[Cite as *Mindlin v. Zell*, 2012-Ohio-3543.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Mindlin et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	
Eileen Zell,	:	No. 11AP-983 (C.P.C. No. 10CVH-10-14965)
Defendant-Third-Party Plaintiff-Appellant,	:	(REGULAR CALENDAR)
David Dale Suttle et al.,	:	
Third-Party Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 7, 2012

Peterson, Ellis, Fergus & Peer LLP, and *Gregory S. Peterson*, for plaintiffs-appellees and third-party defendants-appellees.

Jonathan R. Zell; *Frost Brown Todd LLC,* and *Joseph Dehner*, for defendant-third-party plaintiff-appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Eileen Zell, appeals from a judgment of the Franklin County Court of Common Pleas, which (1) granted summary judgment in favor of appellees, Michael Mindlin, Elizabeth Kurila, and David Dale Suttle, (2) denied appellant's motion

for summary judgment, and (3) granted Suttle's motion for relief from judgment. For the following reasons, we affirm.

I. Background

{¶ 2} On January 30, 2001, Mindlin, Kurila (Mindlin's wife), and Suttle executed a promissory note payable to appellant (Mindlin's aunt) for $90,000 with 5 percent annual interest due on or before December 31, 2001. Appellees, all residents of Missouri, borrowed the money to assist in the operations of a struggling architecture firm owned by Mindlin and Suttle named Suttle Mindlin, LLC. The note was signed by Mindlin, Kurila, and Suttle individually, and by Mindlin and Suttle on behalf of the firm. The terms of the promissory note required the payments to be mailed to appellant's address in Columbus, Ohio.

{¶ 3} Appellees failed to repay the loan by the December 31, 2001 due date; however, they began making sporadic partial payments over the next nine years. Mindlin was diagnosed with cancer in 2003, and in the following years, he repeatedly offered to extend and modify the repayment schedule. Suttle and Mindlin eventually dissolved their architecture firm in 2010.

{¶ 4} In October 2010, Mindlin and Kurila filed a declaratory judgment action against appellant in the Franklin County Court of Common Pleas, seeking a declaration as to the enforceability of the promissory note and the remaining amount due. The complaint alleged that appellant agreed to suspend the repayment schedule and accumulation of interest during Mindlin's illness, and further alleged that Mindlin and Kurila managed to repay appellant in an amount totaling $51,600. According to the complaint, Mindlin and Kurila assumed Suttle's obligations under the promissory note.

{¶ 5} In response, appellant filed an answer and counterclaim together with a third-party complaint against Suttle and Suttle Mindlin, LLC. In her counterclaim and third-party complaint, appellant alleged that appellees were in default under the terms of the note and had been in default since December 31, 2001. Appellant requested judgment against Mindlin, Kurila, and Suttle in the amount of $82,075 with the amount continuing to increase at the rate of 5 percent per year until the note is paid in full.

{¶ 6} While Mindlin and Kurila timely answered the counterclaim, Suttle did not respond to the third-party complaint. Consequently, appellant filed a motion for default

judgment against Suttle on March 15, 2011, seeking judgment for the full amount of the claim plus costs and attorney fees. In a decision and entry filed April 22, 2011, the trial court found Suttle in default and granted judgment in the amount of $83,200 plus interest from March 2, 2011. The trial court "reserve[d]" its ruling on attorney fees and concluded, "This is not a final, appealable order, as there are other parties that remain." (Apr. 22, 2011 Decision and Entry, 1.) Suttle eventually retained the same counsel representing Mindlin and Kurila and, on June 7, 2011, filed a motion for relief from judgment on behalf of himself and Suttle Mindlin, LLC.[1]

{¶ 7} The next month, Mindlin and Kurila moved for summary judgment in favor of their declaratory judgment action and against appellant's counterclaim. The motion asserted that appellant's action on the promissory note was unenforceable under the six-year statute of limitations for negotiable instruments in R.C. 1303.16(A). Suttle filed a memorandum adopting the arguments and request for relief in Mindlin and Kurila's motion for summary judgment. Appellant filed a memorandum contra appellees' motion as well as her own motion for summary judgment. In her memorandum contra, appellant argued that Missouri law governed the promissory note and that Missouri's ten-year statute of limitations in Mo.Rev.Stat. 516.110 had not yet expired. Mindlin, Kurila, and Suttle filed a joint reply.

{¶ 8} In a decision and entry filed October 12, 2011, the trial court granted summary judgment in favor of Mindlin, Kurila, and Suttle, denied appellant's motion for summary judgment, and granted Suttle's motion for relief from judgment. The trial court awarded summary judgment to appellees on the grounds that the promissory note was governed by the six-year statute of limitations in R.C. 1303.16(A), which began to run on December 31, 2001, the due date on the note.

{¶ 9} The trial court filed a decision and entry granting appellees' motion for summary judgment based on the six-year statute of limitations in R.C. 1303.16(A). The trial court also granted Suttle's motion for relief from judgment.

