

[Cite as *Huntington Natl. Bank v. Royal Mt. Sterling Corp.*, 2012-Ohio-4514.]  
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Huntington National Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-174
Royal Mount Sterling Corp. et al.,	:	(C.P.C. No. 11CVH-11-3604)
Defendants-Appellees,	:	(REGULAR CALENDAR)
and	:	
Dina Patel et al.,	:	
Defendants-Appellants.	:	

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D E C I S I O N

Rendered on September 28, 2012

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*Jody Michelle Oster*, for plaintiff-appellee The Huntington National Bank.

*Doucet & Associates, LLC, Stephanie L. Warner, and Troy J. Doucet*, for defendants-appellants Dina and Raman Patel.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendants-appellants, Dina and Raman Patel ("appellants"), appeal the judgment of the Franklin County Court of Common Pleas, which denied appellants' motion for relief from judgment in favor of plaintiff-appellee, The Huntington National

Bank ("appellee"), on its cognovit complaint against appellants and Royal Mount Sterling Corp., Ignas Pandav, and Nirmala Pandav (collectively, "defendants"). For the following reasons, we affirm.

## **I. BACKGROUND**

{¶ 2} On March 21, 2011, appellee filed a cognovit complaint for money judgment against defendants. In it, appellee alleged that, in 2006, Royal Mount Sterling Corp. executed and delivered to appellee a promissory note in the amount of \$350,000. As of February 2011, Royal Mount Sterling Corp. was in default of the note, and \$326,698.08 remained due and owing to appellee.

{¶ 3} Appellee also alleged that, in 2006, appellants executed a written unconditional guarantee, by which appellants guaranteed full payment of all obligations due and owing under the note by Royal Mount Sterling Corp. That guarantee contained a provision, in accordance with R.C. 2323.13, that, by signing, appellants were giving up their rights to notice, a trial, and any claims they might have against a creditor. Defendants Ignas and Nirmala Pandav allegedly signed a similar guarantee.

{¶ 4} Also on March 21, 2011, pursuant to the warrant of attorney and confession of judgment contained in the note and guarantees, an attorney filed an answer and confession of judgment on behalf of defendants.

{¶ 5} On March 24, 2011, the trial court issued a judgment entry, which granted judgment against defendants and in favor of appellee in the amount of \$326,698.08, plus interest and costs. Appellants did not appeal that judgment.

{¶ 6} On June 9, 2011, appellants moved for relief from judgment pursuant to Civ.R. 60(B). Appellants argued that they had a meritorious defense to present in that the note contained the following provision: "The Guaranteed Portion of the Outstanding Principal Balance of this Note Has Been Transferred to a Purchaser for Value." Appellants argued that, because appellee transferred the guaranteed portion of the note's outstanding balance, appellee had no standing to enforce the note against them. Appellee opposed the motion, contending that appellee remained the holder of, and servicer of, the note and all guarantees.

{¶ 7} A magistrate of the trial court held an evidentiary hearing on appellants' motion. Appellants' counsel appeared, but presented no evidence or testimony. Instead, appellants' counsel relied on the legal argument that appellee lacked standing to enforce the note. In her decision, the magistrate rejected that argument, relying instead on appellee's un rebutted evidence, which explained the nature of the transfer and showed that appellee retained all rights to enforce and service the note. The magistrate denied appellants' motion for relief.

{¶ 8} Appellants filed objections to the magistrate's decision. On February 6, 2012, the trial court overruled the objections and adopted the magistrate's decision in favor of appellee.

## II. ASSIGNMENTS OF ERROR

{¶ 9} Appellants filed a timely appeal, and they raise the following assignments of error:

[I.] The Trial Court erred in denying the Appellant[s'] Motion for Relief from Judgment when the Appellants presented facts to support a meritorious defense.

[II.] The Trial Court erred in denying the Appellant[s'] Motion for Relief from Judgment when the Appellee was not the Holder or Assignee of the Note.

## III. DISCUSSION

{¶ 10} We will address appellants' assignments of error together.

{¶ 11} A cognovit note contains provisions designed to cut off defenses available to a debtor in the event of default. *See Tinnes v. Immobilair IV, Ltd.*, 10th Dist. No. 00AP-87 (Feb. 13, 2001); *Fifth Third Bank v. Jarrell*, 10th Dist. No. 04AP-358, 2005-Ohio-1260, ¶ 12. The holder of a cognovit note in default obtains a judgment without a trial of possible defenses that the signers of the note might otherwise assert. *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 176-77 (1972), quoting *Hadden v. Rumsey Prods., Inc.*, 196 F.2d 92, 96 (2d Cir.1952). This is so because, under a cognovit note, the debtor consents in advance to the holder obtaining a judgment without notice or hearing. *Overmyer* at 176. 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. *See Medina Supply Co. v. Corrado*, 116 Ohio App.3d 847, 850 (8th Dist.1996); *Overmyer* at 176.

