

[Cite as *Home S. & L. Co. v. Captiva Hong Kong Ltd.*, 2004-Ohio-6375.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

THE HOME SAVINGS & LOAN )  
COMPANY, )  
 )  
PLAINTIFF-APPELLEE, )  
 )  
- VS - )  
 )  
CAPTIVA HONG KONG LIMITED, )  
et al., )  
 )  
DEFENDANTS-APPELLANTS. )

CASE NO. 03 MA 167

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas  
Court, Case No. 03 CV 1215.

JUDGMENT:

Affirmed.

JUDGES:

Hon. Mary DeGenaro  
Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich

Dated: November 24, 2004

APPEARANCES:

For Plaintiff-Appellee:

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Limited, James Vitullo and  
David Karzmer

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. The trial court entered cognovit judgment to Plaintiff-Appellee, Home Savings and Loan Company of Youngstown, Ohio. Defendants-Appellants, Captiva Hong Kong Limited, James Vitullo, David Karzmer, and Florence Vitullo, appeal the decision of the Mahoning County Court of Common Pleas that denied Appellants' motion for Civ.R. 60(B) relief from that cognovit judgment.<sup>1</sup>

{¶2} Appellants raise a variety of issues on appeal. But the issues they raise demonstrate their misunderstanding of the standard a court must employ to determine whether to grant Civ.R. 60(B) relief. They believe the court must grant that relief if there is an issue as to the existence of a meritorious defense. But they actually bear the burden of alleging operative facts which, if believed, would constitute the meritorious defense. They have failed to allege sufficient operative facts to constitute either of the meritorious defenses they attempt to argue on appeal. Accordingly, the trial court's decision is affirmed.

#### Facts

{¶3} In 2001, Home Savings extended a loan to Appellants for \$60,000.00. Appellants signed a promissory note for that loan containing a warrant of attorney authorizing confession of judgment against them. The loan was modified in 2002 and that modification also contained a warrant of attorney authorizing confession of

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<sup>1</sup> Florence Vitullo declared bankruptcy while this appeal was pending. Due to her bankruptcy, we stayed the proceedings against her. Accordingly, this opinion and judgment only apply to Captiva Hong Kong Limited, James Vitullo, and David Karzmer. In accordance with our previously granted stay, we render no opinion at this time regarding Florence Vitullo's appeal of the trial court's judgment.

judgment against Appellants.

{¶14} Home Savings also extended another loan to a different corporation, which is not a party to this action, and the individual Appellants for \$1,300,000.00 in 2001. Those parties signed a promissory note for this loan as well, which also contained a warrant of attorney authorizing confession of judgment against them. This loan was also modified in 2002 and that modification also contained a warrant of attorney authorizing confession of judgment against Appellants.

{¶15} According to Appellants, these loans were a continuation of a borrower/lender arrangement between Home Savings and Appellants that first began in the mid-1990s. And Appellants produced a letter from a former vice president of Home Savings written in 1999, which stated that the individuals who guaranteed loan #261302044 would not be held personally liable if they deposited \$450,000.00 in a Home Savings deposit account.

{¶16} In December 2002, Home Savings notified Appellants that it did not currently intend to renew or extend the outstanding loans and asked Appellants to pay the balance of the loans before their maturity dates, January 30, 2003. Appellants did not pay the balance of the loans by that date and defaulted on the loan.

{¶17} The parties met in February 2003, and Home Savings indicated that it would be willing to enter into a forbearance agreement, but the parties did not discuss the specifics of a forbearance agreement. Over the next two months, Appellants offered certain collateral, but it was unacceptable to Home Savings. They also tried to obtain alternate financing, but failed. Appellants were still in default on March 17, 2003, when Home Savings notified Appellants that it would only continue to offer the forbearance until March 27, 2003.

{¶18} Although Appellants made further efforts to obtain alternate financing and notified Home Savings of these efforts, they did not do so in time to meet the March 27th deadline. Despite the fact that Appellants kept notifying Home Savings of their efforts to obtain alternate financing, Home Savings filed a complaint seeking cognovit judgment on April 14, 2003 and the cognovit notes were reduced to judgment the next day.

{¶9} Appellants moved for relief from the cognovit judgment, claiming five defenses: 1) breach of contract; 2) incorrect amount of judgment; 3) detrimental reliance; 4) potential counterclaims; and, 5) bad faith. The parties briefed the issues and, after a hearing, the trial court found that Appellants were not entitled to relief from judgment since the claimed defenses were not meritorious defenses to the cognovit judgment. It is from this judgment that Appellants timely appeal.

