties had a written contract that provided for a specific rate of interest, the interest rate did not "exceed[] the legal limit for judgment." See *John Soliday Fin. Group, LLC* at ¶7, quoting *Wigfield* at ¶20.

{¶15} It is within a trial court's discretion to reject an agreed judgment entry. *Rorick v. Rorick*, 9th Dist. No. 09CA009533, 2009-Ohio-3173, at ¶7. Here, however, it would appear that the trial court rejected the parties' entry solely because it believed that the parties' interest rate was illegal. Unlike Ohio's former usury statutes, R.C. 1343.03(A) does not set forth a non-negotiable statutory interest rate. Compare *Merchants Finance Co.*, 138 Ohio St. at 476, quoting General Code § 8305 with R.C. 1343.03(A). Parties may negotiate for an interest rate that exceeds the statutory maximum. R.C. 1343.03(A). Accordingly, the court's rejection of the parties' agreed judgment entry on the basis that its interest rate "exceed[ed] the legal limit for judgment" constitutes an error of law.

{¶16} Contrary to the majority's position that this issue is not ripe for appeal, the trial court specifically dismissed Capital One's complaint because it found that the interest rate contained in the parties' agreed judgment entry "exceed[ed] the legal limit for judgment." This was the sole basis for the court's dismissal. As set forth above, this ruling constitutes an error of law. Because Capital One's first assignment of error challenges the sole basis upon which the trial court dismissed its complaint, I would conclude that this issue is ripe for review. Further, I would conclude that the court erred by finding that the 25% rate of interest in the parties' agreed

judgment entry "exceed[ed] the legal limit for judgment." Accordingly, I respectfully dissent as to the resolution of Capital One's first assignment of error.

APPEARANCES:

FREDERICK STRATMANN, Attorney at Law, for Appellant.

MOLLY HARLAND, pro se, Appellee.