

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mock Road Supermarket, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-913 (C.P.C. No. 10CV-12555)
MiraCit Development Corporation,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 13, 2011

Ball & Tanoury and John L. Tanoury, for appellee.

Theodore Scott, Jr., for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, MiraCit Development Corporation ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying its motion to set aside judgment filed to vacate the August 26, 2010 cognovit judgment granted to plaintiff-appellee, Mock Road Supermarket, Inc. ("appellee"). For the following reasons, we affirm.

{¶2} On August 26, 2010, appellee filed a cognovit complaint alleging that, on April 7, 2008, appellant executed a cognovit note ("note"), in favor of appellee, in the principal amount of \$1,000,000 for the purchase of commercial real estate. Further, the complaint alleged that appellant defaulted on the note, owing appellee a balance of

\$954,549.06, plus interest at a rate of ten percent per annum, commencing April 1, 2010.

In addition, appellee attached a copy of the note to the complaint, which stated, in relevant part:

WARNING: BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

{¶3} On August 26, 2010, on behalf of appellant, an attorney filed an answer confessing judgment in the amount of \$954,549.06, plus interest, costs and reasonable attorney fees. That same day, the trial court entered judgment in the amount of \$954,549.06, plus interest at a rate of ten percent per annum, in favor of appellee.

{¶4} On September 24, 2010, appellant filed a motion to set aside judgment, pursuant to Civ. R. 60(B), along with a motion for leave to file an amended answer. In its motion, appellant made numerous claims, including: (1) insufficient evidence regarding the amount of interest and principal due on the note, (2) breach of contract, (3) fraud, (4) modification, and (5) lack of consideration. Further, on December 8, 2010, appellant filed a "revised" motion to set aside judgment, along with a motion for leave to file an amended answer and a request for an oral hearing, arguing that appellee: (1) failed to perform various contractual obligations, and (2) incorrectly applied an interest rate of ten percent instead of six percent, in calculating the amount due and owing on the note, which resulted in an inflation of the debt by approximately \$9,000. On December 22, 2010,

appellee filed a memorandum contra arguing that, pursuant to the terms of the note: (1) appellant waived all defenses other than payment, and (2) the default interest rate of ten percent was properly applied to the amount due and owing on the note.

{¶5} On April 4, 2011, the trial court issued a decision denying appellant's motion to set aside judgment, finding that: (1) appellant failed to allege a meritorious defense; (2) appellant is not entitled to a hearing on its motion; and (3) appellant's motion for leave to file an amended answer is moot.

{¶6} On September 24, 2010, appellant filed a timely notice of appeal as to the August 26, 2010, cognovit judgment. On April 14, 2011, appellant filed a motion for leave to file an amended notice of appeal to include the trial court's April 4, 2011, decision and entry. On April 19, 2011, we granted appellant's motion. Appellant's amended notice of appeal set forth 19 assignments of error for our consideration. On May 12, 2011, appellant filed a motion to consolidate the assignments of error, which this court granted on May 17, 2011. Therefore, appellant has set forth the following seven assignments of error for our consideration:

[1.] APPELLANT RECEIVED NOTHING FOR THE COGNOVIT PROVISION.

[2.] MODIFICATION OF THE CONTRACT REDUCES THE BALANCE DUE ON THE NOTE TO ZERO.

[3.] PAYMENT WARRANTS GRANTING [CIV.R.] 60(B) MOTION.

[4.] THE RECORD IS INSUFFICIENT TO SUPPORT THE CONFESSION OF JUDGMENT.

[5.] FRAUD WARRANTS VACATING JUDGMENT.

[6.] THE COURT SHOULD HAVE GRANTED APPELLANT LEAVE TO FILE AN AMENDED ANSWER REGARDING IT[S] GENERAL CLAIMS AGAINST APPELLEE EVEN IF IT REFUSED TO ALLOW APPELLANT TO DISPUTE THE COGNOVIT NOTE.

