[Cite as *Trustar Funding, L.L.C. v. Harper*, 2018-Ohio-495.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105837

TRUSTAR FUNDING, L.L.C.

PLAINTIFF-APPELLEE

vs.

CHARLES W. HARPER, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-756112

BEFORE: Boyle, J., McCormack, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: February 8, 2018

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Charles W. Harper, appeals the trial court's denial of his motion to vacate cognovit judgment pursuant to Civ.R. 60(B). He raises five assignments of error for our review:

> 1. The trial court erred to the substantial prejudice of the appellant when it obstructed and restrained appellant from making its case by repeatedly disallowing evidence into the record that was probative of appellant's contention that the appellant's 60(B) motion to vacate should have been granted[.]
>
> 2. The trial court erred when it failed to find that the cognovit note was void because the amount owed on the cognovit note could not be determined solely by referring to the face of the document rendering the note invalid.
>
> 3. The trial court erred by excluding appellant's expert report of witness, Darryl Pittman, who had probative testimony, when said report had been part of the brief and motion in support of the motion to vacate, was timely submitted to the court, and was in the possession of all the parties who supplied responses thereto, all parties received proper notice of the report.
>
> 4. The trial court erred when it did not find the judgment void ab init[i]o when the judgment is void as the plaintiff failed to comply with R.C. 2323.13(D), as such this Honorable court lacked jurisdiction to render this verdict.
>
> 5. The trial court erred when it did not find the judgment void ab init[i]o when the subject transaction was a consumer transaction rendering the cognovit note void pursuant to R.C. 2323.12(E).

{¶2} Finding no merit to his appeal, we affirm.

I. Procedural History

{¶3} On March 19, 2010, plaintiff-appellee, Charles Emerman, as trustee of the Charles Emerman Revocable Trust ("Emerman"), loaned $63,374 to Donald Williams,

Sr., Donald Williams, Jr., and Harper.[1] Trustar Funding, L.L.C. ("Trustar") served as the loan servicer for Emerman, and thus, the cognovit note was between Trustar and the three borrowers. The note was secured by a mortgage on commercial property located at 22021 Euclid Avenue, Euclid, Ohio, which was owned by Shepherd Group Realty and Development Corporation ("Shepherd Group"), which in turn was owned by Donald Williams, Sr. and was a Georgia corporation.

{¶4} On May 25, 2011, Trustar filed a complaint on the cognovit promissory note and obtained a judgment for $71,951.11. Although Harper claims that he never received notice of the cognovit judgment, the docket indicates that he did so via certified mail on June 1, 2011.

{¶5} Harper moved to vacate the cognovit judgment nearly five and a-half years later, on November 20, 2016. After an evidentiary hearing on Harper's motion, the trial court denied it without opinion. It is from this judgment that Harper now appeals.

{¶6} We note that in his five assignments of error, Harper essentially raises two main arguments: that the trial court wrongly denied his Civ.R. 60(B) motion and that the trial court made improper evidentiary rulings that prevented him from establishing his case. We will address his arguments out of order and together where necessary for ease of discussion.

II. Motion for Relief from Judgment

[1]Although Harper claims that the loan was for Donald Williams, Sr. and that he and Donald Williams, Jr. were cosigners, the loan states that they are all borrowers and "primary guarantors."

{¶7} The decision to grant or deny a motion for relief from judgment pursuant to Civ.R. 60(B) is a matter within the trial court's discretion, and an appellate court will not reverse the trial court's ruling absent an abuse of that discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). To find that a trial court abused its discretion, "the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

{¶8} Generally, to prevail on a Civ.R. 60(B) motion, 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 judgment. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶9} Where the judgment sought to be vacated is a cognovit judgment, however, the party filing a Civ.R. 60(B) motion has a lesser burden. A cognovit note is a "legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing[.]" *Medina Supply Co., Inc. v. Corrado*, 116 Ohio App.3d 847, 850, 689 N.E.2d 600 (8th Dist.1996), citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). A cognovit note effectively eliminates

the debtor's opportunity to be heard before judgment is rendered. *See G.W.D. Ents., Inc. v. Down River Specialties, Inc*., 8th Dist. Cuyahoga No. 78291, 2001 Ohio App. LEXIS 2313, 2 (May 24, 2001). Due to the special circumstances involving a cognovit note, a Civ.R. 60(B) movant only needs to assert that the motion was timely and that there is a meritorious defense. *Medina Supply* at 850-851. When a motion for relief from judgment of a cognovit note "is pursued in a timely manner and in light of a proper allegation of a meritorious defense, any doubt should be resolved in favor of setting aside the judgment so that the case may be decided on the merits." *Bank One, NA v. SKRL Tool & Die, Inc*., 11th Dist. Lake No. 2003-L-048, 2004-Ohio-2602, ¶ 16, citing *Advanced Clinical Mgt., Inc. v. Salem Chiropractic Ctr., Inc*., 5th Dist. Stark No. 2003CA00108, 2004-Ohio-120.

