[Cite as *Huntington Natl. Bank v. 199 S. Fifth St. Co.*, 2011-Ohio-3707.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Huntington National Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1082 (C.P.C. No. 10CVH03-3516)
199 South Fifth Street Co., LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Annette Trembly and The Trembly Family Limited Partnership Two,	:	
Defendants-Appellants).	:	

D E C I S I O N

Rendered on July 28, 2011

Bricker & Eckler, LLP, Justin W. Ristau, Vladimir P. Belo and *Molly E. Philipps,* for Huntington National Bank.

Andrew J. Michaels; *Vorys, Sater, Seymour & Pease, LLP*, and *John W. Solomon,* for appellants.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendants-appellants, Annette Trembly and the Trembly Family Limited Partnership Two (collectively, "defendants"), appeal from a judgment of the Franklin County Court of Common Pleas denying defendants' motion to vacate the cognovit

judgment rendered July 29, 2010 in favor of plaintiff-appellee, Huntington National Bank. Because the trial court lacked subject matter jurisdiction to enter the cognovit judgment, we reverse.

I. Facts and Procedural History

{¶2} On March 5, 2010, plaintiff, as successor by merger to Sky Bank, filed a complaint against 199 South Fifth Street Co., LLC, John Messmore, individually and as trustee of the John W. Messmore Revocable Trust Agreement, Mark Jones, Blue Heron Land Co., and defendants for breach of a promissory note ("the note") and the commercial guaranties securing the promissory note.

{¶3} The complaint alleged that 199 South Fifth Street Co., LLC executed and delivered a promissory note to Sky Bank in August 2006 in the amount of $5.36 million. The remaining named parties, including defendants, executed and delivered commercial guaranties for the entire indebtedness under the note. Both the note and the commercial guaranties contained warrants of attorney authorizing an attorney to appear in court after the note became due and to confess judgment. Plaintiff's complaint alleged that 199 South Fifth Street, LLC defaulted on the note in failing to pay the outstanding principal and interest when it became due on August 22, 2008.

{¶4} In seeking cognovit judgment against defendants, plaintiff presented to the court photocopies of the note and all of the commercial guaranties, as well as the affidavit of Michael K. Adamson, plaintiff's Vice President for Special Assets, who attested to the authenticity of the documents and the precise amount of the indebtedness. At no time did plaintiff provide the trial court with the original note or commercial guaranties. The same day plaintiff filed its complaint, it obtained a cognovit judgment on March 5, 2010 in the

amount of $5,035,216.58 pursuant to warrants of attorney contained in the note and the commercial guaranties.

{¶5} On July 29, 2010, defendants filed a motion to vacate the cognovit judgment, arguing the trial court did not have subject matter jurisdiction to render judgment where plaintiff did not provide the trial court with the original warrants of attorney for the note and the commercial guaranties. After the parties fully briefed the issue, the trial court in an October 27, 2010 decision and entry denied defendants' motion to vacate the judgment.

II. Assignments of Error

{¶6} Defendants appeal, assigning the following errors:

> **I. The Trial Court erred by entering a cognovit judgment where the original warrant of attorney to confess judgment was never produced to the Trial Court.**
>
> **II. The Trial Court erred by denying a timely motion to vacate a cognovit judgment where the original warrant of attorney to confess judgment was never produced to the Trial Court.**

Defendants' assignments of error are interrelated, so we address them jointly.

III. Analysis

{¶7} Taken together, defendants' assignments of error contend the trial court lacked subject matter jurisdiction to enter a cognovit judgment against them, rendering the judgment against them void. Defendants assert the trial court erred both in rendering a void judgment and in failing to grant defendants' motion to vacate the void judgment.

A. Standard of Review

{¶8} 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 the time specified under the rule. *Perry v. Gen. Motors Corp.* (1996), 113 Ohio App.3d 318, 320, citing *GTE Automatic Elec., Inc. v. ARC Indus., Inc.,* (1976), 470 Ohio St.2d 146, paragraph two of the syllabus. 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. The decision to grant or deny a Civ.R. 60(B) motion generally is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. *Perry* at 320.

