[Cite as *Cadillac Music Corp. v. Kristosik*, 2009-Ohio-5830.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92677 and 92678

CADILLAC MUSIC CORPORATION, ET AL.

PLAINTIFFS-APPELLEES

vs.

RAYMOND KRISTOSIK, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-666872 and CV-666876

BEFORE: Gallagher, P.J., Rocco, J., and Boyle, J.

RELEASED: November 5, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANTS

Frank Consolo
Consolo O'Brien LLC
75 Public Square
Suite 1010
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEES

Edward R. Reichek
75 Public Square
Suite 1225
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} This is a consolidated appeal in which appellants challenge the judgment entries of the trial court that denied certain motions for relief from judgment. For the reasons stated herein, we reverse and remand.

{¶ 2} The following facts give rise to this appeal. Appellant 4030 Mayfield Road, Inc., was the owner of a business operated as the "R BAR," which was located at 4030 Mayfield Road in South Euclid, Ohio. Appellants Raymond Kristosik and James Lawless are partners in 4030 Mayfield Road, Inc.

{¶ 3} Appellees, Cadillac Music Corporation and JCC Miles, Inc. (collectively "Cadillac Music"), are the holders of two cognovit notes relating to business loans they made to appellants. The first note is dated January 19, 2006. Pursuant to its terms, 4030 Mayfield Road, Inc., Raymond Kristosik, and James Lawless jointly and severally promised to pay $20,000 to Cadillac Music. The second note is dated April 13, 2007. Pursuant to its terms, 4030 Mayfield Road, Inc., and Raymond Kristosik jointly and severally promised to pay $10,000 to Cadillac Music. James Lawless is not a signator on the second note.

{¶ 4} Subsequently, appellants' business was sold to CPEASY, LLC ("CPEASY"). In order to complete the deal, CPEASY and its owner, Craig Pierce, agreed as part of the purchase agreement to assume the liability and

obligation of appellants to Cadillac Music. Cadillac Music was made aware of this arrangement and agreed to the assumption. A new cognovit note, dated June 25, 2007, was executed by CPEASY and Craig Pierce. The note indicates "$25,248 Assumption." The amount of the note represented the aggregate balance owed by appellants to Cadillac Music. Pursuant to the terms of CPEASY's note, CPEASY and Pierce jointly and severally promised to pay the amount to Cadillac. The term "assumption" appears a second time at the bottom of this note.

{¶ 5} After CPEASY defaulted on its note to Cadillac Music, Cadillac Music obtained a cognovit judgment in the amount of $24,538 against CPEASY and Pierce.[1] Cadillac Music also filed the within actions and obtained cognovit judgments against appellants on their notes. The judgment rendered on the first note was in the amount of $13,538, plus interest.[2] The judgment rendered on the second note was in the amount of $11,000, plus interest.[3]

{¶ 6} On September 16, 2008, appellants filed motions for relief from judgment. The trial court held a hearing on the motions. At the hearing, Raymond Kristosik testified that James Comella of Cadillac Music agreed to

---

[1] Cuyahoga County Court of Common Pleas Case No. CV-666396.

[2] Cuyahoga County Court of Common Pleas Case No. CV-666872.

[3] Cuyahoga County Court of Common Pleas Case No. CV-666876.

allow CPEASY to assume the debt. Although Kristosik never asked to have the original notes canceled, he was apparently under the impression that he was no longer obligated on the notes "because I asked him if he would assume them."

{¶ 7} Craig Pierce of CPEASY testified that as part of the purchase agreement with 4030 Mayfield Road, Inc., CPEASY was obligated to assume a debt with Cadillac Music of close to $25,000. He acknowledged that the word "assumption" was written on the cognovit note that he signed. He also testified that he made payments to Cadillac Music after the note was signed.

{¶ 8} James Comella of Cadillac Music acknowledged having discussions with Kristosik about the notes. Comella testified that he agreed to allow Pierce to assume the note so that appellants could complete their business deal with CPEASY. However, he stated he never agreed to release Kristosik and Lawless from their obligation. He claimed that he told them he would not sign a release because he did not intend to release them from their obligation to Cadillac Music until the debt was paid. Despite Pierce's default, Comella did not request payments on the note from Kristosik prior to bringing suit against appellants.

{¶ 9} Following the hearing, the trial court denied the motions for relief from judgment. Although subsequent motions were filed with the trial court, they were not ruled upon at the time the appeals were taken.

{¶ 10} Appellants have appealed the trial court's rulings and have raised two assignments of error for our review. Their first assignment of error challenges the trial court's denial of their motions for relief from judgment.

{¶ 11} We review the trial court's rulings on the motions for relief from judgment for an abuse of discretion. See, e.g., *CitiMortgage, Inc. v. Guthrie*, 175 Ohio App.3d 115, 2008-Ohio-583, 885 N.E.2d 303. "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, 450 N.E.2d 1140.

{¶ 12} Generally, a party who moves for relief from judgment must demonstrate that he has a meritorious defense to present if relief is granted, that he is entitled to relief on one of the grounds listed in Civ.R. 60(B), and that the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. However, because of the special circumstances of a cognovit judgment, "a movant who files for relief from a judgment taken upon a cognovit note need only establish (1) a meritorious defense and (2) that the motion was timely made." *Medina Supply Co. v. Corrado* (1996), 116 Ohio App.3d 847, 850-51, 689 N.E.2d 600. In ruling on a motion for relief from judgment, a trial court must keep in mind that the policy in Ohio is to decide cases on their merits and to afford

Civ.R. 60(B) relief where equitable. *Hiener v. Moretti,* Ashtabula App. No. 2009-A-0001, 2009-Ohio-5060.

