[Cite as *Horvath v. Packo*, 2013-Ohio-1832.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Robin L. Horvath

Appellant

v.

Anthony L. Packo, Jr., et al.

Appellees

Court of Appeals Nos. L-11-1270
L-11-1287

Trial Court Nos. CI0201005313
CI0201005789
CI0201005876

DECISION AND JUDGMENT

Decided: May 3, 2013

* * * * *

Troy L. Moore and Thomas A. Matuszak, for appellant.

William B. Fecher, for appellee Fifth Third Bank.

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YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Robin Horvath, appeals from the judgment of the Lucas County Court of Common Pleas, which denied his Civ.R. 60(B) motion for relief from a cognovit judgment entered against him, Anthony Packo, Jr., and the Packo companies. We affirm.

A. Facts and Procedural Background

{¶ 2} The "Packo companies" consist of Tony Packo's, Inc., and its wholly owned subsidiaries Packo Properties, LLC, and Tony Packo Food Company, LLC. Horvath, Packo, Jr., and Jack Simonetti are the directors of Tony Packo's, Inc.

{¶ 3} On August 18, 2010, the trial court entered a cognovit judgment in favor of appellee, Fifth Third Bank, and against the Packo companies for the Packo companies' default on several loans totaling approximately $2.7 million. The trial court also entered $670,000 cognovit judgments against Horvath and Packo, Jr. as limited guarantors of the Packo companies' debt. The same day, the trial court appointed a receiver over the assets of the Packo companies. No appeal was taken from the cognovit judgment or the order appointing the receiver.

{¶ 4} Over a year later, on August 26, 2011, Horvath filed his Civ.R. 60(B) motion for relief from the cognovit judgments, seeking to vacate the judgment against the Packo companies, himself, and Packo, Jr. In his motion, Horvath asserted he was entitled to relief because Fifth Third conspired with Packo, Jr., and Anthony Packo, III, to procure a default on the Packo companies' loan obligations, and then capitalized on that default by:

> (1) taking cognovit judgment against the Packo Companies and Mr. Horvath; (2) exercising control over what was supposed to be an "intra-family" bid process in this case; (3) offering financing to Packo III and others to purchase the Packo Companies' assets in an attempt to, among

other things, eliminate Mr. Horvath from the Packo Companies (as currently constituted) and prejudice his property/contractual/constitutional rights; and (4) then seizing/garnishing Mr. Horvath's funds when he objected to the proposed sale of the assets and demanded his right to due process of law.

{¶ 5} Horvath derives his assertions from the following series of facts. In December 2009, Horvath resumed all of his duties at the Packo companies following his successful recovery from heart surgery. Upon his return, Horvath requested financial statements for each of the Packo companies. In February 2010, he received those statements and identified what he believed to be questionable transactions evincing financial misappropriations by Packo, III. Horvath notified Packo, Jr., and Packo, III, of his concerns at a March 1, 2010 meeting.

{¶ 6} Subsequently, on April 14, 2010, Horvath received an "offer of the company to acquire [Horvath's] interest in Tony Packo's, Inc." from the Packo companies' attorney. The Packo companies' attorney later testified in a deposition that he was directed to issue the offer by Packo, Jr. Horvath notes that neither himself nor the other director of Tony Packo's, Inc., were given an opportunity to review or approve the offer before it was sent. Thereafter, Horvath sent a letter to the Packo companies' attorney demanding the production of the Packo companies' client file. In his letter, Horvath mentions—for what he claims is the first time—that "litigation was likely."

{¶ 7} Concurrent with these issues, Fifth Third sent a refinancing proposal to the Packo companies on April 1, 2010, for one of their loans that was coming due. The proposal required Horvath to increase his personal guaranty on the debt from 25 percent to 100 percent. Horvath contacted Fifth Third and stated that he was not willing to increase his personal guaranty until his concerns regarding the financial misappropriations were addressed.

{¶ 8} On July 6, 2010, Horvath called a meeting of the directors of Tony Packo's, Inc. Packo, III, also attended. At the meeting, Packo, Jr., and Packo, III, made it clear that they would not discuss any of the items on Horvath's agenda until the issue of the impending maturity of the loan was resolved. Horvath reiterated his position that he was unwilling to increase his personal guaranty on the loan in light of the alleged financial misappropriations. The Packos, on the other hand, took the position that they were no longer willing to sign the financing proposal even if Horvath agreed to increase his personal guaranty. In doing so, they realized that the parties' positions effectively would result in the Packo companies' default on its loan obligations.

{¶ 9} Thereafter, the Packo companies defaulted on their loans. On August 18, 2010, Fifth Third filed its cognovit complaint, and obtained cognovit judgments against the Packo companies, Horvath, and Packo, Jr. The Packo companies went into receivership, and extensive litigation commenced concerning, inter alia, the receivership sale and various claims that Horvath asserted against the Packos, including a shareholder derivative claim based on Packo, III's, alleged financial misappropriations. As part of

that litigation, Horvath served Fifth Third with discovery requests on March 10, 2011, in which he sought all documents, tangible things, and communications from January 1, 2010 to the present, between Fifth Third and the receiver, the receiver's counsel, and the counsel for the Packos. Fifth Third responded to Horvath's discovery request, asserting several objections, including relevance, privilege, and the work-product doctrine.