{¶9} Here, however, the statutory provisions at issue, R.C. 2323.12 and 2323.13, govern a trial court's jurisdiction over cognovit notes, "and these statutory requirements must be met in order for a valid judgment to be granted upon a cognovit note, or for a court to have subject-matter jurisdiction over it." *Buehler* at ¶9, citing *Klosterman v. Turnkey-Ohio, L.L.C.*, 182 Ohio App.3d 515, 2009-Ohio-2508, ¶19. We review the issue of subject matter jurisdiction de novo. *Klosterman* at ¶19, citing *Cheap Escape Co., Inc. v. Tri-State Constr., L.L.C.*, 173 Ohio App.3d 683, 2007-Ohio-6185, ¶18.

B. Original Warrants of Attorney and Void Judgments

{¶10} Defendants initially contend the trial court's entry is void because the note does not comply with R.C. 2323.13(A) in that plaintiff, through the attorney confessing judgment, failed to present the original warrants of attorney to the trial court. As a result, defendants contend, the trial court lacked subject matter jurisdiction to render judgment against defendants.

{¶11} R.C. 2323.13(A) states, in its first sentence, that "[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession." R.C. 2323.13(A) requires in its last sentence that "[t]he original or a copy of the warrant shall be filed with the clerk." Where a cognovit note does not comply with R.C. 2323.13, the trial court lacks subject matter jurisdiction to render judgment, and a judgment entered on that cognovit note is void ab initio. *Klosterman* at ¶25, citing *Taranto v. Wan-Noor* (May 15, 1990), 10th Dist. No. 90AP-1, citing *Patton v. Diemer* (1988), 35 Ohio St.3d 68.

{¶12} Noting the first sentence of R.C. 2323.13(A) refers to a point in time separate from the activity described in the last sentence of R.C. 2323.13(A), defendants contend the plain language of R.C. 2323.13(A) allows an attorney who confesses judgment to file a photocopy of a warrant of attorney with the clerk as part of the record. Nonetheless, defendants assert, the statute requires the attorney confessing judgment to present the original warrant of attorney to the trial court before the trial court may enter cognovit judgment.

{¶13} To support their contention that a trial court has jurisdiction to enter cognovit judgment only where the attorney confessing judgment presents to the court the original

warrant of attorney rather than a photocopy, defendants rely on *Lathrem v. Foreman* (1958), 168 Ohio St. 186, where the Supreme Court of Ohio emphasized "the production of *the* warrant of attorney" as a mandatory jurisdictional requirement of R.C. 2323.13. *Lathrem* at 188. (Emphasis sic.) *Lathrem* concluded that under a strict construction of R.C. 2323.13, "where the original warrant of attorney to confess judgment is not and can not be produced, the court lacks the authority and power to restore or re-establish it in an ex parte proceeding and then enter a valid judgment by confession thereon." *Lathrem* at 190.

{¶14} In an attempt to distinguish *Lathrem*, plaintiff contends the case turned on the fact the "original note with warrant of attorney * * * was lost and therefore not before the court when the judgment was taken and the entry filed," so the plaintiff "presented a copy" of the note and warrant of attorney which the court used to "restore[] the lost note and warrant of attorney." Id. at 186-87. Plaintiff asserts *Lathrem* does not apply here, where no one contends the original note or warrant of attorney has been lost; rather plaintiff simply provided only photocopies to the trial court.

{¶15} Plaintiff suggests *Masters Tuxedo Charleston, Inc. v. Krainock*, 7th Dist. No. 02 CA 80, 2002-Ohio-5235, is more on point than *Lathrem*. *Masters Tuxedo* addressed whether "Masters Tuxedo could * * * obtain a valid cognovit judgment" where it "did not strictly comply with R.C. 2323.13(A)." Id. at ¶9. Relying on *Lathrem*, the defendant in Masters Tuxedo argued "the cognovit judgment is void because the complaint contained a copy of the warrant of attorney, not the original." Id. The court factually distinguished *Lathrem*, because there the warrant of attorney was lost and subsequently recreated. Citing to *Fogg v. Friesner* (1988), 55 Ohio App.3d 139, *Masters Tuxedo* ultimately

concluded "copies are acceptable as an accurate reproduction of the warrant of attorney," so the trial court had jurisdiction to render a cognovit judgment.

{¶16} *Fogg*, on which *Masters Tuxedo* relied, expressly held R.C. 2323.13(A) allows a photographic copy of an original cognovit note in order to establish the warrant of attorney. The court premised its conclusion on R.C. 2323.13(A), deciding that since the statute "does not state that *copies* of a warrant of attorney are invalid * * * it was permissible for appellee to submit an accurate reproduction of the document" to the court for a cognovit judgment. Id. at 141. (Emphasis sic.) *Fogg*, however, does not mention *Lathrem* or its explicit requirement that the original warrant of attorney be presented to the trial court.

{¶17} Moreover, *Fogg's* interpretation of R.C. 2323.13(A) seems to isolate the first sentence of the statute while ignoring the last sentence. "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997-Ohio-35, citing *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 89. In the last sentence of R.C. 2323.13(A), the General Assembly demonstrated its intent to draw a distinction between the original warrant of attorney and a copy. Had the legislature intended to allow attorneys confessing cognovit judgments to present a copy of the warrant to the court, in addition to allowing a copy to be filed with the clerk, the legislature could have so stated. See, e.g., *State ex rel. Cordray v. Court of Claims of Ohio*, 190 Ohio App.3d 161, 2010-Ohio-4437, ¶25, citing *State v. Nucklos*, 121 Ohio St.3d 332, 2009-Ohio-792, ¶18 (observing that had the General Assembly intended

something to be an affirmative defense, "it could have stated" as much in the statute, and when it did not so state, that intention is lacking).

{¶18} Because the legislature used different language in the first and last sentences of R.C. 2323.13(A), we must assume it intended different results from the different words employed. To conclude otherwise would render some of the words the legislature used in the last sentence surplusage, a result that violates the rules of statutory construction. For that reason, *Fogg* is not persuasive. See, e.g., id. at ¶27 (noting the general presumption that the legislature intends a difference in meaning from its use of different language).

{¶19} We further respectfully disagree with the Seventh District's attempt to distinguish *Masters Tuxedo* from *Lathrem*. *Masters Tuxedo* concludes that when *Lathrem* said "the court cannot recreate or restore a warrant of attorney, the court in essence meant redraw." *Masters Tuxedo* at ¶9. Although the facts of *Lathrem* involved a situation in which the original warrant of attorney was lost and subsequently recreated, the syllabus of *Lathrem* is very clear that R.C. 2323.13 "requires the production of *the* warrant of attorney to the court at the time of confessing judgment." *Lathrem* at paragraph two of the syllabus. Given that the substance of the statutory language contained in the current version of R.C. 2323.13(A) is not materially changed since *Lathrem*, we see no basis to deviate from *Lathrem's* requirement that a party seeking cognovit judgment must present the original warrant of attorney to the trial court.

{¶20} Moreover, interpreting R.C. 2323.13(A) to require the production of the original warrant of attorney not only comports with the statutory language but also is in accord with the general rule that we construe the statutory requirements strictly against

the party seeking the cognovit judgment due to the extraordinary nature of the proceedings. *Bank One, N.A. v. DeVillers*, 10th Dist. No. 01AP-1258, 2002-Ohio-5079, ¶37 (stating "[w]arrants of attorney to confess judgment are to be strictly construed against the person in whose favor the judgment is given, and court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject"), citing *Lathrem* at 188. Requiring the attorney confessing judgment to produce the original warrant of attorney provides a minimal level of assurance that the note is authentic and actually exists, while allowing the plaintiff to file a copy of the warrant with the clerk allows the plaintiff to retain control of the instrument after it is presented to the court if the plaintiff so chooses. If the plaintiff is unable to produce the original warrant of attorney, the plaintiff may proceed with a more traditional complaint premised on the note itself.

{¶21} In the final analysis, the language of R.C. 2323.13(A), as the Supreme Court interpreted it in *Lathrem*, requires an attorney confessing judgment to present the original warrant of attorney to the trial court at the time the attorney makes the confession; the plaintiff may then choose to file either the original warrant or a copy of it with the clerk for purposes of maintaining the record. Because the requirements of R.C. 2323.13(A) are jurisdictional, plaintiff's failure to present the original note and warrants of attorney renders the cognovit judgment entered void. See *Klosterman* at ¶25. Accordingly, we sustain defendants' two assignments of error.

IV. Disposition

{¶22} Because the trial court lacked subject matter jurisdiction to enter cognovit judgment against defendants where plaintiff did not present the original warrants of

attorney to the trial court, the cognovit judgment was void ab initio. Having sustained defendants' two assignments of error, we reverse the judgment of the trial court and remand with instructions to vacate the cognovit judgment.

Judgment reversed and cause remanded with instructions.

KLATT and CONNOR, JJ., concur.

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