ORIGINAL

IN THE OHIO SUPREME COURT

THE MERCHANTS BANK & TRUST COMPANY,	:	**CASE NO. 2011-1183**
Plaintiff-Appellee,	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
v.	:	**Court of Appeals Case No. C100037**
FIVE STAR FINANCIAL CORPORATION AND STEVEN A. WINTER,	:	
Defendants-Appellants.	:	

APPELLEE, THE MERCHANTS BANK AND TRUST COMPANY'S MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The issue raised on appeal is not of public or great general interest. The case, and the decision by the First District Court of Appeals, do not involve constitutional issues. It has no impact on the citizens of the state of Ohio. This case has nothing to do with "foreclosure processes" for home mortgages, as Appellants would have this Court infer. Simply put, this case does nothing more than hold Appellants Five Star Financial Corporation ("Five Star") and its President, Steven Winter ("Winter") accountable for the $1.4 million dollars loaned to them by Appellee Merchants Bank & Trust Company ("MBT"), which they admittedly still owe.

To the contrary, this case is about the interpretation of a specific clause in a cognovit note between two sophisticated business entities. Specifically, the issue decided by the lower courts was whether language in the note required MBT to submit certain books or records evidencing the indebtedness as part of a cognovit complaint. In affirming the decision of the trial court, the First District Court of Appeals interpreted the language of the contract to not require submission of the books and records evidencing the indebtedness prior to entry of judgment. The court also correctly noted that Ohio's confession of judgment and warrant of attorney statutes, Ohio Rev. Code §§ 2323.12 and 2323.13, do not contain such a requirement, and to hold otherwise would thwart the legislative intent of the statute, which was to permit warrants of attorney in non-consumer transactions.

At its heart, Five Star's and Winter's appeal is nothing more than a stall tactic to avoid enforcement and collections efforts nearly three years after the judgment. The sole purpose of this appeal is to take advantage of the procedures afforded by the legal system so that Mr. Winter can continue living in his expansive home, drive his luxury automobiles, and continue living a lifestyle that he was accustomed to before he defaulted on nearly $1.4 million in business loans to MBT.

Accordingly, the issues raised on appeal are not of public or great general interest, and this Court should deny jurisdiction.

II. STATEMENT OF THE CASE AND FACTS

Five Star is a licensed mortgage broker and mortgage lender, which is in the business of funding and brokering commercial loans and residential first and second mortgage loans in Ohio. Winter is the president of Five Star and was in charge of its daily operations. On July 25, 2003, Five Star entered into a loan agreement and one-year promissory note, executed by Winter individually and on behalf of Five Star, whereby MBT extended Five Star a $1,000,000 line of credit ("the 2003 Note"). When the 2003 Note matured, Five Star entered into a new credit arrangement with MBT on October 25, 2004, and the parties entered into a Credit and Security Agreement ("2004 Credit Agreement"). As part of the 2004 Credit Agreement, Five Star executed and delivered to MBT a Revolving Line of Credit Note ("2004 Note") in the original principal amount of $2,000,000, which was double the line of credit that had been extended under the 2003 Note.

The 2004 Note was more stringent than the first and provided, among other things, that Five Star would borrow and repay certain credit facilities, subject to the conditions stated in the 2004 Credit Agreement. Whereas the 2003 Note provided that it was governed by Indiana law, the 2004 Note and Credit Agreement expressly provided that they were governed by, and construed and enforced in accordance with, Ohio law. Winter signed just below these provisions.

Winter also executed a Guaranty Agreement ("Guaranty"), wherein he absolutely and unconditionally guaranteed the full payment when due of all of Five Star's obligations to MBT. The 2004 Note and the Guaranty have nearly indistinguishable provisions, including an Ohio

choice of law provision. On the Guaranty, Winter signed immediately below an identical cognovit provision.

The 2004 Note and Guaranty also contained express, conspicuous cognovit clauses, which complied with R.C. 2323.12. For example, the 2004 Note states:

> The Maker authorizes any attorney at law to appear before any Court of Record, state or Federal, in the county or judicial district where this Note was executed or where the Maker or Bank reside or may be found, after the unpaid principal balance of this Note becomes due, either by lapse of time or by operation of any provision for acceleration of maturity contained in the Credit Agreement, and waive the issuance and service of process, admit the maturity of this Note, by reason of acceleration or otherwise, enter appearance and confess judgment against the Maker in favor of the Bank or other holder of this Note for the amount then appearing due on this Note, together with interest thereon and costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution. Maker agrees that the attorneys for Bank or any other holder of this Note may confess judgment pursuant to the foregoing warrant of attorney. . . .The foregoing warrant of attorney shall survive any judgment and may be used from time to time without exhausting the right to further use the warrant of attorney and, if any judgment be vacated for any reason, the Bank or other holder of this Note nevertheless may use the foregoing warranty of attorney to obtain an additional judgment or judgments against the Maker.

The parties modified and extended the 2004 Credit Agreement three times, initially extending it until February 25, 2006, then extending it until May 25, 2007, and finally extending it until May 25, 2008. Pursuant to the express provisions of the extensions, the 2004 Loan Agreements (defined as the 2004 Credit Agreement, together with its supporting 2004 Note, Pledge Agreement, and Guaranty from Winter) remained unmodified and in effect.

Five Star and Winter defaulted on their obligations under the 2004 Loan Agreements, and on January 9, 2008, MBT's Complaint was filed and presented to the trial court. Attached to MBT's Complaint were all of the requisite loan documents described above. On the same day, by virtue of the warrant of attorney found in the 2004 Loan Agreements, attorney Brian Ewald

appeared on Five Star's and Winter's behalf, and confessed judgment on the Note and Guaranty for the principal sum of $1,445,753.39, plus $12,526 in accrued and unpaid interest, plus future interest, late charges, attorneys' fees and court costs in accordance with the terms of the Note.

Five Star and Winter moved to vacate the judgment, arguing, among other things, that MBT was required to attach to its complaint its books and records evidencing the amount of the indebtedness. The court overruled the motion, and Five Star and Winter appealed. On May 25, 2011, the First District affirmed the trial court's judgment in its entirety. This appeal followed.

III. ARGUMENT IN OPPOSITION TO APPELLANTS' FIRST PROPOSITION OF LAW

This Case Involves Contract Interpretation That Is Best Left to the Lower Courts, and Which Has No Impact Upon The State or Its Residents As A Whole

Even a cursory glance at Appellants' argument reveals that it is narrowly tailored to interpretation of specific language in a commercial contract between two business entities. Appellants argued at the court of appeals, as they do now, that MBT's 2004 Note is facially invalid because it states that "[t]he unpaid principal balance of and interest accrued on this Note shall be determined by the ledgers and records of the Bank as maintained in accordance with respective ordinary practices to reflect Advances and payments under this Note and Credit Agreement." Five Star and Winter argue that because the 2004 Note is not sufficient on its face to support a cognovit judgment, the judgment is necessarily void.

The language at issue is not mandated by federal or state statute, and as such, its interpretation does not impact the State of Ohio or its citizens. Rather, the contract language is narrowly tailored to the relationship between Winter, Five Star and MBT, and therefore does not constitute a matter of public or great general interest. The fact that Winter and Five Star do not like the outcome of the First District's decision does not change this.

Nevertheless, as noted by the First District Court of Appeals, Appellants' argument fails for several reasons. First, the warrant of attorney and cognovit provisions of Ohio Rev. Code § 2323.13 do not require a creditor to attach books or records to a cognovit complaint. In fact, there is not a single mention of it in the statute. Rather, § 2323.13 merely requires that the note contain the "magic language" found within the statute, and that the attorney produce and file the warrant at the time he or she confesses judgment. Ohio Rev. Code §§ 2323.13(A) and (D). Both of those requirements were met in this case. Had the legislature intended that the books and records be attached to either the complaint or to the confession of judgment, it certainly could have added such requirements to the statute. It did not, and the First District correctly refused to engraft such a requirement, stating that under R.C. 2323.13:

> "'[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession.' Neither statute, however, requires the instrument containing the warrant of attorney to demonstrate by itself the amount owed by the defendant. We, therefore, decline to adopt such a rule."

Opinion, ¶11.

Moreover, none of the cases cited by Five Star and Winter are on point. For example, they cite *Gunton Corp. v. Banks*, (Franklin Cty. App. No. 01AP-988), 2002-Ohio-2873, for the proposition that where a cognovit note is facially insufficient to support a warrant of attorney, the judgment is void. However, *Banks* involved an ambiguity concerning a maker's identity. *Id.* at ¶¶ 8-9. The ambiguity was such that the court could not determine the maker's identity from the face of the note itself. *Id.* The case simply does not state that a party must attach books and records as part of a cognovit judgment, or that a reference to books and records in the note makes it ambiguous.

