

[Cite as *Kennedy Mint, Inc. v. Print Wave, Inc.*, 2011-Ohio-940.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95371

KENNEDY MINT, INC.

PLAINTIFF-APPELLANT

vs.

PRINT WAVE, INC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-649146

BEFORE: S. Gallagher, P.J., Rocco, J., and Keough, J.

RELEASED AND JOURNALIZED: March 3, 2011

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant Kennedy Mint, Inc. (“Kennedy Mint”) brings this appeal challenging the trial court’s decision to grant the motion for relief from judgment of appellees Print Wave, Inc., Dwayne Lemmer, and James Lemmer (hereinafter referred to as “appellees”). For the reasons set forth herein, we reverse.

{¶ 2} On March 2, 2007, Kennedy Mint entered into an asset purchase agreement (“Agreement”) with appellees for the purchase of certain business assets and equipment they intended to use in their business. The total purchase price was \$550,000, and appellees made a down payment of \$25,000

at the time the Agreement was signed. Appellees also executed a cognovit note (“Note”) to Kennedy Mint for the purchase price of \$525,000.

{¶ 3} Appellees claim that prior to taking possession, they noticed the equipment required some minor repairs. The parties are not disputing whether these repairs were made. However, once appellees took possession and began using the equipment, they noticed significant malfunctions that prevented the equipment from operating properly, despite having been told by Kennedy Mint’s president, Renato Montorsi, that the equipment was in good working order. As a result, appellees were unable to fully meet their customers’ business needs.

{¶ 4} Appellees claim they suffered a loss of business income when the equipment failed to work properly. As such, appellees failed to make payments to Kennedy Mint under the terms of the Agreement, and they defaulted on the Note. On January 29, 2008, Kennedy Mint took judgment by confession on the Note in the amount of \$525,000; it also repossessed the equipment.

{¶ 5} Kennedy Mint claimed it sold the equipment to Brian Layman for \$325,000, which was provided as a setoff against the judgment amount. The judgment was further reduced by services rendered by appellees to Kennedy Mint shortly after the Agreement was entered into. Kennedy Mint instituted collection proceedings against appellees for \$174,757.32. Appellees’ wages

were garnished from July 2008 to July 2010. Kennedy Mint was also granted a creditor's bill to attach appellee James Lemmer's equitable interest in a land installment contract.

{¶ 6} On February 2, 2010, appellees filed a Civ.R. 60(B) motion for relief from judgment.¹ Appellees argued that Kennedy Mint fraudulently induced them to purchase the equipment by misrepresenting the quality of its condition. In their motion, they relied on James Lemmer's and Brian Layman's affidavits. Lemmer stated that upon taking possession of the equipment, he knew immediately that it was not in good working condition. Layman stated that he discovered defects in the equipment once he took possession from Kennedy Mint. Layman also stated that he paid an additional \$80,000 for the equipment, over and above the initial payment of \$325,000. Appellees further argued that their motion was timely because it was filed after they learned from Layman that Kennedy Mint had sold him the same equipment and that it was not in good working order.

{¶ 7} On June 18, 2010, the trial court granted appellees' motion for relief from judgment, and vacated its January 29, 2008 order. Kennedy Mint filed this appeal. It raises one assignment of error for our review, which provides: "The trial court committed reversible error by granting defendants-appellees' motion for relief from judgment pursuant to Ohio Civ.R.

60(B) filed on February 2, 2010, as it was filed two years after judgment was rendered against appellees, and three years after appellees were made aware of their alleged defense.”

{¶ 8} Kennedy Mint argues primarily that appellees’ Civ.R. 60 (B) motion was not timely filed. It contends that appellees knew of the alleged defects in the equipment immediately after they took possession, despite waiting two years to file their motion. Appellees argue that the additional evidence from Layman, procured two years after judgment, is critical to their argument that Kennedy Mint fraudulently induced them to purchase defective equipment by misrepresenting that it was in good working condition. Appellees also argue that they discovered evidence that Kennedy Mint received an additional \$80,000 from Layman for the purchase of the equipment, and therefore the setoff amount is more than Kennedy Mint represented.

{¶ 9} “The standard of review on appeal for a motion to vacate, pursuant to Civ.R. 60(B), is an abuse of discretion.” *CitiMortgage, Inc. v. Guthrie*, 175 Ohio App.3d 115, 2008-Ohio-583, 885 N.E.2d 303, ¶ 14. “Abuse of discretion connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court.” (Citations and quotations

¹ Appellees do not specifically state whether their motion is based on Civ.R. 60(B)(3) or (5).

omitted.) *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 342, 1998-Ohio-387, 695 N.E.2d 1140.