[7.] EVEN IF THE TRIAL COURT CONSIDERED APPELLANT'S PRESENTATION OF FACTS INSUFFICIENT TO WARRANT REVERSAL OF THE COGNOVITS [SIC] NOTE JUDGMENT, THE OTHER ISSUES PRESENTED IN THE AMENDED ANSWER OF APPELLANT WERE SUFFICIENT TO PROCEED TO TRIAL.

{¶7} It is well-settled that, "[t]o prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." See *GTE Automatic Elec. Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of syllabus.

{¶8} However, the *GTE* test, stated above, has been "modified when a party is seeking relief from a cognovit judgment." *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, ¶18. Pursuant to the modified standard, a movant need only satisfy the first and third prongs of *GTE*: (1) the party has a meritorious defense or claim to present if the court grants relief, and (2) the party made the motion within a reasonable time. This modification is appropriate in the instance of a cognovit judgment because "the second *GTE* requirement, pertaining to whether the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), is automatically satisfied through Civ.R. 60(B)(5)," encompassing "any other reason justifying relief from judgment." *Classic Bar*

and Billiards, Inc. v. Samaan, 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶13; see also Civ.R. 60(B)(5).

{¶9} Further, "[t]he decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." *Sadraoui v. Hersi*, 10th Dist. No. 10AP-849, 2011-Ohio-3160, ¶11, citing *Perry v. Gen. Motors Corp.* (1996), 113 Ohio App.3d 318, 320. "An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable." *Classic Bar and Billiards* at ¶10, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Therefore, if a Civ.R. 60(B) motion " 'contains allegations of operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion.' " *Shuford v. Owens*, 10th Dist. No. 07AP-1068, 2008-Ohio-6220, ¶15, quoting *State ex. rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151.

{¶10} In *Classic Bar and Billiards* at ¶8, citing *Tinnes v. Immobiliare IV, Ltd.* (Feb. 13, 2001), 10th Dist. No. 00AP-87, this court stated that "[a] cognovit note contains provisions designed to cut off defenses available to a debtor in the event of default." In addition, Ohio courts have held that " 'by definition, cognovit notes cut off every defense, except payment, which the maker of the note may have against enforcement of the note.' " *Sadraoui* at ¶14, quoting *Shuford* at ¶18, quoting *First Natl. Bank of Pandora v. Freed*, 3d Dist. No. 5-03-36, 2004-Ohio-3554, ¶9, quoting *Advanced Clinical Mgmt., Inc. v. Salem Chiropractic Ctr., Inc.*, 5th Dist. No. 2003CA00108, 2004-Ohio-120, ¶18. However, Ohio courts have also recognized additional meritorious defenses involving the integrity and validity of cognovit notes, including: " 'improper conduct in obtaining the

debtor's signature on the note; deviation from proper procedures in confessing judgment on the note; and miscalculation of the amount remaining due on the note at the time of confession of judgment.' " *Sadraoui* at ¶14, quoting *Freed* at ¶9.

{¶11} In its first assignment of error, appellant alleges that it received nothing in return for the cognovit provision, and, therefore, the contract lacked consideration. In support of this argument, appellant states that: (1) there was no valuable consideration supporting the debt owed by appellant; (2) appellee failed to transfer the business to appellant; (3) appellee failed to transfer applicable licenses and permits to appellant; (4) prior to transferring the business to appellant, appellee intentionally caused a substantial decrease in the value of the business; (5) contrary to the parties' agreement, appellee closed the business causing substantial loss in good will and value; (6) appellant assumed debt related to the business, causing a substantial decrease in the value of the business; (7) appellee reduced the number and value of assets transferred without reducing the purchase price; and (8) appellee failed to give appellant satisfactory possession of the business within 30 days.