{¶ 10} Following that response, Horvath filed his Civ.R. 60(B) motion, seeking relief from the cognovit judgments. Horvath theorized that because Fifth Third asserted the work-product doctrine, it must have been contemplating litigation as early as January 1, 2010, and

> [t]he only way that Fifth Third could have come to that conclusion was if Fifth Third had been communicating with the Packos between January 1, 2010 and June 1, 2010, i.e., when Mr. Horvath began asking for the financial statements of the Packo Companies from Ms. Dooley, discovered misappropriations, and raised such misappropriations with (among others) the Packos.

Horvath parlayed this theory into his conclusion that Fifth Third acted in concert with the Packos to procure the default, leading to the cognovit judgment.

{¶ 11} Fifth Third responded to Horvath's motion for relief from judgment, arguing first that it was untimely. Fifth Third pointed out that nearly all of the facts relied upon by Horvath were known to him, and were included in a complaint he filed against the Packos on July 23, 2010, *before* the trial court entered cognovit judgments in favor of

Fifth Third. Further, Fifth Third recognized the coincidence that Horvath's Civ.R. 60(B) motion was filed on the same day the trial court established as the deadline for any interested party to submit an offer to purchase the receivership assets.[1]

{¶ 12} Additionally, Fifth Third argued that Horvath failed to set forth any operative facts that would entitle him to relief. Fifth Third maintained that Horvath's allegation that it procured the Packo companies' default was "nonsensical" in light of four facts:

1. Horvath and Packo, Jr., both refused Fifth Third's April 1, 2010 refinancing proposal.

2. The notes matured in August 2010.

3. The Packo companies were in default.

4. Following default, Fifth Third obtained judgment.

Fifth Third also contended that even if Horvath's allegations were presumed true, he still would not be entitled to relief because none of them are a defense to a cognovit judgment, but rather would form the basis for a separate claim against Fifth Third.

{¶ 13} The trial court held a hearing on Horvath's Civ.R. 60(B) motion on September 9, 2011. At the hearing, and in response to the timeliness argument, Horvath stated that he only recently became aware that the default on the note and the execution on the default may have been "predetermined" by Fifth Third and the Packos.

[1] In addition to his Civ.R. 60(B) motion, Horvath also simultaneously filed a motion to extend the time to submit offers to purchase the receivership assets, and a motion for the receiver to reject all contracts between Fifth Third and the Packo companies.

Specifically, Horvath referred to Packo, III's, "prophecy" at the July 6, 2010 board meeting that the Packo companies would default on the note, and that Fifth Third's collection efforts would be ineffective against Packo, Jr., so the bank would ultimately seek its money from Horvath. Horvath asserted that he began to view that prophecy as more than a threat when, in February 2011, Fifth Third exercised its right of set-off against Horvath's bank accounts. Horvath noted that no funds had been collected from Packo, Jr., although Fifth Third countered that Packo, Jr., did not have any money on deposit with the bank. Horvath stated that he then became even more suspicious when Fifth Third asserted the work-product doctrine in response to his March 10, 2011 discovery requests, which sought documents going back to January 1, 2010. Based on this, Horvath believed that Packo, III, was not merely making threats at the July 6, 2010 board meeting, but rather was "stating what was a foregone conclusion based upon conversations the Packos and their counsel had with the bank that are as yet to date undisclosed to Mr. Horvath by virtue of Fifth Third Bank asserting the work-product privilege."

{¶ 14} Fifth Third's assertion of the work-product doctrine occurred in June 2011. Horvath subsequently moved to compel the production of those documents, to which Fifth Third took an extension to respond until August 16, 2011. Thus, Horvath argued that his Civ.R. 60(B) motion was timely when he filed it ten days later. Further, Horvath characterized Fifth Third's position as effectively being that if it can "cover it up long

enough then latches or untimeliness is an effective defense." Horvath contended such an argument would be improper.

{¶ 15} Following the hearing, the trial court summarily denied Horvath's Civ.R. 60(B) motion, stating only, "The Court finds Plaintiff Robin L. Horvath's Motion for Relief from Judgment Pursuant to Civ.R. 60(B) (Mtn. #60)[2] not well-taken and same is OVERRULED and DENIED."

B. Assignment of Error

{¶ 16} Horvath now appeals, raising a single assignment of error:

> The trial court abused its discretion and committed reversible error when it denied Mr. Horvath's Civ.R. 60(B) motion for relief from Fifth Third's cognovit judgment.