{¶10} Appellants argue the following three assignments of error on appeal:

{¶11} "The trial court erred in overruling appellants' motion for relief cognovit judgment pursuant to Ohio Civil rule 60(B) in that the appellants have valid and meritorious defenses to present should relief from judgment be granted."

{¶12} "The trial court applied the incorrect legal standard in deciding whether to vacate the cognovit judgment."

{¶13} "The trial court erred by incorrectly making findings of fact without holding an evidentiary hearing."

{¶14} Appellants' arguments in these assignments of error are all related. Accordingly, they will be addressed together.

#### Civ.R. 60(B) and Standard of Review

{¶15} In each of their assignments of error, Appellants claim the trial court erred by not granting their motion for Civ.R. 60(B) relief from judgment. They believe that they presented enough evidence to establish that there is a litigable issue regarding a meritorious defense to the cognovit judgment against them. In response, Home Savings argues that the evidence Appellants produced is insufficient to demonstrate the existence of a meritorious defense. The crux of the parties' dispute is the level of proof a party must present to demonstrate the existence of a meritorious defense.

{¶16} To prevail on a Civ.R. 60(B) motion, the movant must demonstrate: 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. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The decision to

grant or deny a motion for relief from judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} A party may not use a Civ.R. 60(B) motion as a substitute for appeal. *Steadley v. Montanya* (1981), 67 Ohio St.2d 297, 299. "We cannot leave the Civ.R. 60(B) context and engage in an isolated consideration of whether we would have made the same determinations as the trial court on various unappealed decisions." *McGowan v. Stoyer*, 10th Dist. No. 02AP-263, 2002-Ohio-5410, ¶13.

{¶18} Generally, a movant must prove all three requirements of the *GTE* test to prevail on a motion for relief from judgment. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. But "the existence of a valid defense to all or part of the claim constitutes a ground for relief from a cognovit judgment entered by confession upon a warrant of attorney without prior notice to the defendant." *Matson v. Marks* (1972), 32 Ohio App.2d 319, 323; see also *Your Financial Community of Ohio, Inc. v. Emerick* (1997), 123 O.A.3d 601,605. Thus, if the movant can demonstrate a meritorious defense to a cognovit judgment entered by confession upon a warrant of attorney without prior notice to the defendant, then he satisfies both the first and second prongs of the *GTE* test.

{¶19} In this case, the parties do not dispute the fact that the Appellants filed their motion within a reasonable time. They filed their motion on May 14, 2003, less than thirty days after the trial court entered the cognovit judgment. They only dispute whether the Appellants have presented a meritorious defense and thereby meeting the first two prongs of the *GTE* test.

{¶20} Appellants contend that they are only required to demonstrate that a meritorious defense might exist. They do not believe they are required to prove their meritorious defenses to obtain relief from judgment. Appellants are incorrect.

{¶21} Appellants base their argument on a supposed bias in favor of granting motions under Civ.R. 60(B) so that cases may be decided on their merits. But while

courts have an interest in deciding cases on their merits, courts also have a strong interest in the finality of judgments. *Ciavarella v. Ciavarella*, 7th Dist. No. 02 CO 11, 2004-Ohio-0568, ¶37. Thus, the standards courts must employ when ruling on a Civ.R. 60(B) motion is not the one cited by Appellants. Courts are not required to "resolve all doubt in favor of the moving party" and grant relief from judgment when the movant has alleged a meritorious defense.

{¶22} Although a "movant is not required to prove that she will ultimately prevail if relief is granted," the moving party still has the burden "to allege operative facts which would constitute a meritorious defense if found to be true." *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565; see also *Rose Chevrolet* at 20. Thus, the movant must provide the trial court with enough operative facts to constitute the meritorious defense and must allege those operative facts with enough specificity to allow the trial court to decide whether the movant has met that test. *Syphard v. Vrable*, 141 Ohio App.3d 460, 463, 2001-Ohio-3229. If the facts that the movant alleges are not sufficient to constitute a meritorious defense, then the movant has failed to meet her burden.

{¶23} In the trial court, Appellants claimed that they have five valid defenses to the cognovit judgment: 1) breach of contract; 2) incorrect amount of judgment; 3) detrimental reliance; 4) potential counterclaims; and, 5) bad faith. Appellants do not reassert each of these defenses on appeal. Instead, they make two arguments. First, they claim that there is an issue of fact regarding whether Home Savings breached a contract to release the individual defendants from personal liability for the loans. Second, they argue that they have a counterclaim against Home Savings and that this is a meritorious defense to a cognovit judgment.