{¶12} In response to appellant's argument, appellee contends that, pursuant to the note's cognovit provision, appellant waived all claims and defenses regarding the enforcement of the contract, other than payment itself. Further, appellee states that, although appellant acknowledges that cognovit provisions cut off and waive every defense except payment, appellant also contends that this court should broadly define "payment" to include defenses based upon the alleged breach of the underlying contract.

{¶13} In *Sadraoui* at ¶15, this court stated that "lack or failure of consideration frequently is not considered a meritorious defense to a cognovit note judgment because it

is of the type of defense inherently waived in signing the cognovit note." See also *Tinnes*. Here, the record indicates that the cognovit note, signed by appellant, contained a warning advising appellant that:

BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL * * * REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

(Emphasis added.) (See Cognovit Note attached to Complaint.)

{¶14} The foregoing language clearly eradicates appellant's right to notice and court trial, as well as to any possible defenses for nonpayment including, but not limited to, appellee's failure to comply with the parties' agreement. Therefore, appellant has failed to establish a meritorious defense regarding lack of consideration.

{¶15} Appellant's first assignment of error is overruled.

{¶16} In its second assignment of error, appellant alleges that appellee unilaterally modified the contract, thereby reducing the balance due on the note to zero. In support of this argument, appellant generally alleges that, subsequent to executing the cognovit note, appellee modified the note by altering the transfer of the grocery store's assets. Appellant states that the modifications relate to the following: (1) identification of transferable assets; (2) number of transferable assets; (3) the date of transfer; and (4) the selection of the person responsible for operation of the grocery store pending the transfer of assets.

{¶17} In *Shuford*, at ¶19, quoting *Resolution Trust Corp. v. J.B. Centron Dev. Co.* (1993), 92 Ohio App.3d 643, 647, this court stated that "[u]nder Ohio law, 'an oral

modification of a contract *may* be a defense to a cognovit judgment and, thus, satisfy the "meritorious defense" criteria for Civ.R. 60(B).' " (Emphasis added.)

{¶18} However, in the present matter, the record is void of any evidence regarding a unilateral modification of the note at issue in this case. The terms of the note clearly state that: "FOR VALUE RECEIVED, the undersigned, jointly and severally if more than one, promise to pay to the order of Mock Road Supermarket Inc., Columbus Ohio, or at such other address as the holder hereof may from time to time designate in writing, the principal sum of One Million Dollars and No Cents (\$1,000,000.00)." (See Cognovit Note attached to Complaint.)

{¶19} Further, it is evident that appellant has mischaracterized a purported breach of the parties' real estate purchase contract as an oral modification of the note. (See Commercial Real Estate and Asset Purchase Contract, Memorandum Contra Defendant's Motion to Set Aside Plaintiff's Judgment, Exhibit A.) The crux of appellant's argument is that appellee promised to transfer an established business generating profit instead of a start-up business that appellant had to build from nothing. According to appellant, appellee allegedly failed to deliver on this promise, thus causing appellant an additional financial burden. While appellant's alleged grievances with appellee may raise issues regarding a breach of contract, they do not constitute an oral modification of the existing contract or note between the parties. Therefore, appellant has failed to establish a meritorious defense regarding oral modification of the parties' real estate purchase contract or note.

{¶20} Appellant's second assignment of error is overruled.

{¶21} In its third assignment of error, appellant alleges that it overpaid the amount due under the note because it did not owe appellee any money, but made regular payments until appellee hired an attorney to confess judgment against appellant and failed to transfer the assets of the grocery store to appellant. Appellant also alleges that appellee failed to credit appellant for payments of at least \$9,000. In response, appellee contends that appellant's only real argument, regarding the issue of payment and/or miscalculation of the amount owed on the note, hinged upon appellee's alleged misuse of a ten percent interest rate on the unpaid balance of the note in default.

{¶22} First, we note that appellant's argument regarding not owing anything on the note due to appellee's failure to transfer assets is another attempt to utilize a breach of contract and/or lack of consideration defense as proof of payment. As stated above, breach of contract and/or lack of consideration are not considered meritorious defenses to a cognovit judgment.

