

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sky Bank et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 11AP-1075
Michael F. Colley et al.,	:	(C.P.C. No. 07CVH-08-10623)
Defendants-Appellees,	:	(REGULAR CALENDAR)
(James M. Ryan,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on September 25, 2012

*Weltman, Weinberg & Reis, Co., L.P.A., Matthew G. Burg,
and John R. Wirthlin, for appellee Sky Bank.*

James M. Ryan, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, James M. Ryan, appeals from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to vacate judgment, which the trial court sua sponte converted to a motion for relief from judgment under Civ.R. 60(B). The court's judgment also denied appellant's motion to dismiss the case for lack of personal jurisdiction and granted motions by other parties to strike appellant's counterclaim, answer, and amended complaint. Plaintiff-appellee, Sky Bank, has not filed an appellee's brief in this case, but has filed a motion to dismiss the appeal on the grounds

that issues presented here have been previously decided by this court and are therefore res judicata.

{¶ 2} Sky Bank obtained, on August 17, 2007, a judgment on a cognovit note against appellant and other parties. This court affirmed the judgment on appeal. *Sky Bank v. Colley*, 10th Dist No. 07AP-751, 2008-Ohio-1217. Some three and one-half years after our decision, appellant attempted to revive the case with a series of filings in the trial court. On August 1, 2011, appellant filed a "Motion to Vacate Void Judgment." At that time he also filed an answer to the original complaint. On August 15, 2011, appellant filed an amended answer and counterclaim. Sky Bank and other parties responded with various motions to strike and motions to dismiss these additional filings. On October 17, 2011, appellant filed a motion to dismiss the original complaint by Sky Bank that commenced the matter, asserting that he was never served with the complaint.

{¶ 3} The trial court collectively treated appellant's motion to vacate void judgment and motion to dismiss as a motion for relief from judgment pursuant to Civ.R. 60(B). The trial court denied relief from judgment in part on the basis that the issues raised in appellant's motions had been considered by this court upon appeal, and that our appellate judgment precluded further litigation on all issues that were raised or could have been raised in the initial appeal.

{¶ 4} Appellant has timely appealed and brings the following four assignments of error:

[I.] The Franklin County Clerk of Court's failure to notify James M. Ryan of the Judgment Entry that constituted a Final Appealable Order issued on August 17, 2007 tolls the time for Appellant's appeal. The Trial Court erred in not including civil Rule 58 (B) language in its November 15, 2011 Journal Entry and its Judgment Entry dated August 17, 2007 which also was without directions to serve counsel with the Entry.

[II.] The Trial Court Erred in its sua sponte conversion of the Motion to Vacate Void Judgment to a Civil Rule 60 (B) Motion and Erred in its denying Defendant Ryan's Motion to Vacate Void Judgment.

[III.] The Trial Court Erred in Denying Defendant Ryan's Motion to Dismiss Plaintiff Sky Bank's Complaint.

[IV.] The Trial Court Erred in Granting Plaintiff's Motions to Strike and Motion to Dismiss filed September 12, 2011 & Plaintiff's Motion to Strike and Motion to Dismiss with Prejudice dated October 3, 2011.

{¶ 5} We first consider Sky Bank's motion to dismiss this appeal on grounds of res judicata. While res judicata may provide us with a basis for affirming the trial court's denial of Civ.R. 60(B) relief, it does not bar this appeal entirely. This is not a repetitive appeal, but an initial appeal from the trial court's denial of relief from judgment. Sky Bank's motion to dismiss the appeal is denied.

{¶ 6} Appellant's first assignment of error asserts that the clerk of court failed to notify appellant of the initial judgment in 2007. Appellant asserts that this tolls the time for appeal from that judgment. Because appellant did in fact timely appeal to this court from the 2007 judgment, the need for tolling in this case is difficult to discern, as is the object of this assignment of error entirely. Appellant's first assignment of error is overruled.

{¶ 7} Appellant's second assignment of error asserts the trial court erred in both denying appellant's motion to vacate a void judgment and in sua sponte converting that motion to a motion for relief from judgment pursuant to Civ.R. 60(B). Appellant argues that a court's judgment that is void ab initio represents a nullity that may be vacated by the trial court without undergoing a Civ.R. 60(B) analysis. This basic proposition is correct. The authority to vacate a void judgment "is not derived from Civ.R. 60(B), but rather constitutes an inherent power possessed by the court." *Maple Dell Manor v. Peterson*, 11th Dist. No. 93-P-0039 (Feb. 11, 1994), citing *Patton v. Diemer*, 35 Ohio St.3d 68, 70 (1988). The accuracy of this legal proposition, however, does not alter the result in this case because no prejudicial error resulted from the trial court's application of Civ.R. 60(B) analysis to appellant's motion.

{¶ 8} Appellant argues that the initial trial court judgment in this matter was void because he was never served with the initial complaint and the court thus never acquired personal jurisdiction over him. The judgment against appellant is based upon a cognovit note. "By its very terms, a cognovit note allows for judgment to be taken against the debtor-party without notice or hearing[.]" and invokes a waiver of personal jurisdiction. *Dollar Bank v. The Bernstein Group, Inc.*, 71 Ohio App.3d 530, 533 (10th Dist.1991).

There is no issue of personal jurisdiction in this case. While a defendant may still argue lack of subject-matter jurisdiction in a cognovit note action, *see generally, Arlington Bank v. BEE, Inc.*, 10th Dist. No. 10AP-41, 2010-Ohio-6040, that aspect of the matter was fully addressed in our 2008 decision on direct appeal and our disposition of that issue stands as the law of the case and may not be revisited. The trial court did not err in denying appellant's motion to vacate a void judgment. Appellant's second assignment of error is overruled.

{¶ 9} Appellant's third assignment of error asserts various procedural defects in the proceedings leading to judgment on a cognovit note. All of these issues were raised in the prior appeal to this court from that judgment, were addressed by this court and found without merit, and could not have provided grounds for relief from judgment in the trial court. Appellant's third assignment of error is overruled.

{¶ 10} Finally we turn to appellant's fourth assignment of error, which asserts that the trial court erred in striking his amended complaint and counterclaim. On October 3, 2011, DB Midwest, LLC, an assignee of the original judgment in this case, filed a motion to strike appellant's answer, amended answer, and counterclaim. On September 12, 2011, two parties not participating in this appeal, Felex Melchor and Huntington National Bank, filed motions to strike appellant's answer, amended answer, and counterclaim.

{¶ 11} The trial court granted these motions as part of its judgment denying relief from judgment to appellant. Based upon the status of the case and the fact that appellant's pleadings were filed after the trial court had rendered judgment in the matter some three years before, these pleadings were well out of rule and properly struck by the trial court. Appellant's fourth assignment of error is accordingly overruled.

{¶ 12} In accordance with the foregoing, appellant's four assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas denying his motions to vacate void judgment and motion to dismiss complaint is affirmed. Sky Bank's motion to dismiss appeal is denied.

*Judgment affirmed;
motion to dismiss appeal denied.*

KLATT and FRENCH, JJ., concur.