{¶ 13} In this case, the timeliness of appellants' motions is not an issue since they were filed a little over a month after Cadillac Music was awarded the cognovit judgments. The parties contest whether appellants established a meritorious defense. To establish a meritorious defense, a movant is not required to prove that he will ultimately prevail if relief is granted. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. Rather, the moving party is only required to allege operative facts that would constitute a meritorious defense if found to be true. *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565, 602 N.E.2d 1231. When a movant sets forth allegations of operative facts that would warrant relief under Civ.R. 60(B), the trial court should grant a hearing to take evidence and verify the operative facts before ruling on the motion. See *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105, 316 N.E.2d 469.

{¶ 14} Here, the trial court conducted a hearing and allowed appellants to present evidence in order to verify the operative facts in support of the motion. Although a hearing was conducted, "appellant was not required to prove that his Civ.R. 60(B) arguments would prevail at trial. His burden was still merely to demonstrate the existence of a meritorious defense. The purpose of the hearing was not to establish the merit of appellant's defenses;

rather, the purpose of the hearing was to verify the operative facts." *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 667, 2005-Ohio-4041, 834 N.E.2d 836.

{¶ 15} Appellants essentially argue that evidence was presented reflecting that Cadillac Music agreed to the assumption of the debt by CPEASY and Pierce, and that there was a novation of the cognovit notes upon which the judgments were obtained. A novation occurs "where a previous valid obligation is extinguished by a new valid contract, accomplished by substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration. A novation discharges the obligations of the parties under the original contract." (Internal citations and quotations omitted.) *Lexford Prop. Mgt., LLC v. Lexford Prop. Mgt., Inc.* (2001), 147 Ohio App.3d 312, 317, 770 N.E.2d 603. "[F]or a 'novation' to be effective, all the parties must agree to the substitution of the new debtor for the old one, and, therefore, to the new or changed terms pursuant to which the substitution is made. Intent, knowledge and consent are the essential elements in determining whether a purported novation has been accepted. A party's knowledge of and consent to the terms of a novation need not be express, but may be implied from circumstances or conduct. But the evidence of such knowledge and consent must be clear and definite, since a

novation is never presumed." (Internal citations omitted.) *Bolling v. Clevepak Corp*. (1984), 20 Ohio App.3d 113, 125, 484 N.E.2d 1367.

{¶ 16} A novation may constitute a meritorious defense to a judgment entered on a cognovit note where sufficient operative facts demonstrating a novation are presented. See *National City Bank v. Reat Corp.* (Sep. 11, 1989), Cuyahoga App. Nos. 55740, 55741, 55861, and 55862; *National City Bank v. Johnson* (Nov. 30, 1989), Cuyahoga App. No. 56285.[4]

{¶ 17} In this case, no express agreement was entered to release appellants from their obligations to Cadillac Music. However, some evidence was presented to suggest that an implied novation may have occurred. The transcript and evidence in the record reflect that Cadillac Music was aware that CPEASY was purchasing the business from appellants. Cadillac Music agreed to the assumption of the debt by CPEASY and Pierce, and appellants were under the impression that they were relieved of their obligations on the original notes. A new note was executed by CPEASY and Pierce for the combined amount owed by appellants on their notes. The CPEASY note clearly reflected that it was an "assumption." Cadillac Music accepted payments from Pierce on the CPEASY note, and proceeded to deal with Pierce

[4] In the *Reat* and *Johnson* cases, there was evidence that the parties entered into a new consensual agreement to consolidate the old debts of REAT and Johnson and restructure them into a new debt obligation. Thus, this court found that there were serious questions as to the validity of the two original cognovit notes and that the appellees had demonstrated a meritorious defense. *Reat*, supra; *Johnson*, supra.

in regard to the business. Upon this evidence, we find that a question exists as to whether the cognovit note entered with CPEASY and Pierce was a replacement of the two prior notes with appellants and was intended "to extinguish an old debt by substituting a new debt in its place." See *Reat*, supra; *Johnson*, supra.

{¶ 18} We recognize that a creditor may consent to an assumption without releasing parties from individual obligations. See *Cardinal Federal Savings Bank v. Simmons* (Dec. 30, 1988), Butler App. No. 88-05-063. However, in this case, evidence was presented to indicate a novation may have occurred. Although Comella testified that he rejected a release and that he did not intend to release appellants from their obligations, this is an issue that should be decided on its merits.

{¶ 19} We find that appellants have set forth sufficient operative facts to establish the existence of a meritorious defense and that the trial court abused its discretion in failing to afford appellants Civ.R. 60(B) relief.

{¶ 20} Having found that appellants have raised a meritorious defense entitling them to relief from judgment, we need not address appellants' arguments pertaining to double recovery, partial payment, waiver, fraud,

collateral estoppel, validity of the note, and individual liability. These are all issues that may be addressed in the trial court on remand.[5]

{¶ 21} Appellants' first assignment of error is sustained. We decline to address appellants' second assignment of error.[6]

Judgment reversed, case remanded.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
MARY J. BOYLE, J., CONCUR

---

[5] We recognize that separate and independent judgments were entered with respect to the debt owed to Cadillac Music. The trial court may wish to consolidate the cases upon remand in order to better address the issues of joint and several liability and double recovery, as well as the other issues involved in the actions.

[6] Appellants' second assignment of error challenges the validity of the April 13, 2007 cognovit note.