{¶ 10} Generally, a party who moves to vacate a 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 Auto. Elec., Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. However, where the movant seeks to vacate a cognovit judgment, a less stringent standard applies because the movant did not have an opportunity to be heard before the judgment was entered. *Baker Motors, Inc. v. Baker Motors Towing, Inc.*, 183 Ohio App.3d 223, 2009-Ohio-3294, 916 N.E.2d 853, ¶ 9.

{¶ 11} “[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, 850-851, 689 N.E.2d 600. Furthermore, in establishing a meritorious defense, the “movant’s burden is only to allege a meritorious defense, not to prove that he will prevail on that defense.” *Meyers v. McGuire* (1992), 80 Ohio App.3d 644, 646, 610 N.E.2d 542, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564.

{¶ 12} “By executing a cognovit provision in a note and allowing a confession of judgment, the maker of the note waives his or her rights to

notice and a prejudgment hearing. Consequently, collateral attacks on cognovit judgments are liberally permitted, and the burden on the party moving for relief is ‘somewhat lessened.’” (Internal citations omitted.) *Second Natl. Bank of Warren v. Web Producers, Inc.*, Columbiana App. No. 03-CO-68, 2004-Ohio-5786, ¶ 14.

{¶ 13} Despite the less stringent standards required of the movant, “[t]he defenses available to the maker of a cognovit note are extremely limited. The defense of nondefault is certainly one. ‘Other asserted defenses found meritorious include improper conduct in obtaining the debtor’s signature on the note; deviation from proper procedures in confessing judgment on the note; and miscalculation of the amount remaining due on the note at the time of confession of judgment. * * * Thus, a meritorious defense is one that goes to the integrity and validity of the creation of the debt or note, the state of the underlying debt at the time of confession of judgment, or the procedure utilized in the confession of judgment on the note.’” (Internal citations omitted.) *Baker Motors*, at ¶ 12. We note, however, that a claim based on an improper setoff amount is not a meritorious defense.² *Id.* at ¶ 13-14.

² In its reply brief, Kennedy Mint acknowledges the additional \$80,000 payment from Layman, which would reduce appellees’ debt to \$94,757.32.

{¶ 14} By claiming that Kennedy Mint fraudulently induced them to enter into the Agreement, appellees are essentially arguing that Kennedy Mint engaged in improper conduct in obtaining their signature on the Note. Specifically, they claim that Kennedy Mint misrepresented the quality and condition of the equipment to induce appellees to purchase it. “Fraud in the inducement of signing a contract is a valid defense to a cognovit judgment.” *Second Natl. Bank of Warren*, ¶ 17.

{¶ 15} In order to establish a claim for fraudulent inducement, a party must prove: “(1) a representation, or silence where there is a duty to disclose, (2) which is material to the transaction, (3) made falsely, with knowledge of its falsity, or with such utter disregard as to its truth that knowledge may be inferred, (4) with the intent to mislead another into relying on it, (5) justifiable reliance on the representation, and (6) resulting injury proximately caused by the reliance.” *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 475, 700 N.E.2d 859.

{¶ 16} Even if we accept that appellees have alleged a valid claim for fraudulent inducement, and therefore have established a meritorious defense, we do not find that appellees’ motion was timely filed, despite the fact that the law requires only that the motion be filed within a reasonable time. See *Richard Hart Printing v. Design Collective, Inc.* (June 28, 1990), Franklin App. No. 89AP-1113.

{¶ 17} In James Lemmer’s affidavit, he states that he “immediately discovered that various pieces of equipment were not functional, did not function in a satisfactory manner, and/or required repairs or maintenance prior to their use.” Lemmer aff., at ¶ 6. Despite Lemmer’s “immediate” revelation that Kennedy Mint misrepresented the equipment’s condition, appellees contend that their motion required Layman’s affidavit to demonstrate Kennedy Mint continued to misrepresent its faulty condition. We disagree.

{¶ 18} Nothing in an agreement between Kennedy Mint and any subsequent purchaser could have induced, fraudulently or otherwise, appellees to enter into a contract three years earlier. Appellees had all the evidence they needed to file their Civ.R. 60(B) motion, or in the alternative a separate cause of action, asserting a claim for fraud either when Lemmer discovered the equipment was not working properly or as late as when Kennedy Mint took judgment by confession in January 2008. Waiting two years to assert that the subsequent purchaser’s affidavit is critical to their fraud claim, especially when appellees acknowledge they knew immediately after taking possession of the equipment that its condition was not as represented, sets their motion outside a reasonable time frame.

{¶ 19} While appellees may still have a valid claim for fraud or breach of contract, we find that appellees’ Civ.R. 60(B) motion was not filed within a

reasonable time, as required under the rule. While we recognize the trial court likely determined that appellees raised a meritorious defense, we nevertheless reverse due to the untimeliness of the motion. Kennedy Mint's sole assignment of error is sustained, and the decision of the trial court is reversed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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
KATHLEEN ANN KEOUGH, J., CONCUR