COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

NATIONAL CITY BANK	**:**	
Plaintiff	**:**	**CASE NO. 2006 CVH 00240**
vs.	**:**	**Judge McBride**
JOHN W. PAXTON, SR., et al.	**:**	**DECISION/ENTRY**
Defendants	**:**	

Santen & Hughes, Charles M. Meyer and Brian P. O'Connor, attorneys for the defendants John Paxton, Sr., Janet Paxton, and Paxton Farms, Inc., 600 Vine Street, Suite 2700, Cincinnati, Ohio 45202.

Graydon Head & Ritchey LLP, Susan M. Argo and Jeffrey J. Hanneken, attorneys for the plaintiff National City Bank, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202-3157.

This cause is before the court for consideration of a motion for order of distribution filed by the defendants John W. Paxton, Sr., Janet Paxton, and Paxton Farms.

The court scheduled and held a hearing on the motion on May 21, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, the evidence presented for the court's consideration, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On February 17, 2006, the plaintiff National City Bank filed its complaint on cognovit promissory notes and guaranty. In its prayer for relief, the plaintiff requests the following:

> "1. On Count I, judgment against Defendants, John W. Paxton, Sr. and Janet R. Paxton, jointly and severally, in the sum of $2,972,093.13, plus interest which continues to accrue at a per diem rate of $614.58 from February 15, 2006, plus late charges and all other costs and advances.
>
> 2. On Count II, judgment against Paxton Farms [in the same amounts].
>
> 3. For all other relief, legal and equitable, including reasonable attorney's fees, to which Plaintiff is entitled."[1]

Attached to the complaint is the subject promissory note which states in relevant part as follows:

> "Should the indebtedness represented by this Note or any part thereof be collected at law or in equity * * * or should this Note be placed in the hands of attorneys for collection upon the occurrence of Default, Borrowers agree to pay, in addition to the principal, premium and interest due and payable hereon, all costs of collection, including reasonable attorney's fees and expenses."[2]

[1] Complaint at pg. 3.
[2] Complaint, Exhibit A at pg. 2.

On the date of the filing of the complaint, this court signed a judgment entry granting judgment to the plaintiffs against the defendants in the sum requested, including interest as requested, "plus late charges and all other costs and advances until paid in full."[3] The judgment entry does not specifically mention attorney fees or address that prayer for relief.

This case then went through various proceedings, including a bankruptcy stay, in the years following the filing of the judgment entry. In August 2006, the plaintiff and the defendants entered into a forbearance agreement, which was amended in November of that year. That amendment states in pertinent part that "[t]he Obligations owing by Borrower are also subject to increase for advances made or incurred by Secured Party for costs, including legal fees."[4] That forbearance agreement was defaulted upon and the plaintiff commenced to attempt to obtain satisfaction of the judgment.

In November 2011, the plaintiff learned of an Edward Jones brokerage account belonging to the defendant, and the plaintiff filed garnishment paperwork with regard to that account. In March 2012, the defendants filed an emergency motion for stay of that garnishment, arguing that the plaintiff was seeking an amount for attorney fees in the garnishment which the defendants were contesting. The parties appeared before this court on March 23, 2012 at which time the parties agreed that the remaining amount of the judgment would be disbursed to the plaintiff and the residual funds would be held by the clerk of courts pending determination of the attorney fee issue.

The defendants argue in their current motion for order of distribution that the plaintiff is not entitled to attorney fees because the judgment entry filed on February 17,

[3] Judgment Entry at pg. 2.
[4] Plaintiff's Memorandum in Opposition to Defendants' Motion for Order of Distribution, Exhibit D at ¶ 3.

2006 does not mention attorney fees and, therefore, the plaintiff cannot now seek to collect such fees. The defendant also notes that there has been no determination by this court as to the reasonableness of those fees.

In response, the plaintiff argues that the general language of "all other costs and advances" encompasses attorney fees and that, at most, this court should find that the 2006 judgment entry was not a final order because it did not dispose of all requests for relief contained in the complaint.

