[Cite as *Pramco CV6, L.L.C. v. ASET Corp.*, 2010-Ohio-990.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

PRAMCO CV6, LLC Plaintiff-Appellee	:	C.A. CASE NO. 23183
vs.	:	T.C. CASE NO. 2008-CV-937
ASET CORPORATION, et al. Defendants-Appellants	:	(Civil Appeal from Common Pleas Court)

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O P I N I O N

Rendered on the 12th day of March, 2010.

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Jean Ann S. Sieler, Atty. Reg. No. 0037946, Mark A. Ozimek, Atty. Reg. No. 0077978, Ninth Floor, Four Seagate, Toledo, OH 43604
Attorneys for Plaintiff-Appellee

John Paul Rieser, Atty. Reg. No. 0017850, Patricia J. Friesinger, Atty. Reg. No. 0072807, 7925 Graceland Street, Dayton, OH 45459
Attorneys for Defendants-Appellants

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GRADY, J.:

{¶ 1} This is an appeal from a final order denying the Defendant's Civ.R. 60(B) motion to vacate judgments on cognovit notes. We find that Defendants failed to demonstrate a meritorious defense that would apply to the Plaintiff's claims for relief on which the judgments were granted. Therefore, we will affirm the trial court's order.

{¶ 2} On July 31, 2001, Defendant ASET Corporation ("ASET") executed two cognovit promissory notes in favor of Fifth Third Bank ("Fifth Third"). One note was in the principal amount of $526,709, and provided for repayment in monthly installments of $10,000, with applicable interest at a rate calculated at 3.50% in excess of Fifth Third's prime rate. The note further provided that the interest rate would increase to 9.5% in excess of that prime rate in the event of ASET's default.

{¶ 3} The other note was in the principal amount of $73,073, and provided for repayment in monthly installments of $6,050, with applicable interest at a rate calculated at 2.5% in excess of Fifth third's prime rate. The interest rate would increase to 8.5% in excess of that prime rate in the event of ASET's default.

{¶ 4} Defendants ASET Technical Surveillance, Inc. ("ATS"), ASET Protection Specialists, Inc. ("APS"), and Charles R. Carroll each executed an Unlimited Guaranty that guaranteed ASET's repayment of the two notes. The Unlimited Guaranty provided that a failure to pay ASET's obligations timely could result in a judgment without notice to the guarantor. Both notes contained warrants of attorney that provided for a confession of judgment on behalf of ASET if ASET defaulted on its repayment obligations.

{¶ 5} On May 1, 2002, Fifth Third, ASET, and the three guarantors executed a Forbearance Agreement. It provided that

during the "Forbearance Period" of May 1, 2002 through October 31, 2002, ASET would make monthly payments of between $5,000 and $10,000 on the two notes. Also, the rates of interest on the payments ASET made during that period were fixed at 8.25% on the note for $526,709 and 7.25% on the note for $77,073. The Forbearance Agreement further provided that ASET would pay the remaining balances on the two notes in full at the conclusion of the Forbearance Period on October 31, 2002. Paragraph 9 of the Forbearance Agreement provides, in pertinent part: "This agreement sets forth the entire agreement of the parties and this Agreement may not be modified or amended except in a writing signed by both parties. . ."

{¶ 6} ASET failed to pay off the balances remaining on the two notes at the conclusion of the Forbearance Period, though it continued to make payments that were accepted by Fifth Third, which subsequently assigned its interests in the two notes to Plaintiff Pramco CV6, LLC ("Pramco"). ASET stopped making any payments on the note for $526,709 in February of 2007. It had stopped making any payments on the note for $77,073 in September of 2006. The three guarantors made no payments to Pramco.

{¶ 7} On January 28, 2008, Pramco commenced an action in the court of common pleas against ASET and the three guarantors. On February 4, 2008, the court granted cognovit judgments for Pramco

on both notes for the balances outstanding, based on a confession of judgment an attorney filed on behalf of the Defendants pursuant to the warrant of attorney in the two notes.

{¶ 8} On September 26, 2008, Defendants filed a combined Civ.R. 60(B) motion to vacate the cognovit judgments or consolidate further proceedings with Montgomery County Court of Common Pleas Case No. 2002 CV 01606, which is related litigation involving the same parties. (Dkt. 23.) The trial court denied the motion on December 10, 2008. Defendants filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS/APPELLANTS FAILED TO DEMONSTRATE A MERITORIOUS DEFENSE ENTITLING THEM TO RELIEF UNDER CIV.R. 60(B) FROM THE COGNOVIT JUDGMENT TAKEN BY PLAINTIFF/APPELLEE."

{¶ 10} "To prevail on [a] motion under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party 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, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150 (citations omitted).