{¶23} Second, in review of the record, we note that, in its motion to set aside judgment, appellant only addresses an alleged overpayment of \$9,000 in the context of applying the wrong interest rate to calculate the remaining amount owed on the note in default. Appellant's affidavit avers, in relevant part, that "[c]ontrary to [appellee's] sworn [sic] statements to this Court, and the Judgment Entry presumably prepared by [appellee] and submitted to this Court for signature, the Note accrues interest at the rate of only 6% and had a possible maximum balance due of only \$945,012.44." (See affidavit attached to appellant's Motion to Set Aside Judgment at ¶33.) Further, appellant contends that appellee's affidavit falsely certifies a balance due on the note exceeding \$945,012.44 because appellee applied an interest rate of ten percent, "resulting in an immediate

inflation of [appellant's] debt by \$9,000." (See affidavit attached to appellant's Motion to Set Aside Judgment at ¶33.)

{¶24} While appellant correctly states that the note at issue accrues interest at a rate of six percent, it fails to explain that the six percent interest rate only applies if payment on the note is current. If payment on the note is in default, interest accrues at a higher rate of ten percent. The default provision in the note clearly states that:

Upon default in payment of any installment within 10 calendar days after the same is due, or upon failure to perform any of the covenants or conditions of this note, this note shall, at the option of the holder hereof, *bear interest thereafter at the rate of 10% per annum*, and the entire principal hereof then remaining unpaid, together with all accrued interest, shall, at said holder's option, become immediately due and payable without any notice or demand.

(Emphasis added.) (See Cognovit Note attached to Complaint.) Pursuant to the plain language of the cognovit note, the trial court correctly entered judgment in the amount of "\$954,549.06, plus interest on the unpaid balance at the rate of ten percent from the date of this judgment, until fully paid." (See Aug. 26, 2010, Judgment Entry.) Further, appellant failed to set forth any additional operative facts regarding an alleged overpayment in the amount of \$9,000. Therefore, appellant has failed to establish a meritorious defense regarding overpayment and/or miscalculation of the amount due and owing on the note.

{¶25} Appellant's third assignment of error is overruled.

{¶26} In its fourth assignment of error, appellant alleges that the record is insufficient to support the confession of judgment because material terms have been omitted from the note due to an alleged oral agreement between the parties, which alter

the amount due on the note and, therefore, render the note void. Further, appellant alleges that the amount owed on the note and the date of payment required under the note cannot be determined solely by referring to the face of the note. For the following reasons, we disagree.

{¶27} Here, the note at issue states that:

FOR VALUE RECEIVED, the undersigned, jointly and severally if more than one, promise to pay to the order of Mock Road Supermarket Inc., Columbus Ohio, or at such other address as the holder hereof may from time to time designate in writing, the principal sum of *One Million Dollars and No Cents (\$1,000,000.00)*. The principal sum shall be due and payable as follows:

The loan balance shall bear interest at a rate of 6.00% compounded annually. The loan shall be amortized over a twenty year (20) period with a balloon payment of all outstanding amounts owed on or before May 1, 2010. Maker shall make monthly payments of both principal and interest in the amount of \$7,164.31 commencing June 1, 2008[,] and continuing each and every other consecutive month through the date of the balloon payment. All or any part of the principal sum and accrued interest may be prepaid at any time without penalty. All payment obligations hereunder shall be subordinated to the note obligation of maker to Huntington National Bank.

(Emphasis added.) (See Cognovit Note attached to Complaint.) Based upon the foregoing, the note clearly indicates that: (1) the principal sum of \$1,000,000, plus interest at a rate of six percent, is due and owing, and (2) monthly payments, in the amount of \$7,164.31, shall commence on June 1, 2008, with a balloon payment due on or before May 1, 2010, of any outstanding amounts owed. In addition, as noted above, the record is void of any evidence of a separate oral agreement between the parties which modified the terms of the note. Finally, prior to the trial court granting judgment on the note,

appellee properly filed its complaint, affidavit and answer confessing judgment. Therefore, we find that the record is sufficient to support the confession of judgment in this matter.