II. Analysis

{¶ 17} Civ.R. 60(B) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 12, 371 N.E.2d 214 (1978). Thus, "[a] motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary,

[2] Given the voluminous filings in the proceedings, the trial court instituted a numbering system to keep track of the various motions.

or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 18} Generally, to prevail on a Civ.R. 60(B) motion, a movant must satisfy three elements: "(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.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. However, in the context of cognovit judgments, the burden on the movant is relaxed, and only two of the three elements need to be satisfied. *Antonio Sofo & Son Importing Co., Inc. v. Grinders, Inc.*, 6th Dist. No. L-11-1113, 2012-Ohio-1109, ¶ 6. "[R]elief 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." *Id.*, quoting *Meyers v. McGuire*, 80 Ohio App.3d 644, 646, 610 N.E.2d 542 (9th Dist.1992).

{¶ 19} Horvath expends considerable effort to demonstrate that his allegation that Fifth Third conspired with the Packos to tortiously interfere with the loan contract between the Packo companies and itself constitutes a meritorious defense to the cognovit judgment. However, Horvath makes no effort to demonstrate how his motion for relief

from judgment is timely. Thus, even assuming that Horvath has alleged a meritorious defense, we hold that the trial court did not abuse its discretion in denying his motion.

{¶ 20} Horvath's motion is grounded in the "catch-all" provision of Civ.R. 60(B)(5). Therefore, it is not subject to the one-year limitation, but still must be made "within a reasonable time." "Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case." *S.R. v. B.B.*, 6th Dist. No. L-09-1293, 2011-Ohio-358, ¶ 19, quoting *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶ 33. Notably, the movant bears the burden of submitting "factual material which on its face demonstrates the timeliness of the motion." *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974).

{¶ 21} Here, in both his motion to the trial court and his merit brief on appeal, Horvath fails to make any attempt to demonstrate that his motion was filed in a reasonable time when it was filed one year and eight days after the cognovit judgment was entered. Interestingly, in his reply brief on appeal, Horvath responds to Fifth Third's position that his motion is untimely by arguing that (1) timeliness is not an issue before this court because the trial court "never ruled—nor even referenced in the order on appeal—that Mr. Horvath's Civ.R. 60(B) motion was somehow untimely filed," and (2) the cases cited by Fifth Third do not support its position because they stand for the proposition that Civ.R. 60(B)(5) is not subject to the one-year limitation. Regarding Horvath's second argument, we find that Fifth Third cited those cases not for the

proposition that motions filed under Civ.R. 60(B)(5) must be filed within one year, but rather for the proposition that time periods shorter than one year may still be unreasonable. As to his first argument, we note that the trial court's omission of the reasons for denying his motion does not obviate his burden to satisfy the timeliness element. To that end, conspicuously absent from Horvath's reply is any reasoning to support why his motion was timely, save perhaps for his statement, "In the context of this case, this Court should consider the extent of Mr. Horvath's extraordinary, costly and time-consuming—albeit unsuccessful—attempts to unearth evidence of the truth that ultimately became the subject of Mr. Horvath's Civ.R. 60(B) motion—attempts that continue to this day."

{¶ 22} "In the absence of any explanation for the delay in filing the Civ.R. 60(B) motion, the movant has failed to meet his burden of establishing the timeliness of his motion." *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 53, 610 N.E.2d 455 (9th Dist.1991). Thus, for that reason alone, the trial court did not abuse its discretion when it denied Horvath's Civ.R. 60(B) motion.

{¶ 23} Furthermore, the only indication we have of Horvath's justification for the delay is found in the transcript from the hearing on Horvath's Civ.R. 60(B) motion, and even that justification is insufficient. Horvath claims that the delay occurred because he only recently became aware of Fifth Third's potential involvement in nefariously procuring the default. However, by his own admission, Horvath's suspicions were raised in February 2011 when Fifth Third exercised its set-off rights against his account, and

further heightened in June 2011 when Fifth Third asserted the work-product doctrine in response to his broad discovery request.[3] It then took an additional two months for Horvath to file his Civ.R. 60(B) motion.

{¶ 24} Even if we give credence to Horvath's allegations and conclusions, we find that, in the context of the ongoing litigation and the impending receivership sale, this two-month delay was unreasonable. Throughout, Horvath was intimately involved in the proceedings, and was well aware of the emphasis placed on a timely resolution of the receivership sale in the interests of maintaining the viability of the Tony Packo's franchise. However, instead of bringing his concerns to the court's attention immediately, Horvath waited until the deadline for submitting bids for the receivership assets. Moreover, Horvath's argument that his motion was timely because it was filed shortly after Fifth Third filed its response to his motion to compel is unpersuasive. Fifth Third's response does not raise any new grounds for not complying with the discovery requests, but instead, reiterates those grounds already raised. Accordingly, no new information was presented that would support Horvath's allegation that Fifth Third conspired with the Packos. Therefore, we conclude that Horvath did not file his Civ.R. 60(B) motion within a reasonable time, and the trial court did not abuse its discretion in denying the motion.

[3] The trial court later denied Horvath's motion to compel regarding these discovery requests, characterizing them as "tantamount to a fishing expedition."

{¶ 25} Horvath's assignment of error is not well-taken.

III. Conclusion

{¶ 26} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to Horvath pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE