[Cite as *Sadraoui v. Hersi,* 2011-Ohio-3160.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mohamed Sadraoui et al.,	:	
Plaintiffs-Appellants,	:	
		No. 10AP-849
v.	:	(C.P.C. No. 10CVH-05-7631)
Samsam Hersi et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 28, 2011

Law Offices of Marcell Rose Anthony, LLC, and *Marcell Rose Anthony,* for appellants.

Eugene P. Weiss, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiffs-appellants, Mohamed Sadraoui, Mohamed Terhzaz, and Said Dennoune, appeal from a judgment of the Franklin County Court of Common Pleas granting the motion for relief from judgment of defendants-appellees, Samsam Hersi and Abdul Ismail, and vacating the trial court's May 20, 2010 cognovit judgment granted to plaintiffs. Because (1) the trial court did not err in determining defendants asserted a meritorious defense challenging the actual amount defendants owed under the cognovit

note, but (2) the trial court erred in vacating the cognovit judgment in its entirety, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} On May 20, 2010, plaintiffs filed a non-consumer cognovit complaint with the trial court, alleging defendants executed a non-consumer cognovit promissory note with a warrant of attorney, in the principal amount of $40,000, plus interest. Plaintiffs alleged defendants defaulted on the note and owed plaintiffs $30,000, plus $500 in attorney's fees. Plaintiffs attached a copy of the cognovit note to the complaint, which contained the following statement:

> WARNING: BY SIGNING THIS COGNOVIT PROMISSORY NOTE, YOU HEREBY WAIVE YOUR RIGHTS TO SERVICE OF A COMPLAINT AND SUMMONS IN THE EVENT OF DEFAULT AND FURTHER WAIVE ALL DEFENSES YOU MAY HAVE IN A COURT OF LAW OR EQUITY. FURTHER YOU HEREBY WAIVE TRIAL BY JURY OR THE COURT, AND ANY APPEAL, AND CONSENT TO COGNOVIT NOTE JUDGMENT AGAINST YOU.

(Complaint, Exhibit A.) The same day an answer was filed confessing judgment for plaintiffs in the amount of $30,500 on the cognovit note, and the trial court entered judgment for plaintiffs in that amount, plus interest.

{¶3} On June 30, 2010, defendants filed a motion for relief from judgment pursuant to Civ.R. 60(B), asserting plaintiffs did not advance to defendants the amount plaintiffs sought in their complaint. Plaintiffs responded with a memorandum opposing the motion, as well as a motion for sanctions, to which defendants filed a reply. Both parties requested an oral hearing on the matter. On August 10, 2010, the trial court issued a combined decision and entry granting defendants' motion for relief from judgment, an

entry vacating the trial court's May 20, 2010 cognovit judgment, and a decision and entry denying plaintiffs' motion for sanctions. The trial court concluded defendants' claim that "[p]laintiffs have obtained a judgment in excess of what they are entitled to" was a meritorious defense to the cognovit note judgment. (Decision and Entry, 3.)

II. Assignments of Error

{¶4} Plaintiffs appeal, assigning the following errors:

> I. FAILURE OF CONSIDERATION IS NOT A VIABLE MERITORIOUS DEFENSE TO A COGNOVIT NOTE, THE APPELLEES HAVING WAIVED ALL DEFENSES UPON SIGNING THE COGNOVIT NOTE. THUS, THE RULE 60(B) MOTION TO VACATE SHOULD HAVE BEEN DENIED.
>
> II. EVEN IF FAILURE OF CONSIDERATION WERE A VIABLE MERITORIOUS DEFENSE TO A COGNOVIT NOTE, THERE WERE CONFLICTING AFFIDAVITS IN THE BRIEFING ON CONSIDERATION ON THE RULE 60(B) MOTION TO VACATE, WHICH SHOULD HAVE LED TO THE DENIAL OF THE RULE 60(B) MOTION TO VACATE.
>
> III. THE AFFIDAVIT TO THE RULE 60(B) MOTION TO VACATE WAS DEFECTIVE AND SIGNED BY THE WRONG PARTY DEFENDANT, AND THEREFORE, THE RULE 60(B) MOTION SHOULD HAVE BEEN DENIED.
>
> IV. WHERE THERE ARE CONFLICTING AFFIDAVITS ON CONSIDERATION, ASSUMING A VIABLE MERITORIOUS DEFENSE AND NOT WAIVED IN THE COGNOVIT NOTE, THE COURT SHOULD HAVE HELD A HEARING ON OPERATIVE FACTS AND NOT SUMMARILY GRANTED THE RULE 60(B) MOTION. TO SUMMARILY GRANT RELIEF WITHOUT A HEARING WAS A DENIAL OF DUE PROCESS.

III. Final Appealable Order

{¶5} In response to plaintiffs' assigned errors, defendants assert the trial court's decision and entry granting defendants' Civ.R. 60(B) motion for relief from judgment is not

a final appealable order, thus questioning this court's jurisdiction to entertain plaintiffs' appeal.

{¶6} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments, or decrees. "[T]he entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10, quoting *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94. Conversely, "[a] judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." Id., quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

{¶7} "A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B)." *Fahey Banking Co. v. United Telephone Credit Union, Inc.*, 10th Dist. No. 09AP-1130, 2010-Ohio-2193, ¶18, citing *Denham v. New Carlisle*, 86 Ohio St.3d 594, 595, 1999-Ohio-128. Civ.R. 54(B) applies to multi-claim or multi-party actions and allows a court to "enter final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay." Civ.R. 54(B) does not apply to this appeal, as the trial court's decision addressed the only issue before it when it granted defendants' motion for relief from judgment and vacated its May 20, 2010 judgment.

{¶8} In contesting whether the trial court's order is appealable, defendants' focus on R.C. 2505.02(B)(1), which provides "[a]n order is a final order that may be reviewed,

affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." Within those parameters, defendants assert the trial court's decision and entry is not final and appealable because, following the trial court's decision to grant defendants' Civ.R. 60(B) motion, the underlying case remains pending for final resolution.

{¶9} Defendants' argument improperly focuses on R.C. 2505.02(B)(1) while ignoring R.C. 2505.02(B)(3). Under R.C. 2505.02(B)(3), an order is final when it "vacates or sets aside a judgment or grants a new trial." "The law in Ohio is clear that '[a]n order vacating a judgment under Civ.R. 60(B) is a final appealable order.' " *Bourque v. Bourque* (1986), 34 Ohio App.3d 284, 286, quoting *Bates & Springer, Inc. v. Stallworth* (1978), 56 Ohio App.2d 223, paragraph four of the syllabus. See also *Arrow Machine Co., Ltd. v. Rapid Rigging, Inc.*, 11th Dist. No. 2007-L-114, 2008-Ohio-526, ¶11 (stating "[t]he granting of [Civ.R. 60(B)] motion for relief from judgment which vacates a default judgment is a final order"), citing *GTE Automatic Elec. Co. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph one of the syllabus; *Irion v. Incomm Electronics*, 4th Dist. No. 05CA1, 2006-Ohio-362, ¶21 (stating a trial court's decision granting a Civ.R. 60(B) motion for relief from judgment is a final order under R.C. 2505.02(B)(3) as it is an "order that vacates or sets aside a judgment or grants a new trial").

Accordingly, the trial court's judgment granting defendants' Civ.R. 60(B) motion and vacating the trial court's cognovit judgment is a final, appealable order.

IV. First Assignment of Error – Lack of Meritorious Defense

{¶10} Plaintiffs' first assignment of error asserts the trial court erred in concluding lack or failure of consideration is a meritorious defense to a cognovit judgment and

warrants Civ.R. 60(B) relief from judgment. Plaintiffs contend lack of consideration is instead an affirmative defense that defendants waived in signing the cognovit note and it cannot serve as a meritorious defense in a Civ.R. 60(B) motion.

{¶11} In order to prevail on a motion for relief from judgment under Civ.R. 60(B), a movant generally must demonstrate (1) the movant has a meritorious defense or claim to present if relief is granted; (2) the movant 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. *Perry v. Gen. Motors Corp.* (1996), 113 Ohio App.3d 318, 320, citing *GTE Automatic Elec.* If Civ.R. 60(B)(1), (2), or (3) are the grounds for relief, the motion must be made within one year after the judgment, order, or proceeding was entered or taken; otherwise, the motion must be made within a reasonable time. Id. The 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. Id.

{¶12} In cases involving a Civ.R. 60(B) motion for relief from judgment taken on a cognovit note, a movant "need only establish (1) a meritorious defense and (2) that the motion was timely made." *Buehler v. Mallo*, 10th Dist. No. 10AP-84, 2010-Ohio-6349, ¶8, quoting *Medina Supply Co. v. Corrado* (1996), 116 Ohio App.3d 847, 851. Plaintiffs do not dispute defendants' motion was timely. The merit of plaintiffs' first assignment of error thus turns on whether defendants' motion presented a meritorious defense.