LEGAL ANALYSIS

In *Bankers Trust Co. v. Orchard* (March 8, 2000), 9th Dist. No. CA-19528, 2000 WL 254899, the Ninth District Court of Appeals noted that, "[w]hen a judgment includes a monetary award, it should articulate the amount of the award, or at the very least it should articulate a definite formula for calculating the amount."[5] The judgment entry on default which was the subject of the *Orchard* case contained a definite monetary award as to the principal amount due and owing under the subject note as well as a definite formula for calculating the amount of interest due.[6] However, the entry also made an additional award for "advances for taxes, insurance and otherwise expended (*sic*), plus costs."[7] The court concluded that this award was not definite nor did it provide a definite formula for calculating the award.[8] As such, the appellate court determined that the

[5] *Bankers Trust Co. v. Orchard* (March 8, 2000), 9th Dist. No. CA-19528, 2000 WL 254899 at *2.
[6] Id.
[7] Id.
[8] Id.

judgment entry was not a final, appealable order and, consequently, the court did not have jurisdiction to hear the appeal.[9]

In the case at bar, the 2006 judgment entry awards the plaintiff a sum certain for the amount due and owing under the promissory note and also sets out a definite formula for the calculation of interest. However, there is no information in the judgment entry as to the amount due and owing for the "late charges and all other costs and advances * * *."

As noted above, the enforceable language in the promissory note regarding attorney fees provides for the payment of "all costs of collection, including reasonable attorney's fees and expenses." Additionally, the amendment to the forbearance agreement between the parties states as quoted above that the obligations of the defendants were subject to increase for "advances made or incurred by Secured Party for costs, including legal fees." This language suggests that both parties involved in the present case understood that attorney fees were included under the umbrella of "costs," and that such fees were part of the defendants' obligation due and owing under the promissory note.

As such, the court finds that the 2006 judgment entry was not a final, appealable order. Furthermore, the court finds that the February 2006 judgment entry was not a final, appealable order based upon an alternative analysis. In *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Industries, LLC* (2007), 116 Ohio St.3d 335, 879 N.E.2d 187, the defendant's answer included a request for statutory attorney

[9] Id.

fees and sanctions pursuant to Civ.R. 11.[10] The summary judgment order appealed did not dispose of this claim for attorney fees and did not include Civ.R. 54(B) language that "there is no just reason for delay."[11] The Ohio Supreme Court held that "* * * when attorney fees are requested in the original pleadings, a party may wait until after entry of a judgment on the other claims in the case to file its motion for attorney fees[;]" and "when attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just reason for delay, is not a final, appealable order."[12] The court also noted that "[i]f attorney fees are requested in the pleadings, a motion for attorney fees filed after an order on the other claims in the case cannot be denied on the basis of res judicata * * * because no order has disposed of the claim for fees."[13]

Several appellate courts have limited the holding in the *Vaughn Industries* case "by holding that the mere mention of attorney's fees in the answer to the complaint does not rise to the level of a separate claim for relief preventing a judgment from becoming a final appealable order."[14] "These two courts were concerned that an overly broad application of the *Vaughn* holding would require the dismissal of practically every civil appeal on jurisdictional grounds because most complaints contain a pro forma request for attorney's fees and this request is usually ignored by the trial court when final

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[10] *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Industries, LLC* (2007), 116 Ohio St.3d 335, 879 N.E.2d 187, at ¶ 9.
[11] Id.
[12] Id. at ¶ 17.
[13] Id. at ¶ 15.
[14] *Ricciardi v. D'Apolito* (March 12, 2010), 7th Dist. No. 09MA60, 2010-Ohio-1016, ¶ 9, citing *Knight v. Colazzo* (Dec. 17, 2008), 9th Dist. No. 24110, 2008-Ohio-6613; and *Jones v. McAlarney Pools, Spas & Billiards, Inc.* (March 19, 2008), 4th Dist. No. 07CA34, 2008-Ohio-1365.