{¶28} Appellant's fourth assignment of error is overruled.

{¶29} In its fifth assignment of error, appellant alleges that appellee committed fraud by concealing and/or misrepresenting certain material facts relating to the transfer of assets as set forth in the parties' asset purchase contract. (See Commercial Real Estate and Asset Purchase Contract, Memorandum Contra Defendant's Motion to Set Aside Plaintiff's Judgment, Exhibit A.)

{¶30} In *Oberkonz v. Gosha*, 10th Dist. No. 02AP-237, 2002-Ohio-5572, ¶16, quoting *Masters Tuxedo Charleston, Inc. v. Krainock*, 7th Dist. No. 02 CA 80, 2002-Ohio-5235, ¶8, this court stated that "[i]n order to fulfill the requirement of presenting a meritorious defense, "a movant need only allege a meritorious defense, not prove that he will prevail on that defense." ' ' However, "[t]he movant must allege operative facts with *enough specificity* to allow the trial court to decide whether he or she has met that test." (Emphasis added.) *Oberkonz* citing *Syphard v. Vrable*, 141 Ohio App.3d 460, 463, 2001-Ohio-3229.

{¶31} Here, a review of the record indicates that, in its motion to set aside judgment, appellant alleged facts regarding a possible breach of the parties' asset purchase contract, but did not allege any specific operative facts regarding its allegations of fraud. (See Motion to Set Aside Judgment at 13-15.) Throughout its motion, appellant generally alleges that appellee concealed certain "material facts" but does not state with any specificity the nature of those facts in order for the trial court to determine whether, if

granted relief, appellant would have a meritorious defense. (See Motion to Set Aside Judgment at 13-15.) Therefore, appellant has failed to establish a meritorious defense regarding fraud.

{¶32} Appellant's fifth assignment of error is overruled.

{¶33} In its sixth and seventh assignments of error, appellant argues that, even if the trial court considered appellant's presentation of facts insufficient to warrant reversal of the cognovit judgment, the trial court should have granted appellant leave to amend its answer and proceed to trial on other nonrelated issues.

{¶34} As stated above, in order to be entitled to relief pursuant to Civ. R.60(B), a movant must allege operative facts demonstrating that it has a meritorious defense or claim to present if relief is granted. See *Sadraoui* at ¶11. In the present matter, the trial court found appellant's presentation of facts insufficient to grant relief pursuant to Civ.R. 60(B) and, as such, correctly rendered appellant's motion for leave to amend its answer moot. Therefore, the trial court did not err in rendering appellant's motion for leave to amend its answer moot.

{¶35} Appellant's sixth and seventh assignments of error are overruled.

{¶36} Based upon the foregoing, we find that the trial court did not abuse its discretion in denying appellant's motion to set aside judgment prior to holding an evidentiary hearing because appellant failed to set forth any operative facts demonstrating a meritorious defense to the cognovit judgment.

{¶37} In addition, on June 14, 2011, appellant filed a motion to strike with this court. Appellant contends that appellee references: (1) an asset purchase agreement, and (2) an answer confessing judgment, without any citation to the record. Further,

appellant contends that appellee states that "[a]ppellant knowingly, advisedly and with the full benefit of its legal counsel waived any and all claims or defenses it might otherwise have against enforcement of the note, except for the defense of payment," without any citation to the record. (See appellant's Memorandum in Support of Motion to Strike.)

{¶38} We find that appellee's statements are supported by evidence contained within the record and, therefore, shall not be stricken. Therefore, appellant's motion to strike is denied.

{¶39} For the foregoing reasons, appellant's motion to strike is denied, his seven assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Motion to strike denied;
judgment affirmed.*

SADLER and CONNOR, JJ., concur.