{¶13} In general, "[a] cognovit note contains provisions designed to cut off defenses available to a debtor in the event of default." *Classic Bar & Billiards, Inc. v. Fouad Samaan*, 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶8. "The holder of a cognovit note in default obtains a judgment without a trial of possible defenses which the signers of

the note might otherwise assert." Id. "This is so because, under a cognovit note, the debtor consents in advance to the holder obtaining a judgment without notice or hearing." Id. "An attorney, whom the note holder may designate, appears on behalf of the debtor and, pursuant to provisions of the cognovit note, confesses judgment and waives the debtor's right to notice of the proceedings." Id.

{¶14} Consistent with *Classic Bar & Billiards*, Ohio courts, including this one, have observed that cognovit notes, by definition, " 'cut off every defense, except payment, which the maker of the note may have against enforcement of the note.' " *Shuford v. Owens*, 10th Dist. No. 07AP-1068, 2008-Ohio-6220, ¶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. Although the defense of non-default "is not the only meritorious defense recognized by courts as being available to a cognovit judgment debtor seeking Civ.R. 60(B) relief," a judgment on a cognovit note generally " 'will not be vacated for reasons which do not encompass such matters of integrity and validity.' " Id., quoting *First Merit Bank v. NEBS Financial Servs., Inc.*, 8th Dist. No. 87632, 2006-Ohio-5260, ¶18, quoting *Rothstein v. Rothstein*, 8th Dist. No. 86090, 2005-Ohio-6381, ¶9. Other meritorious defenses that implicate the integrity and validity of a cognovit note include "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." Id., quoting *Freed* at ¶9.

{¶15} Within that context, 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 *Diamond v. Arabica Coffee One Corp.*, 8th Dist. No. 93740, 2010-Ohio-3090, ¶13 (concluding the movant waived his defense "that there was no consideration" when he signed the cognovit note, and Civ.R. 60(B) relief was not appropriate where the movant did not claim "he paid the debt or even that there is something invalid about the note itself"); *Advanced Clinical Mgmt.* at ¶19 (concluding the appellants could not assert "failure of consideration of the promissory note" as a defense to a judgment on the note because "the cognovit provisions in the promissory note" prevented that allegation as a defense). But see *Gerold v. Bush*, 6th Dist. No. E-07-013, 2007-Ohio-5885, ¶20 (stating the defense of "failure of consideration * * * if proven, would defeat a suit on a note," with the result that defendant's so alleging such a "potentially meritorious defense[]" meant the trial court did not err in granting defendant's Civ.R. 60(B) motion).

{¶16} We need not resolve whether failure of consideration is a meritorious defense under Civ.R. 60(B), because the trial court based its decision on defendants' defense that the amount plaintiffs claim defendants owe to plaintiffs under the note is incorrect. A dispute about the amount actually owed under the cognovit note is a meritorious defense to a cognovit note judgment. See *Freed* at ¶9 (noting "miscalculation of the amount remaining due on the note at the time of confession of judgment" is a defense involving the integrity and validity of the cognovit note and thus is a meritorious defense for purposes of a Civ.R. 60(B) motion); *Lewandowski v. Donohue Intelligraphics, Inc.* (1994), 93 Ohio App.3d 430, 432-33 (concluding defendant's defense "that the amount of the judgment entered pursuant to the cognovit provision had been incorrectly calculated" was a meritorious defense sufficient for trial court to grant Civ.R. 60(B) relief);

Simmons Capital Advisors, Ltd. v. Kendall Group, Ltd., 10th Dist. No. 05AP-1087, 2006-Ohio-2272, ¶23 (concluding trial court abused its discretion in denying appellants' Civ.R. 60(B) motion where appellants "alleged a meritorious defense" in challenging "the 'amount of judgment' on the cognovit note," especially where the terms of the note itself seemed to contemplate such a challenge to the note); *Lykins Oil Co. v. Pritchard*, 169 Ohio App.3d 194, 2006-Ohio-5262, ¶18 (concluding the trial court abused its discretion in denying the Civ.R. 60(B) motion for relief where defendants "raised a meritorious defense attacking * * * the amount of the judgment rendered against them").