[1] For ease of reference, we will refer to Suttle and Suttle Mindlin, LLC together as "Suttle."

II. Appellant's Assignments of Error

{¶ 10} In a timely appeal, appellant presents the following three assignments of error for our consideration:

> [I.] The trial court committed reversible error in granting summary judgment for plaintiffs-appellees Michael Mindlin and Elizabeth Kurila and third-party defendant-appellee David Suttle.
>
> [II.] The trial court committed reversible error in granting third-party defendant-appellee David Suttle's motion for relief from default judgment.
>
> [III.] The trial court committed reversible error in denying Mrs. Zell's motion for summary judgment.

A. First and Third Assignments of Error

{¶ 11} For ease of discussion, we begin by addressing appellant's first and third assignments of error together as they challenge the trial court's decision granting and denying the motions for summary judgment. Appellate review of summary judgment is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. To obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24.

{¶ 12} The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once the moving party meets this initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id*.

{¶ 13} Appellant claims the trial court erred by relying on R.C. 1303.16(A), or any Ohio statute of limitations for that matter, in granting appellees' motion for summary

judgment. According to appellant, the parties agreed for the promissory note to be governed by Missouri law, which imposes a ten-year statute of limitations. *See* Mo.Rev.Stat. 516.110. We disagree.

{¶ 14} At the outset, there is no choice-0f-law provision in the promissory note—a fact repeatedly acknowledged by appellant at trial and on appeal. (Appellant's Brief, 25; Memorandum in Opposition, 2.) Appellant nevertheless claims that subsequent discussions, as evidenced by the emails and proposed refinancing agreements attached to her memorandum contra, reveal that the parties intended to be governed by Missouri law. However, as appellant admits in her briefing, none of those documents were "ever executed" in the form of a binding contract modification. (Appellant's Brief, 26.) Therefore, these extraneous materials cannot be used to discern the intent of a clear and unambiguous contract. *See Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, ¶ 66 ("extrinsic evidence cannot be considered to give effect to the contracting parties' intentions when the language of the contract is clear and unambiguous").

{¶ 15} Absent an express statement that the parties intended another state's statute of limitations to apply, the law of the forum dictates the statute of limitations in an action for breach of contract. *Nationwide Mut. Fire Ins. Co. v. Rose*, 9th Dist. No. 05CA008814, 2007-Ohio-1216, ¶ 7; *Lawson v. Valve-Trol Co.*, 81 Ohio App.3d 1, 4 (9th Dist.1991), citing, inter alia, *Howard v. Allen*, 30 Ohio St.2d 130 (1972); *see also* 1 Restatement of the Law 2d, Conflict of Laws, Section 142(1) (1971)[2] ("An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state."). Thus, by choosing Ohio as the forum for pursuing her action, appellant was subject to Ohio's statute of limitations even if her claim would be timely in Missouri.

{¶ 16} Applying Ohio law, the trial court found the promissory note to be governed by the statute of limitations in R.C. 1303.16(A). That statute, which codifies Section 3-118(a) of the Uniform Commercial Code, states that "an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the

[2] While Section 142(1) was revised in 1988, the 1988 version retains the view that a forum state should apply its own statute of limitations when shorter than that of the foreign state. *See* Section 142(1) (1988) ("The forum will apply its own statute of limitations barring the claim.").

due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." R.C. 1303.16(A). The promissory note in this case was, on its face, payable to appellant at a definite time, i.e., December 31, 2001, and, therefore, R.C. 1303.16(A) required any action to enforce the note to be brought within six years after that due date. *See Brisk v. Draf Industries, Inc.*, 10th Dist. No. 11AP-223, 2012-Ohio-1311, ¶ 19, quoting *Parmore Group v. G & V Invests., Ltd.*, 10th Dist. No. 05AP-756, 2006-Ohio-6986, ¶ 23 ("a promissory note, containing a promise to pay a fixed amount on or before a certain date, constituted a negotiable instrument under R.C. 1303.03(A), and * * * was 'subject to the six-year statute of limitations set forth in R.C. 1303.16(A)' rather than the 15-year statute of limitations under R.C. 2305.06"). Thus, we agree with the trial court's conclusion that the note was governed by the six-year statute of limitations in R.C. 1303.16(A).

{¶ 17} Appellant presents a variety of alternative arguments for reversal as to why the promissory note was timely under Ohio law. She claims (1) appellees waived any statute-of-limitations defense by not asserting it until the filing of their motion for summary judgment, (2) the trial court should have applied the 15-year statute of limitations for written contracts in R.C. 2305.06 rather than the six-year period in R.C. 1303.16(A), and (3) even if R.C. 1303.16(A) did apply, the limitations period was tolled by operation of R.C. 2305.08, 2305.15, and reset by R.C. 1303.07(B)(4).