judgment is rendered."[15] The Fourth District Court of Appeals specifically held that "[a]bsent an attorney fee request under specific authority, appellate courts should 'treat the fee request as having been overruled *sub silento* ' when not specifically disposed of in the trial court's order."[16]

This court did not find a case in which the Twelfth District Court of Appeals has addressed other courts' limitation of the *Vaughn Industries* holding; however that court has ruled that when a plaintiff's complaint contained a request for attorney fees and the judgment entry did not address that request, the entry was not a final appealable order.[17] Furthermore, the Ohio Supreme Court has not revisited the issue since several appellate courts limited its holding in *Vaughn Industries*.

The court agrees with the appellate courts' concern that most complaints contain pro forma requests for attorney fees when there is no statutory basis for an award of attorney fees and the claims at issue are not claims under which attorney fees are allowed to be collected. However, in the case at bar, while the prayer for relief does not specifically state as much, the plaintiff's right to attorney fees was based on language in the cognovit promissory note between the parties. Ohio courts consistently enforce attorney fee provisions in cognovits notes.[18] This right to attorney fees based on language included in a written agreement between the parties is different than a "catch-all" request for attorney fees included in a prayer for relief to which the party would have no feasible entitlement under existing law.

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[15] Id.
[16] *Green v. Germain Ford of Columbus, LLC* (Sept. 24, 2009), 10th Dist. No. 08AP-920, 2009-Ohio-5020, ¶ 18, quoting *McAlarney*.
[17] *Harris v. Conrad* (June 17, 2002), 12th Dist. No. CA2001-12-108, 2002-Ohio-3885.
[18] See, e.g., *State Resources Corp. v. Hendy* (April 20, 2011), 9th Dist. No. 25423, 2011-Ohio-1900, ¶ 26; *B&I Hotel Management, LLC v. Ditchman Holdings, LLP* (Nov. 24, 2004), 8th Dist. No. 84265, 2004-Ohio-6294; and *Baumeister Family Trust v. Jackson Properties Ltd.* (Oct. 18, 2001), 6th Dist. No. E-01-029, 2001 WL 1308030.

The court finds, based on all of the analysis set forth above, that the February 2006 judgment entry was not a final order disposing of all claims in the present case. The plaintiff's request for attorney fees remained outstanding and must be adjudicated before a final, appealable order may issue in this case. Additionally, even if the request for attorney fees in the prayer for relief would not rise to the level of a claim for attorney fees as contemplated by the courts limiting the holding of *Vaughn Industries*, the judgment entry's award of "costs and advances" did not set forth a sum certain or method for calculation of any such sum. As such, the 2006 judgment entry was not a final entry and the plaintiff is permitted to pursue its claim for attorney fees.

The court does agree with the defendants, however, that the plaintiff may not simply present an amount of attorney fees for payment to the garnishee when there has been no determination by the court of the reasonable amount of attorney fees to be awarded in the case at bar. A trial court errs when it fails to conduct the required analysis of reasonableness of attorney fees, including the factors set forth in Ohio Rule of Professional Conduct 1.5(A), in a cognovit judgment case.[19]

CONCLUSION

The defendants' motion for order of distribution is not well-taken and is hereby denied.

Due to the fact that the plaintiff's request for attorney fees contained in the complaint has not yet been adjudicated, the court hereby orders counsel to conference within seven days of the date of this decision and call the Assignment Commissioner

[19] *B&I Hotel Management*, supra, ¶ 52.

(732-7108) to choose a date for an evidentiary hearing on attorney fees to be held within four weeks of the date of this decision. If counsel feel they need more time to prepare for this hearing, they may contact this court's chambers (732-7104) to request that a telephone conference be set to discuss the matter of extending the date of the hearing past the four weeks ordered by the court.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 15th day of June 2012 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride