

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

LYKINS OIL COMPANY :
Plaintiff : **CASE NO. 2012 CVH 00482**
vs. : **Judge McBride**
CHARLES E. CULP, et al. : **DECISION/ENTRY**
Defendant :

Finney, Stagnaro, Saba & Patterson Co., LPA, Paul T. Saba and Jeffrey M. Nye, attorneys for the plaintiff Lykins Oil Company, 2623 Erie Avenue, Cincinnati, Ohio 45208.

Boucher & Boucher Co., LPA, Richard A. Boucher, attorney for the defendants Charles E. Culp and Charlie's Marathon Holdings, LLC, 12 W. Monument Avenue, Suite 200, Dayton, Ohio 45402.

This cause is before the court for consideration of a motion to render judgment void, motion to vacate judgment, and motion for stay of execution filed by the defendants Charles E. Culp and Charlie's Marathon Holdings, LLC.

The court scheduled and held a hearing on the motions on May 18, 2012. At the conclusion of the hearing, the court took the issues raised by the motions under advisement.

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

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff Lykins Oil Company filed its cognovit complaint in this case on March 14, 2012. Attached to the cognovit complaint are several "Standard Dealer Agreements" between Lykins and the corporate defendant, several cognovit guaranties of the corporate defendant's obligation executed by the defendant Charles Culp, a summary of the gallons of gasoline purchased by the corporate defendant pursuant to the agreements, a cognovit promissory note executed by both defendants, and a ledger for payments made and owing pursuant to that note.¹

Pursuant to a warrant of attorney, an answer confessing judgment was filed contemporaneously with the complaint.² On March 15, 2012, a judgment entry was signed and filed by the court granting the plaintiff its requested relief.

The defendants filed their motion to render judgment void, motion to vacate judgment, and motion for stay of execution on April 3, 2012.

¹ Cognovit Complaint, Exhibits A-G.

² Answer.

LEGAL ANALYSIS

I. MOTION TO RENDER JUDGMENT VOID

The defendants argue that the judgment entered in the present case is void because it requires the court to consider documentation outside the four corners of the promissory note to determine the amount due and owing.

“ ‘The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.’ ”³ “ ‘[T]he purpose of a cognovit note is to allow the holder of the note to quickly obtain judgment, without the possibility of trial.’ ”⁴

In *Gunton Corp. v. Banks* (June 6, 2002), 10th Dist. No. 01AP-988, 2002-Ohio-2873, the 10th District Court of Appeals noted that “[i]n order for a cognovit judgment to be valid, the terms of the note itself must be sufficient to facially support the judgment for which confession is made[,]” and a trial court may not “take into account anything other than the notes themselves and the confession of judgment.”⁵ The court held that the note at issue in the *Gunton* case did not facially support the judgment because the party attempting to enforce the note had a different name than the party to whom the note was given.⁶ As a result, the court found that the judgment was void and invalid.⁷

³ *Merchants Bank & Trust Co. v. Five Star Fin. Corp.*, 195 Ohio App.3d 42, 958 N.E.2d 964, 2011-Ohio-2476, ¶ 6 (Ohio App. 1st Dist., 2011), quoting *D.H. Overmyer Co. v. Frick Co.* (1972), 405 U.S. 174, 176, 92 S.Ct. 775, 31 L.Ed.2d 124.

⁴ *Id.*, citing *Sky Bank v. Colley*, 10th Dist. No. 07AP-751, 2008-Ohio-1217, 2008 WL 714063, at ¶ 7.

⁵ *Gunton Corp. v. Banks* (June 6, 2002), 10th Dist. No. 01AP-988, 2002-Ohio-2873, at ¶¶ 29, 31.

⁶ *Id.*

⁷ *Id.* at ¶ 33.

The court in *Onda, LaBuhn, Rankin & Boggs Co., LPA v. Johnson*, 184 Ohio App.3d 296, 920 N.E.2d 1000 (Ohio App. 4th Dist., 2009), after discussing *Gunton* and one other appellate case, held that “[u]nder the terms of the modification agreement, in order to determine the actual amount due on the note, one must refer to ‘the books and records of the Secured Party and the Debtors.’ Thus, the note contains ambiguities that require reference to additional documents in order to calculate the amount owed. A cognovit note must support the cognovit judgment on its face. Because the note in question fails to do so, it is facially insufficient to support a cognovit judgment.”⁸ The court found that the judgment was void and invalid because “when a cognovit note is facially insufficient to support a confession of judgment, the cognovit judgment is void.”⁹

In *Merchants Bank & Trust Co. v. Five Star Fin. Corp.*, 195 Ohio App.3d 42, 958 N.E.2d 964, 2011-Ohio-2476, ¶ 6 (Ohio App. 1st Dist., 2011), the First District Court of Appeals found that neither statute authorizing cognovit judgments (R.C. 2323.12 and 2323.13) “requires the instrument containing the warrant of attorney to demonstrate by itself the amount owed by the defendant[,]”¹⁰ and the court held that “the note was not facially insufficient to support a cognovit judgment merely because it determined the amount owed by Five Star by reference to extrinsic documents.”¹¹

Under the terms of the note at issue in that case, the unpaid principal balance and interest owed on a \$2,000,000 line of credit was to be determined by the ledgers and records of the lender.¹² That court found that the plaintiff was not required to

⁸ *Onda* at ¶ 11.

⁹ *Id.* at ¶ 12, citing, *Gunton*.

¹⁰ *Merchants Bank* at ¶ 11.