#### Breach of Contract

{¶24} Appellants first claim that Home Savings breached an agreement to release them from personal liability on the loans. According to Appellants, Home Savings agreed not to hold them personally liable for the loans if they deposited \$450,000.00 in a Home Savings deposit account. They claim that they did so. Accordingly, they believe Home Savings has breached this contract.

{¶25} In response, Home Savings argues that there is no agreement to release the individual Appellants from liability from the loans at issue in this case since the letter Appellants rely on cites a different loan number than the loans involved in this case. And Home Savings contends that letter cannot refer to these loans since it was sent before Appellants entered into this loan. Home Savings further contends that Appellants did not demonstrate that they met the conditions of the alleged agreement. So it contends that the existence of that agreement is not a meritorious defense even if there was an agreement that it would release the individual Appellants from personal liability upon certain conditions.

{¶26} Home Savings is correct. The language contained in the new loans is unambiguous. It clearly contemplates that the individual Appellants would be personally liable for the debt. The alleged release was a possible release from personal liability on an earlier loan. It was entered into in 1999 and referred to a loan numbered 261302044 for \$450,000.00. In contrast, the loans in this case were numbered 261302553 and 261302723, the parties entered into them in 2001, Appellants reaffirmed their individual liability in 2002, and the loans were for \$1,360,000.00.

{¶27} Appellants argue that the loan in question is part of an ongoing relationship, so Home Savings' earlier release should apply to these later loans. But Appellants cite no law supporting their argument. In any case, the new loans are just that, new contracts with new, unambiguous terms. Appellants were under no obligation to continue their relationship with Home Savings by entering into new contractual agreements every year.

{¶28} Appellants have failed to provide any evidence that the former agreement has any binding effect on the loans at issue in this case. Their claims that this needs to be further litigated miss the point. They bore the burden of alleging sufficient operative facts which, if believed, would prove their meritorious defense. They have failed to meet that burden.

{¶29} Finally, Home Savings correctly states that Appellants failed to provide evidence that they complied with the terms of the arrangement referred to in the

exhibit. That exhibit stated that Home Savings would release Appellants from liability if they put \$450,000.00 in a deposit account as liquid collateral on the loan. Thus, the fact that Appellants may have deposited more than this amount in the account sometime after the agreement does not demonstrate that they complied with the agreement. Under the language of the agreement, they had to *maintain* an account in the full amount of the loan in order to release them from liability. Appellants have not alleged that they maintained an account in that amount as required by the alleged agreement.

{¶30} In conclusion, the trial court did not abuse its discretion when it determined that Appellants have not alleged sufficient facts to demonstrate that Home Savings violated an agreement to release the individual Appellants from liability on the loans at issue in this case. Appellants have failed to allege operative facts that demonstrate either that the release from liability applies to these loans or that they complied with the terms of the agreement to release liability. Thus, Appellants' argument in this regard is meritless.

#### Counterclaims

{¶31} In their second argument, Appellants claim that Home Savings has failed to comply with the duties imposed on it by R.C. 1309.610. They argue that a related entity abandoned all real or personal property it owed to Home Savings as part of a bankruptcy action, that the inventory of that business may be worth more than \$680,000.00, and that Home Savings has failed to preserve, care for, sell, or otherwise dispose of that property. Home Savings argues that it did not violate its statutory duties since the statutory language was permissive rather than mandatory.

{¶32} Regardless of the merits of either party's arguments in this regard, this is the first time in the proceedings that the issue has been raised. Appellants did not even mention this issue at the trial court, let alone allege any operative facts supporting their claims. It is axiomatic that a party cannot raise issues for the first time on appeal that were not raised below. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. This court cannot say the trial court abused its discretion by not finding that this is a meritorious defense when Appellants did not allege the facts they



currently allege. Appellants' argument in this regard is also meritless.

#### Conclusion

{¶33} Appellants misunderstand the burden imposed upon them by Civ.R. 60(B). They believed they only needed to show that there was a possibility that they had a meritorious defense to the judgment entered against them. But they had the burden of alleging operative facts which, if believed, would constitute a meritorious defense. The facts they have alleged are insufficient to demonstrate that Home Savings agreed not to hold them personally liable on these loans. Furthermore, the facts are insufficient to demonstrate that Appellants complied with the terms of the alleged agreement. Appellants failed to raise any issue regarding the property abandoned to Home Savings in the bankruptcy action before the trial court, so there are no allegations of operative facts supporting its claim that this is a meritorious defense either. Accordingly, the trial court did not abuse its discretion when it denied Appellants' motion for Civ.R. 60(B) relief from judgment.

{¶34} Accordingly, Appellants' assignments of error are meritless and the judgment of the trial court is affirmed.

Waite, P.J., concurs.

Vukovich, J., concurs.