They also cite *Onda, LaBuhn, Rankin & Boggs Co., L.P.A. v. Johnson* (Pickaway Cty. App. No. 08CA16) 184 Ohio App. 3d 296; 2009-Ohio-4726 and *Simmons Capital Advisors Ltd. v.*

Kendall Group, Ltd., (Franklin Cty. App. No. 05AP1087) 2006-Ohio-2272, which, like the other cases they cite, were not binding on the First District Court of Appeals. Consequently, the fact that the First District interpreted the contract before it differently does not somehow make the issue one of public or great general interest. In any event, the First District properly distinguished *Onda* and *Simmons*, since those cases do not give effect to the legislative intent of §§ 2323.12 and 2323.13. As stated by the First District, to hold that a note is facially insufficient because it references extrinsic evidence:

> "would severely undermine the clear legislative intent to allow warrants of attorney in nonconsumer transactions. Such a holding would leave numerous proper lending arrangements unenforceable in cognovit actions, particularly when the amount owed may change from day to day, such as with open lines of credit and interest-bearing loans."

Opinion, ¶12.

Indeed, no interest bearing note could, on its face, show the precise amount due and payable, as that amount changes daily when interest accrues. Thus, under Appellants' theory, all notes are ambiguous and unenforceable, since the notes on their face do not evidence the amount of the debt due and owing. Such a strained interpretation defeats the purpose of a warrant of attorney, where an outside attorney reviews the allegations, the amounts due and owing, admits them, and then confesses judgment as to the amount due under a cognovit note. At a minimum, Five Star's and Winter's overarching interpretation requires every note to attach the "books and records" of the company or other evidence of the amount of the indebtedness, a requirement otherwise absent from §2323.13, and a requirement the First District aptly refused to adopt.

Had the parties intended for the warrant of attorney to evidence of the amount of the indebtedness, they certainly could have incorporated such a requirement in their contract. Indeed, the First District specifically noted that in *Bank One, N.A. v. DeVillers*, 10th Dist. No. 01AP-1258, 2002-Ohio-5079, the Tenth Appellate District held that where a warrant of attorney

authorized the confession of judgment for an unpaid amount "as evidenced by an affidavit signed by an officer of the Lender for the amount then due," the lender was required to submit that affidavit before judgment. Opinion, ¶13.

Here, the First District recognized that the 2004 Note and related 2004 Credit Agreement are clear and unambiguous, and contain no such requirement. The 2004 Note states that the maker "promises to pay to the order of MERCHANTS BANK & TRUST . . . the principal amount of TWO MILLION AND 00/100 DOLLARS ($2,000,000) or such lesser amount as shall from time to time have been borrowed by the Maker subject to the conditions of the Credit Agreement." Additionally, the principal amount of the 2004 Note, "$2,000,000.00", is clearly printed in the top left hand corner of it, just below the instrument's title. Further, the Note provides the repayment terms for the principal balance in accordance with the Credit Agreement. Indeed, the second, third and fourth modification of the 2004 Note each state that Five Star "agrees and promises to pay the amount of the Note," and that Five Star has "no cause of action . . . or defense with respect to the Note." Thus, as it is uncontested that Five Star and Winter failed to repay the note, there is simply no defense available to them.

Moreover, the cognovit provisions in the 2004 Note are equally clear and unambiguous, and do not require that MBT provide or attach the books or ledgers of the company. The cognovit provision provides:

> The Maker authorizes any attorney at law to appear before any Court of Record . . . and waive the issuance and service of process, admit the maturity of this Note, by reason of acceleration or otherwise, enter appearance and confess judgment against the Maker in favor of the Bank or other holder of this Note for the amount then appearing due on this Note, together with interest thereon and costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution. . . . .

Noticeably absent from this provision is any requirement that the complaint or the attorney confessing judgment provide any evidence of the amount of the indebtedness. Instead, the attorney may "confess judgment against the Maker . . . for the amount then appearing due on this Note, together with interest thereon and costs of suit. . . ." and "release all errors and waive all rights of appeal and stay of execution" relating to the 2004 Note. That is exactly what happened in this case.

In sum, neither the clear and unambiguous language in the 2004 Note nor Ohio law requires the attachment of "books and ledgers." Moreover, because the interpretation of specific language negotiated between sophisticated business entities does not involve a matter of public or great general interest, this Court should decline jurisdiction. *See BJ Bldg. Co., LLC v. LBJ Linden Co., LLC*, 2d Dist. No. 21005, 2005-Ohio-6825, at ¶33 ("The note, in conjunction with the confession of judgment, was sufficient to inform the court of the amount of LBJ's indebtedness at the time the judgment by confession was made.")

IV. CONCLUSION

For the foregoing reasons, this case does not involve matters of public or great general interest. Plaintiff/Appellee The Merchant's Bank and Trust Company hereby requests that this Court decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular United States mail, postage prepaid, upon the following this 9th day of August, 2011:

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