¹¹ *Id.* at ¶ 12.

¹² *Id.* at ¶ 2.

submit copies of the ledgers and records to the court with its complaint because it found that the confession of judgment was adequate to support the judgment.¹³

However, several courts have determined that “[i]f the note refers to other documents that are necessary in understanding the material terms of the note, the supporting documents must be submitted in order to obtain a valid cognovit judgment.”¹⁴

The parties in *Century Natl. Bank v. Gwinn* (Feb. 22, 2012), 4th Dist. No. 11CA20, 2012-Ohio-768, executed a promissory note for a specific amount set forth in the note along with a set interest rate.¹⁵ After distinguishing *Onda* and *Gunton* on their facts, the court found that a cognovit note, a copy of the mortgage related to the note, and an affidavit from the lender establishing an amount due and owing under the note were “all the documents necessary for an understanding the material terms of the note” and, because those documents were submitted with the cognovit complaint, the judgment was found to be valid.¹⁶

However, in *Gwinn*, the amount owed could be determined facially from the cognovit note itself. The borrower promised to pay \$825,000 together with interest on the unpaid principal balance from February 27, 2009, until paid in full.¹⁷ The note also contained specified amounts and calculations to be utilized in the event of either prepayment or default and amounts from which late charges could be calculated.¹⁸ In essence, the affidavit only summarized the amount which was due under the terms of the cognovit note, which was facially sufficient to allow these calculations to be made.

¹³ Id. at ¶ 16.

¹⁴ See, e.g., *Richfield Purchasing, Inc. v. Highpoint Truck Terminals, Inc.* (Dec. 1, 2005), 8th Dist. No. 86056, 2005-Ohio-6348, ¶ 11, citing *Bank One v. DeVillers* (Dec. 26, 2002), 10th Dist. No. 01AP-1258, 2002-Ohio-5079; and *Dayton v. Core Investments*, 78 Ohio App.3d 284, 604 N.E.2d 772 (Ohio App. 10th Dist., 1992).

¹⁵ *Gwinn* at ¶ 2.

¹⁶ Id. at ¶¶ 19-20.

¹⁷ Id. at ¶ 2.

¹⁸ Id. at ¶ 17.

In summarizing the law which is applicable to cognovit judgments, the *Gwinn* court stated:

“As recognized by the court in *Bank One, N.A. v. Devillers*, 10th Dist. No. 01 AP–1258, 2002–Ohio–5079, in order for a cognovit judgment to be valid, the terms of the note itself must be sufficient to facially support the judgment for which confession is made. *Id.* at ¶ 37. Likewise, it has been recognized that ‘where an understanding of the material terms of a note requires reference to other documents referred to in the note, the supporting documents must be submitted in order to obtain a valid cognovit judgment.’ *Id.* at ¶ 37, citing *Citizens Fed. S. & L. Assn. of Dayton v. Core Invests.* (1992), 78 Ohio App.3d 284, 604 N.E.2d 772.”¹⁹

In *Lykins Oil Co. v. Pritchard*, 169 Ohio App.3d 194, 862 N.E.2d 192 (Ohio App. 1st Dist., 2006), a contract similar to the contract at issue in this case was entered into by the parties.²⁰ The individual defendant executed a guaranty and became personally liable for all payments under the gasoline supply contract.²¹ The plaintiff obtained a cognovit judgment based upon an affidavit from Lykins’ Chief Financial Officer setting forth the amount due and owing.²² The appellate court noted that “[u]nlike many cognovit notes, the [defendants’] note did not guaranty their liability for a sum certain. Instead their liability was open-ended.”²³ While that court did vacate the judgment under 60(B) because the defendants set forth several meritorious defenses, the court never addressed or reached the issue of whether the cognovit judgment was valid based on the above analysis as that issue does not have appear to have been raised by the parties in that case.

¹⁹ *Id.* at ¶ 18.

²⁰ *Pritchard* at ¶ 4.

²¹ *Id.*

²² *Id.* at ¶ 15.

²³ *Id.* at ¶ 16.

In the case at bar, the two guaranties executed by Charles Culp, even read in conjunction with the Standard Dealer Agreements to which they correspond, do not facially support the judgment. Instead, the court is required to look at information outside the note, namely documents setting forth the gallons of gasoline purchased and the amount of liquidated damages which are assessed as the result of failing to purchase the required number of gallons in each quarter the contract was in effect.

The terms of the note itself are not sufficient to facially support the judgment for which confession is made, and while several cases cited above allow consideration of documentation outside the four corners of the note, the consideration of said documents is permitted because they are specifically referenced in the note in relation to determining the amount due and owing. In this regard, it does not appear that Exhibit E to the complaint was specifically referenced in the guaranties or even in the dealer agreements.

The court does note that the cognovit mortgage note does contain an amount certain (\$25,637.24 plus interest). However, it also contains provisions requiring the payment of a certain price per gallon of product sold under the dealer agreement, putting this note and Exhibit G, which is also not specifically referenced by the guarantees or dealer agreements, within the same analysis as set forth above.

Based on the above analysis, the court finds that the notes at issue did not facially support the judgment and, consequently, the judgment is void and invalid. Due to this finding, the defendants' motion to vacate the judgment and motion for stay are rendered moot.

CONCLUSION

The defendants' motion to render judgment void is well-taken and is hereby granted. As a result of this holding, the defendants' motion to vacate the judgment and motion for stay are hereby rendered moot.

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.

Administrative Assistant to Judge McBride