{¶ 18} Appellant did not, however, raise any of these arguments in the trial court. Instead, she devoted her 30-page memorandum opposing summary judgment to arguments regarding why her counterclaim was timely under Missouri law, without asserting any waiver or tolling arguments under Ohio law. "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997) (citation omitted). This rule is "deeply embedded in a just regard for the fair administration of justice" and "impos[es] upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error." *Id*. While summary judgment decisions are reviewed under a de novo standard, de novo review does not afford appellants with a "second chance" to raise arguments they should have raised in the trial court. *State ex rel. Conroy v. Williams*, 185

Ohio App.3d 69, 2009-Ohio-6040, ¶ 45 (7th Dist.); *Aubin v. Metzger*, 3d Dist. No. 1-03-08, 2003-Ohio-5130, ¶ 10. Because appellant failed to raise these arguments in the trial court, we decline to address them for the first time on appeal.

{¶ 19} For the reasons stated above, the trial court properly granted summary judgment in favor of appellees because an action to enforce the promissory note was barred by the six-year statute of limitations in R.C. 1303.16(A). Because the timeliness of the action was dispositive, the trial court also did not err by denying appellant's motion for summary judgment. Therefore, appellant's first and third assignments of error are overruled.

B. Second Assignment of Error

{¶ 20} Appellant's second assignment of error challenges the trial court's decision granting Suttle's Civ.R. 60(B) motion for relief from default judgment. According to appellant, Suttle's motion did not raise a meritorious defense based on the statute of limitations and the trial court should not have relied on that defense in granting Civ.R. 60(B) relief. Appellant also claims Suttle failed to demonstrate that his failure to timely respond to the counterclaim amounted to "excusable neglect" under Civ.R. 60(B)(1). We find these arguments unpersuasive for the following reasons.

{¶ 21} While both parties assume Civ.R. 60(B) governs Suttle's motion, that rule only authorizes relief from "final" judgments or orders. Civ.R. 60(B); *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, ¶ 52 (10th Dist.), citing *Jarrett v. Dayton Osteopathic Hosp., Inc.*, 20 Ohio St.3d 77 (1985). An order is not final, however, where it disposes of fewer than all claims or parties without "an express determination that there is no just reason for delay." Civ.R. 54(B). Such an order remains interlocutory and "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Civ.R. 54(B). "A Civ.R. 60(B) motion for relief from such an interlocutory order will be properly taken by the trial court as a motion for reconsideration." *Chitwood v. Zurich Am. Ins. Co.*, 10th Dist. No. 04AP-173, 2004-Ohio-6718, ¶ 9; *Vance* at ¶ 52.

{¶ 22} Here, the trial court's entry of default judgment against Suttle was not final because it disposed of only the claims against Suttle without certifying that there was no just reason for delay as required by Civ.R. 54(B). As the trial court specifically noted,

"This is not a final, appealable order, as there are other parties that remain." (Apr. 22, 2011 Decision and Entry, 1.) Appellant conceded the interlocutory nature of the order in her "Motion to Make Judgment Against Third-Party Defendants Final," where she requested that the default judgment "be made final" so that "she may begin collection proceedings." (June 14, 2011 Motion, 1-2.) Thus, because the entry of default judgment was not final, we will review the trial court's decision granting relief from that judgment as a decision granting reconsideration under Civ.R. 54(B). *See Vance* at ¶ 53; *Beck-Durell Creative Dept., Inc. v. Imaging Power, Inc.*, 10th Dist. No. 02AP-281, 2002-Ohio-5908, ¶ 9; *Yoder v. Blake*, 9th Dist. No. 10CA0110-M, 2012-Ohio-861, ¶ 13.

{¶ 23} A trial court has plenary power in ruling on a motion for reconsideration, and we will not reverse such rulings absent an abuse of discretion. *Vance* at ¶ 53 (quotations omitted). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). " 'It is suggested that when an interlocutory order is modified or vacated the standard for a common law motion for reconsideration, the "apparent justice" standard, ought to apply, though the court should also be guided by Civ.R. 60(B) standards, albeit applied less rigorously.' " *Vance* at ¶ 53, quoting *Baker v. Schuler*, 2d Dist. No. 02CA0020, 2002-Ohio-5386, ¶ 22, citing Klein/Darling, Ohio Civil Practice, Baldwin (1997 Ed.), Section AT 54-3.

{¶ 24} Construing appellant's Civ.R. 60(B) motion as a motion for reconsideration and applying the above standard, we cannot find the trial court abused its discretion by reconsidering its interlocutory order and affording Suttle the same relief as that afforded to Mindlin and Kurila. Suttle filed his appearance and motion for relief less than two months after the interlocutory default judgment was filed against him, and he joined Mindlin and Kurila in their request for summary judgment without any objection from appellant. Under these circumstances, and given our finding that summary judgment was properly awarded to Suttle, Mindlin, and Kurila, we find nothing unreasonable, arbitrary or unconscionable about the trial court's decision to reconsider its interlocutory order. Accordingly, appellant's second assignment of error is overruled.

III. Conclusion

{¶ 25} Having overruled appellant's first, second, and third assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