{¶10} Whether a Civ.R. 60(B) motion is considered to be filed within a reasonable time depends upon the facts and circumstances of each case. *Busselle v. Redden's Auto Body & Garage*, 8th Dist. Cuyahoga No. 85824, 2005-Ohio-4011, ¶ 9, citing *Middletown v. Campbell*, 21 Ohio App.3d 63, 486 N.E.2d 208 (12th Dist.1984). This court, however, has consistently found unjustified delays of more than two months unreasonable under Civ.R. 60(B). For example, in *Larson v. Umoh*, 33 Ohio App.3d 14, 17, 514 N.E.2d 145 (8th Dist.1986), this court held that:

> [A]n unjustified four-month delay necessarily precludes relief from a money judgment. *Mount Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App. 2d 285, 289, 413 N.E. 2d 850. It has even been held that an unjustified delay for two and one-half months is unreasonable as a matter of law. *Zerovnik v. E. F. Hutton & Co.* (June 7, 1984), Cuyahoga App. No. 47460, unreported. Further, we affirmed the denial of relief from a money

> judgment when the movant failed to justify his fifty-one-day delay in seeking that relief. *Riley v. Heritage Mut. Ins. Co.* (Sept. 25, 1986), Cuyahoga App. No. 50972, unreported.
>
> **{¶11}** We further reiterated this point in *Busselle*:
>
> [W]e have consistently recognized that filing a Civ.R. 60(B) motion for relief from judgment several months after the party received actual notice of the judgment and absent any explanation for the delay, is considered unreasonable. *A. Packaging Serv. Co., Inc. v. Siml* (Sept. 21, 2000), Cuyahoga App. No. 77708, 2000 Ohio App. LEXIS 4300 (over 10 months was unreasonable); *Brackins v. Brackins* (Dec. 16, 1999), Cuyahoga App. No. 75025, 1999 Ohio App. LEXIS 6061 (waiting nearly a year to file motion was unreasonable); *Mount Olive Baptist Church v. Pipkins Paints and Home Improvement Ctr., Inc*. (1979), 64 Ohio App.2d 285, 289, 413 N.E.2d 850 (waiting seven months was unreasonable). *See, also, Abrams v. AAL Industries*, Cuyahoga App. No. 82831, 2003-Ohio-6179, (waiting nearly a year to file motion absent any explanation was unreasonable).

Busselle at ¶ 9.

{¶12} Thus, regardless of whether Harper asserted a meritorious defense against the cognovit judgment, we must determine if he demonstrated that his motion for relief from judgment was filed within a reasonable time. After review, we find that he did not meet this threshold burden. In the instant case, Harper received notice of the cognovit judgment on June 1, 2011. Despite receiving this notice, he waited nearly five and one-half years — until November 20, 2016 — to file his Civ.R. 60(B) motion.

{¶13} Harper argued in his Civ.R. 60(B) motion that he timely filed his motion based on two theories. First, he argued that the cognovit note was void ab initio, and thus, could be filed at anytime. Next, he argued that his delay was reasonable because he was participating in settlement talks with the lender. For the reasons set forth below, we find no merit to either of these arguments.

A. Void Ab Initio

{¶14} Harper argued in his motion that the cognovit note was void ab initio due to the lack of the required statutory warning language under R.C. 2323.13(D) (warrant of attorney to confess judgment), and because the cognovit note was actually a consumer loan, which is prohibited under R.C. 2323.13(E). We note that Harper also raised these arguments in his fourth and fifth assignments of error on appeal, which we will address now.

{¶15} When cognovit instruments do not comply with the requirements of R.C. 2323.13(D), the trial court lacks subject matter jurisdiction to enter cognovit judgment, and judgment entered on such a cognovit note is void ab initio. *PC Surveillance.net, L.L.C. v. Rika Group Corp*., 7th Dist. Mahoning No. 11 MA 165, 2012-Ohio-4569, ¶ 21.