{¶17} The noted cases thus direct disposition of defendants' argument supporting their motion. Defendants alleged in their Civ.R. 60(B) motion that the amount plaintiffs sought in their complaint was inconsistent with the express terms of the cognovit note attached to the complaint. Indeed, plaintiffs acknowledged at oral argument on appeal that not only did the judgment not properly reflect the amount owed under the note, but deciding the amount at issue properly would be before the trial court on remand. Defendants similarly conceded at oral argument on appeal that a hearing solely on the amount of damages would be proper following a determination the note is valid. Defendants thus asserted a meritorious defense to the cognovit note judgment in their allegation that the amount of the judgment was incorrect.

{¶18} The trial court, however, erred to the extent it vacated the entire judgment, because neither the trial court's decision and entry nor defendants' allegations present any basis to conclude the note is invalid. Instead, the trial court should have granted defendants' Civ.R. 60(B) motion to the extent necessary to take evidence on the amount defendants actually owe plaintiffs under the terms of the note. See generally *Meyer v.*

Chieffo, 180 Ohio App.3d 78, 2008-Ohio-6603, ¶26 (remanding the matter to the trial court for a trial as to damages only where liability on breach of contract claim had been established); *Columbus Retail, Inc. v. Dalt's, LLC*, 10th Dist. No. 04AP-735, 2005-Ohio-764, ¶21 (overruling an assignment of error with respect to liability but sustaining with respect to damages, and remanding matter to trial court to determine issue of amount of damages owed). Accordingly, we sustain in part and overrule in part plaintiffs' first assignment of error.

V. Second, Third, and Fourth Assignments of Error – Affidavit and Hearing

{¶19} Plaintiffs' second, third, and fourth assignments of error are interrelated, so we address them jointly. Plaintiffs' third assignment of error challenges the validity and adequacy of the affidavit attached to defendants' Civ.R. 60(B) motion, while plaintiffs' second and fourth assignments of error assert the trial court erred in failing to conduct an evidentiary hearing before granting defendants' motion.

{¶20} To obtain relief under Civ.R. 60(B), the moving party "must present operative facts that demonstrate the existence of a meritorious defense or claim." *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, ¶20. When 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." *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 1996-Ohio-54. Nonetheless, "[a] trial court does not abuse its discretion by failing to conduct an evidentiary hearing on a Civ.R. 60(B) motion when the court has sufficient evidence before it to decide whether a meritorious defense was presented." *Natl. City Bank v.*

Concorde Controls, Inc., 11th Dist. No. 2001-L-113, 2002-Ohio-6578, ¶19, citing *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14.

{¶21} Plaintiffs argue both that defendants' affidavit did not allege sufficient operative facts to allow the trial court to find a meritorious defense and that Hersi, who purportedly had difficulty with the English language, was not a proper affiant. According to plaintiffs, the trial court at a minimum should have conducted a hearing before granting defendants' motion for relief from judgment.

{¶22} Underlying plaintiffs' second, third, and fourth assignments of error and their contentions about a hearing is the same basic premise that the trial court erroneously concluded failure or lack of consideration is a meritorious defense. The trial court, however, did not decide the Civ.R. 60(B) motion on that basis. Further, nothing in the trial court's decision and entry suggests the cognovit note is not valid. As a result, the sole issue on remand will be the amount actually owed under the note. Plaintiffs acknowledge the amount owed under the note is properly before the trial court for determination pursuant to hearing, meaning any alleged error in the trial court's relying on Hersi's affidavit or in failing to conduct a hearing does not prejudice plaintiffs: plaintiffs will have the opportunity on remand to establish the amount of damages they are owed and to refute defendants' allegations regarding that amount. Accordingly, our disposition of plaintiffs' first assignment of error renders plaintiffs' second, third, and fourth assignments of error moot.

VI. Disposition

{¶23} Because the trial court did not err in determining defendants properly asserted a meritorious defense in alleging the amount owed under the note was incorrect,

but defendants did not allege, and the trial court did not find, the note was invalid, the trial court erred in vacating the judgment in its entirety. The trial court on remand instead should conduct a hearing solely on the amount defendants owe plaintiffs under the note. Accordingly, we affirm in part and reverse in part the judgment of the trial court, and we remand this matter to the trial court to determine the amount defendants actually owe to plaintiffs under the cognovit note.

Judgment affirmed in part and reversed in part; cause remanded with instructions.

SADLER and DORRIAN, JJ., concur.

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