{¶ 11} "In Ohio, cognovit judgments present special circumstances, and '[t]he prevailing view is that relief from a judgment taken upon a cognovit note, without prior notice, is warranted by authority of Civ.R. 60(B)(5) when the movant (1) establishes a meritorious defense, (2) in a timely application.'" ***Fifth Third Bank of Western Ohio v. Shepard Grain Co., Inc.*****, Miami App. No. 2003 CA 40, 2004-Ohio-1816, at ¶11 (citations omitted). The issue before us is whether the movants demonstrated a meritorious defense.**

{¶ 12} In order to establish a meritorious defense for purposes of their Civ.R. 60(B) motion, Defendants were required "'to set forth with sufficient clarity and particularity the facts that [they claim] entitle [them] to relief from the judgment in order that the trial court may make a [threshold] determination whether those facts, if proven, would entitle [them] to the relief requested.'" ***Security National Bank and Trust Co. v. Broock*** **(Oct. 20, 1993), Clark App. No. 3006, quoting** ***Borror v. Borror*** **(Oct. 15, 1987), Darke App. No. 1188-CA. If those facts, when proven, would not, as a matter of law, entitle Defendants to relief, then the trial court properly denies the motion.** ***Fifth Third Bank of Western Ohio v. Shepard Grain Co., Inc.*****, Miami App. No. 2003 CA 40, 2004-Ohio-1816, at ¶60. In addition, Defendants must present more than mere general allegations or conclusions. Id.**

{¶ 13} It is undisputed that ASET failed to pay the remaining balance on the two notes after the expiration of the Forbearance Period, as the Forbearance Agreement required. ASET continued to make payments, but it stopped making any payments on the $526,709 note in February of 2007 and stopped making any payments on the $77,073 note in September of 2006. Balances were due to Pramco and those obligations remain unpaid. Moreover, ATS, APS, and Carroll failed to make payments on their guarantees. Despite these facts, Defendants argue that they have a meritorious defense. According to Defendants, they were not obligated to pay the entire balance to Fifth Third at the end of the Forbearance Period because the term of the Forbearance Agreement was extended, which also allowed ASET to continue making monthly payments on the two notes without resulting in a default on the original terms of the notes. Further, Defendants argue that their failure to continue making monthly payments after February of 2007 is excused by the fact that Pramco had made it clear that it would no longer abide by the terms of the Forbearance Agreement.

{¶ 14} In overruling Defendants' Civ.R. 60(B) motion, the trial court found that Defendants did not establish a meritorious defense. The trial court stated, in part:

{¶ 15} "In this case, the Defendants have failed to demonstrate a meritorious defense entitling them to relief under Civ.R. 60(B).

Defendants contend that there is doubt as to whether Pramco properly applied their payments. However, Pramco provided a payment history detailing all payments as applied, authenticated by Turnia's affidavit. The Defendants failed to rebut this evidence. Moreover, the parties agree that the Defendants stopped making payments. The only issue is whether the parties had extended the forbearance agreement, effectively excusing Defendants' failure to pay.

{¶ 16} "However, the alleged oral modification of the forbearance agreement cannot constitute a meritorious defense for two reasons. First, the Defendants failed to demonstrate any evidence of consideration supporting the alleged oral modification. As the Eleventh District Court of Appeals found in *Bates* [*v. Midland Title of Ashtabula County, Inc.*, Lake App. No. 2003-L-127, 2004-Ohio-6325], an alleged oral modification to a written loan document cannot support relief under Civ.R. 60(B) unless there is evidence showing consideration for the modification. Secondly, the loan documents in this case clearly state that they are the complete agreement between the parties, and that the agreement could only be amended, modified, or extended in writing. See Forbearance Agreement at ¶9. As no writing modifying the agreement and supported by consideration has been shown, the Defendants' request cannot be granted." (Dkt. 26, p.

8.)

{¶ 17} We review for an abuse of discretion the trial court's determination as to whether sufficient operative facts were demonstrated to justify vacating the judgment. *Shepard Grain Co.*, at ¶60 (citations 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* (1983), 5 Ohio St.3d 217, 219 (citations omitted).

{¶ 18} Defendants argue that the trial court abused its discretion by denying their Civ.R. 60(B) motion because the Forbearance Period was extended and Defendants did not default under the terms of the Forbearance Agreement. Defendants rely on the fact that Fifth Third accepted ASET's payments after the Forbearance Period expired on October 31, 2003, which Defendants argue constituted an oral modification or modification by subsequent acts. We do not agree.

{¶ 19} "An agreement altering the rights of the parties under a written contract must be based on sufficient consideration.[] Likewise, an agreement to modify a contract requires consideration.[] Thus, an oral agreement to modify a prior written agreement must be founded on a new consideration that is distinct from the consideration supporting the prior agreement; it cannot

be supported on the supposition that it is founded on the continuation or extension of the consideration of the prior written contract that is complete in itself.[]" 17 Ohio Jurisprudence 3d (2008) 390, Contracts, Section 41 (citations omitted).