{¶16} R.C. 2323.13(D) provides that:

> A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1974, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the space or spaces provided for the signatures of the makers, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:
>
> "Warning — By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

{¶17} Harper contends that the required warning (or warrant of attorney to confess

judgment) does not appear directly above or below the signature block on the cognovit note. We disagree.

{¶18} In this case, the statutory warning is bolded and in all capital letters. It begins on the bottom of page three and continues at the top of page four, which is then followed by the signature block. Harper's signature is the first of the three borrowers and is directly below the warrant of attorney. Thus, although the warning was not entirely on the same page, it was still placed directly above the signatures.

{¶19} Harper further argues that he did not see the entire statutory warning because he was only given page four of the note. Harper's initials, however, appear at the bottom of all four pages. Indeed, on the bottom of page three — where the statutory warning begins — Harper's initials are literally right under the first part of the warning (approximately a quarter of an inch below the warning), which again is bolded and in all capital letters.

{¶20} Harper next argues that the cognovit note was void because the loan was for consumer purposes. The note itself, however, clearly states that its purpose was for a business loan. The note also states in a separate section that the proceeds of the note were being "used to purchase and rehabilitate an investment property that borrowers intend to either lease or resell for profit."

{¶21} Harper asserts (and testified as much at the hearing) that the loan was actually for Donald Williams's personal debt, but the trial court could not consider his testimony under the parol evidence rule.

{¶22} "The parol evidence rule is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting the terms of the contract with evidence of alleged or actual agreements." *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 440, 662 N.E.2d 1074 (1996). Thus,

> "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."

Id., quoting 3 Corbin, *Corbin on Contracts*, Section 573, at 357 (1960).

{¶23} The purpose of the parol evidence rule is to protect the integrity of written contracts. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000); *Ed Schory & Sons* at 440. By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments. *Id*. The parol evidence rule, however, does not prohibit a party from introducing extrinsic evidence for the purpose of proving fraudulent inducement. *Id*., citing *Drew v. Christopher Constr. Co., Inc.*, 140 Ohio St. 1, 41 N.E.2d 1018 (1942), paragraph two of the syllabus.

{¶24} Establishing a fraud claim for purposes of overcoming the parol evidence rule is not easy. The *Galmish* court explained:

> "[A] fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit."

Id. at 29-30, quoting Shanker, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court)*, 23 Akron L.Rev. 1, 7 (1989).

{¶25} Here, Harper does assert that he was fraudulently induced into entering the cognovit note and he testified to matters outside of the contract in his attempt to prove this claim. But evidence that the loan was actually for personal debt and not for commercial purposes was not one of those reasons. The purported "false promise" was that he was told that the property securing the note would easily cover the amount of the loan if there was a default on the loan, and thus, there was no risk to the loan — it had nothing to do with Harper's claim that the loan was for consumer purposes.

{¶26} Accordingly, Harper's fourth and fifth assignments of error are overruled.

B. Settlement Talks

{¶27} Harper further argues that his nearly five and a-half year delay in filing his Civ.R. 60(B) motion was reasonable because he was involved in settlement talks with Trustar and Emerman. Harper, however, never offered any proof of these purported settlement talks besides his own self-serving testimony. Even assuming for the sake of argument that Harper was involved in settlement talks, that would never have justified a delay of five and a-half years.

{¶28} Moreover, the record negates Harper's claim that he was involved in settlement talks at all — let alone for many years. The evidence established at the hearing showed that Harper did everything he could for as long as he could to avoid

paying the debt.

{¶29} Thus, Harper failed to establish that he filed his motion for relief from judgment within a reasonable time. Because Harper has not met this threshold requirement under Civ.R. 60(B) and *GTE Automatic*, 47 Ohio St.2d 146, 351 N.E.2d 113, we do not need to reach his other three assignments of error because they all go to whether he established he has a meritorious defense, which is irrelevant because he failed to establish the first part of the test. Thus, Harper's remaining assignments of error are moot.

{¶30} Accordingly, we overrule Harper's five assignments of error and affirm the judgment of the trial court because it did not abuse its discretion when it denied Harper's Civ.R. 60(B) motion.

{¶31} Judgment affirmed.

It is ordered that appellee recover from appellant the 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.

MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and

SEAN C. GALLAGHER, J., CONCUR