

[Cite as *Diersing v. Huntington Natl. Bank*, 2010-Ohio-3038.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RONALD J. DIERSING, ET AL.

Plaintiffs-Appellants

-vs-

HUNTINGTON NATIONAL BANK

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09CAE110094

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 09CVH1013

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 30, 2010

APPEARANCES:

For Plaintiffs-Appellants

ROBIN L. JINDRA
JAMES R. BILLINGS
33 South James Road
3rd Floor
Columbus, OH 43213

For Defendant-Appellee

DENNIS J. MORRISON
LISA T. BANAL
2006 Kenny Road
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Farmer, P.J.

{¶1} On October 7, 2009, appellee, Huntington National Bank, filed a cognovit complaint for judgment against appellants, Ronald and Susan Diersing, for money due and owing on a promissory note. By cognovit judgment entry filed October 8, 2009, appellee was awarded \$198,723.19 as against appellants, plus other sums for costs and fees.

{¶2} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶3} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING COGNOVIT JUDGMENT ENTRY AGAINST APPELLANTS."

I

{¶4} Appellants claim the trial court erred in granting cognovit judgment to appellee as the promissory note was insufficient to support the judgment and was ambiguous as to "other amounts due" and "default interest rate." We disagree.

{¶5} Appellants argue the various ambiguities in the note necessitate reference to additional evidence outside the note itself.

{¶6} The cognovit complaint sought "other sums" as provided in the note as follows:

{¶7} "WHEREFORE, Huntington respectfully prays for joint and several judgment on the Note against Ronald J. Diersing aka Ronald J. Diersing, Sr. and Susan T. Diersing aka Susan Diersing in the amount of One Hundred Ninety-Eight Thousand Seven Hundred Twenty-Three Dollars and Nineteen Cents (\$198,723.19), together with

interest at the variable default rate as specified in the Note from September 26, 2009, plus late charges, costs, and attorney's fees, which, as of October 1, 2009 were \$445.50, and other sums, as provided in the Note; and for such other and further relief to which Huntington may be entitled in equity or at law."

{¶8} Appellants argue the attorney fee provisions in the note are vague and ambiguous:

{¶9} "CONFESSION OF JUDGMENT. Borrower hereby irrevocably authorizes and empowers any attorney-at-law, including an attorney hired by Lender, to appear in any court of record and to confess judgment against Borrower for the unpaid amount of this Note as evidenced by an affidavit signed by an officer of Lender setting forth the amount then due, attorneys' fees plus costs of suit, and to release all errors, and waive all rights of appeal.***Borrower waives any conflict of interest that an attorney hired by Lender may have in acting on behalf of Borrower while such attorney is retained by Lender. Borrower expressly consents to such attorney acting for Borrower in confessing judgment.

{¶10} "ATTORNEYS' FEES: EXPENSES. Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorney's fees and Lender's legal expenses, whether or not there is a lawsuit, including attorney's fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law."

{¶11} Attached to the complaint is the affidavit for attorney fees in the total amount of \$445.50. Appellants cite this court to *Gunton Corporation v. Banks*, Franklin App. No. 01AP-988, 2002-Ohio-2873, for the proposition that the cognovit provisions of the promissory note sub judice are invalid because the amount owed for attorney fees cannot be determined from the four-corners of the note.

{¶12} We disagree with the analysis as it applies to attorney fees in this case. The plain reading of the attorney fees provisions contained in the note establish they are collectable. By attaching the attorney's affidavit in support of the fees, we find no ambiguity exists vis-à-vis the note, complaint, and confession of judgment. In reading the note in this case, we find it qualifies under R.C. 2323.12 and no ambiguities as to indebtedness, liability for attorney fees, and court costs exist.

{¶13} As to the collection of attorney fees, expenses, and court costs, we find these sums as requested in the underlying complaint arise by operation of law (R.C. 130.21). They do not render the note ambiguous.

{¶14} Secondly, appellants argue the default interest rate references numerous applicable interest rates and is therefore facially ambiguous as to which rates of interest apply. Further, appellants argue the cognovit judgment entry failed to attach a time period, such as "per diem" to the interest rate.

{¶15} The complaint requested a specific sum (\$198,723.19) with interest at a variable default rate as specified in the note. The note set forth the rates in the paragraph entitled "Variable Interest Rate":

{¶16} "The interest rate on this Note is subject to change from time to time based on changes in an independent index which is the One (1) year Federal Home

Loan Bank-Cincinnati Advance Rate (the 'Index'). The Index is not necessarily the lowest rate charged by Lender on its loans. If the Index becomes unavailable during the term of this loan, Lender may designate a substitute index after notice to Borrower. Lender will tell Borrower the current Index rate upon Borrower's request. The interest rate change will not occur more often than each Twelve (12) months. Borrower understands that Lender may make loans based on other rates as well. **The Index currently is 2.200% per annum. The interest rate or rates to be applied to the unpaid principal balance of this Note will be the rate or rates set forth herein in the 'Payment' section. Notwithstanding any other provision of this Note, after the first payment stream, the interest rate for each subsequent payment stream will be effective as of the last payment date of the just-ending payment stream.**

NOTICE: Under no circumstances will the interest rate on this Note be more than the maximum rate allowed by applicable law. Whenever increases occur in the interest rate, Lender, at its option, may do one or more of the following: (A) increase Borrower's payments to ensure Borrower's loan will pay off by its original final maturity date, (B) increase Borrower's payments to cover accruing interest, (C) increase the number of Borrower's payments, and (D) continue Borrower's payments at the same amount and increase Borrower's final payment."

{¶17} The cognovit judgment entry sets the date of September 26, 2009 for the running of interest. We find the rates specifically set forth are discernable from the clear language of the note. We find no ambiguity nor any need to resort to items beyond the four-corners of the note. We find appellee complied with R.C. 2223.12 and 2323.13.

{¶18} The sole assignment of error is denied.

{¶19} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

SGF/sg 0610

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

RONALD J. DIERSING, ET AL.	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
HUNTINGTON NATIONAL BANK	:	
	:	
Defendant-Appellant	:	CASE NO. 09CAE110094

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellants.

s/ Sheila G. Farmer_____

s/ John W. Wise_____

s/ Patricia A. Delaney_____

JUDGES