{¶ 20} The $10,000 monthly payments that ASET made after the expiration of the Forbearance Period were required by the terms of the two notes. Therefore, these payments were not new consideration, and they cannot support a modification of the two notes or the Forbearance Agreement. Further, Defendants have failed to identify any facts to support a meeting of the minds between ASET and Fifth Third that would support a modification of the terms of the two notes or Forbearance Agreement. The fact that Fifth Third continued to accept payments due under the terms of the two notes arguably could constitute a waiver by Fifth Third of its right to allege a breach by ASET for its failure to pay the note balances in full at the end of the Forbearance Period. However, it is not evidence of a meeting of the minds between Defendants and Fifth Third that the terms of the two notes or Forbearance Agreement would be extended. In any event, ASET's failure to make any payments at all after September of 2006 and February of 2007 constitutes a breach for which Pramco is entitled to a judgment for the balances remaining. Therefore, Defendants have failed to establish a meritorious defense based on an oral

modification or modification by subsequent acts.

{¶ 21} Defendants also argue that their Civ.R. 60(B) motion should have been granted because the interest rates charged by Fifth Third exceeded the interest rates agreed upon in the Forbearance Agreement. The loan worksheet and payment history attached to the affidavit of Julie Tumia (Dkt. 24) set forth the payments made by Aset after the Forbearance Period expired and the interest rates charged to the outstanding obligations. The interest rates applied after the Forbearance Period ended reflected the higher interest rates provided in the terms of the two notes in case of a default by Aset. Although lower interest rates were applied during the Forbearance Period pursuant to the terms of the Forbearance Agreement, Fifth Third was permitted to return to the higher interest rates provided in the two notes once the Forbearance Period ended. The notes also provided for a penalty rate of interest in the event of ASET's default, which occurred when it stopped making payments. The affidavit of Ms. Tumia shows that this occurred, and Defendants have provided no facts to show otherwise.

{¶ 22} Defendants have provided no facts to support their contention that there was a meeting of the minds between Defendants and Fifth Third that the lower interest rate in the Forbearance Agreement would survive the expiration of the Forbearance Period.

General allegations or conclusions are insufficient to meet Defendants' burden under Civ.R. 60(B). *Shepard Grain Co.* Therefore, the trial court properly denied Defendants' Civ.R. 60(B) motion.

{¶ 23} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT ERRED IN FINDING THAT THE ACTION BY PLAINTIFF/APPELLEES IN THE UNDERLYING LITIGATION SHOULD NOT BE JOINED WITH THE LONG-STANDING RECEIVERSHIP CASE (INVOLVING ALL OF THE SAME PARTIES)."

{¶ 25} Based on our disposition of the first assignment of error, the second assignment of error is overruled as moot. The judgment of the trial court will be affirmed.

BROGAN, J., concurs.

FAIN, J., concurs in the judgment.

FAIN, J. concurring:

{¶ 26} I concur fully in all of the holdings set forth in Judge Grady's well-reasoned opinion for this court.

{¶ 27} My purpose in writing separately is merely to continue my war against one of the most unfortunate formulations – if not the most unfortunate formulation – to appear in Ohio appellate jurisprudence:

{¶ 28} "The term 'abuse of discretion' connotes more than an

error of law or of judgment."

{¶ 29} I have traced this offensive formulation as far back as *Steiner v. Custer* (1940), 137 Ohio St. 448, 450, which, in turn, cites Black's Law Dictionary (2 Ed.), 11 as authority. The definition of "abuse of discretion" in Black's Law Dictionary, Eighth Edition (2004), at 11, offers no support for the offensive formulation:

{¶ 30} "1. An adjudicator's failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."

{¶ 31} Interestingly, the definition of "abuse of discretion" in Black's Law Dictionary, Fourth Edition (1968), which was the edition of Black's Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

{¶ 32} " 'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion. * * * * . *It is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances*. * * * * . And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is

that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; *an error of law*. * * * * .

{¶ 33} "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. * * * * . Unreasonable departure from considered precedents and settled judicial custom, *constituting error of law*. * * * * . The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court and is said by some authorities to imply not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. * * * * . Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. * * * * . Difference in judicial opinion is not synonymous with 'abuse of discretion' as respects setting aside verdict as against evidence. * * * * ." (Citations omitted; emphasis added.)

{¶ 34} I can only speculate that the origins of the offending formulation lay in an attempt to make the following point too

succinctly:

{¶ 35} When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error.[1] By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.

{¶ 36} I know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But I am not aware of any Ohio appellate decisions, and I hope I never become aware of any, in which it is declared, as part of the *holding,* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 37} I will save the enterprising researcher the trouble of combing through opinions in which I appear as the author by freely admitting that, on numerous occasions, I have been too lazy to delete a quotation or paraphrase of the offending formulation from a staff attorney's draft. I am confident, however, that in none of the opinions I have authored is it part of the *holding* that a trial court may, in the exercise of its discretion, commit an error of law.

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[1] Of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review.

{¶ 38} So let me close by boldly declaring that no court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.[2]

Copies mailed to:

Jean Ann S. Sieler, Esq.
Mark A. Ozimek, Esq.
John Paul Rieser, Esq.
Patricia J. Friesinger, Esq.
Hon. Mary Wiseman

[2] **This does not, of course, obviate the existence of frequent and lively disagreements between courts and individual judges as to what the law is.**