{¶ 12} A debtor on a cognovit judgment may pursue a Civ.R. 60(B) motion for relief from judgment. *Masters Tuxedo Charleston, Inc. v. Krainock*, 7th Dist. No. 02 CA 80, 2002-Ohio-5235, ¶ 7. Generally, to prevail on a Civ.R. 60(B) motion, the movant must demonstrate that (1) the party has a meritorious defense or claim to present if the court grants relief, (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), and (3) the party made the motion within a reasonable time. *GTE* at paragraph two of the syllabus.

{¶ 13} Ohio courts have modified the *GTE* standard where a debtor challenges a cognovit judgment, however. *Simmons Capital Advisors, Ltd. v. The Kendall Group, Ltd.*, 10th Dist. No. 05AP-1087, 2006-Ohio-2272, ¶ 15; *Jarrell* at ¶ 11. A Civ.R. 60(B) movant that challenges a cognovit judgment need only satisfy the first and third prongs of *GTE*, i.e., the movant need only allege a meritorious defense and file a timely motion. *Simmons Capital* at ¶ 16; *Jarrell* at ¶ 11. Under the modification, 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), which indicates "any other reason justifying relief from judgment." *Masters Tuxedo* at ¶ 7.

{¶ 14} We apply an abuse of discretion standard to the trial court's decision to deny a Civ.R. 60(B) motion. *Your Fin. Community of Ohio, Inc. v. Emerick*, 123 Ohio App.3d 601, 605 (10th Dist.1997). We similarly apply an abuse of discretion standard to a trial court's decision on objections to a magistrate's decision. *McNeilan v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 10AP-472, 2011-Ohio-678, ¶ 20. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 15} Here, appellants contend that they presented facts to support a meritorious defense. Actually, appellants presented no facts, no evidence, and no

testimony in support of their motion at the evidentiary hearing. The unrebutted evidence—the documents and affidavits presented by appellee—established the existence of the note, appellants' guarantee, default on the note, the amount due, and appellee's right to enforce the terms of the note against appellants as guarantors.

{¶ 16} In its memorandum in opposition to appellants' motion, appellee explained the nature of the note, the guarantees, and the transfer at issue, and also attached evidence and an affidavit in support of its explanation. From these documents, we know that appellee made the loan to Royal Mount Sterling Corp. in cooperation with the U.S. Small Business Association ("SBA"), which guaranteed 75 percent of the loan. In 2006, appellee, SBA, and Signature Bank executed a secondary participation agreement, by which appellee acknowledged that it had assigned to Signature Bank, for value, the portion of the loan guaranteed by SBA, or \$261,660.65. Despite the assignment, the agreement provided that appellee "shall remain obligated under the terms and conditions of" the original loan agreement, and "shall continue to service the Loan in the manner set forth in" that agreement.

{¶ 17} Appellants direct our attention to a stamped and signed notice on the note, just following their signatures on behalf of Royal Mount Sterling Corp. The notice reads: "The Guaranteed Portion of the Outstanding Principal Balance of this Note Has Been Transferred to a Purchaser for Value." Appellants rely on this notice as evidence that appellee is not the current holder of the amount due from them pursuant to their guarantee and, therefore, lacks standing to enforce the note against them. We disagree.

{¶ 18} First, as the evidence and affidavit presented by appellee clarify, the notice's reference to a "Guaranteed Portion" of the outstanding balance refers to the portion of the loan guaranteed by SBA. It has nothing to do with the guarantee granted by appellants, and appellants presented no evidence to show otherwise.

{¶ 19} Second, the notice's reference to a transfer of the guaranteed portion refers to appellee's assignment of the SBA-guaranteed portion of the loan, or \$261,660.65, to Signature Bank; appellee did not transfer the remaining balance of \$87,220.21. And, despite the assignment of the SBA portion of the loan, appellee not only retained its rights to enforce the terms of the original note, but as servicer of the loan, remains

obligated to do so. Appellee need not pursue other means of collection, as the guarantee signed by appellants expressly provides that appellee "is not required to seek payment from any other source before demanding payment from" appellants. Therefore, appellants present no grounds on which to conclude that appellee may not enforce the note, whether as a holder or otherwise.

{¶ 20} Based on the un rebutted evidence presented by appellee, the magistrate and the trial court properly concluded that appellants did not present a meritorious defense to the judgment against them. Therefore, the trial court did not abuse its discretion by overruling appellants' objections to the magistrate's decision and denying appellants' motion for relief from judgment. Therefore, we overrule appellants' assignments of error.

{¶ 21} As a final matter, we note that our decision is limited to the facts and assignments of error before us. We express no opinion as to other issues, including whether appellants should have raised their issues in a direct appeal, rather than a 60(B) motion.

#### **IV. CONCLUSION**

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

*Judgment affirmed.*

KLATT and DORRIAN, JJ., concur.

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