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EXPLANATION OF WHY THIS CASE IS
OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an issue of public or great general interest and concern as it challenges the application of Ohio Civil Rule of Procedure 60(B) and the “abuse of discretion” standard of review. In this case, the Eighth Circuit Court of Appeals, citing an abuse of discretion, reversed and remanded the judgment of the Cuyahoga County Court of Common Pleas which denied Appellees’ Motion to Vacate Judgment. The court of appeals found that Appellees alleged operative facts that would constitute a meritorious defense if found to be true.

The decision of the court of appeals threatens the application of Civil Rule 60(B) by this State’s common pleas courts. In the instant case, the common pleas court reviewed the parties’ briefs filed in response to Appellees’ Motion to Vacate Judgment and held an evidentiary hearing where it heard oral testimony of the parties and integral third-parties. As the trier of fact, the common pleas court weighed the evidence presented and held that Appellees failed to meet the standards of Civil Rule 60(B). Specifically, the common pleas court found that Appellees failed to allege a meritorious defense and therefore denied Appellees’ Motion to Vacate Judgment.

In its decision, the court of appeals stepped into the shoes of the common pleas court and inappropriately overturned its factual determination. The court of appeals failed to demonstrate how the common pleas court’s denial of Appelles’ Motion to Vacate Judgment was unreasonable, arbitrary or unconscionable per the “abuse of discretion” standard of review. If allowed to stand, the court of appeals’ decision would give parties a second opportunity to obtain a favorable ruling on appeal and would change the “abuse of discretion” standard of review.

STATEMENT OF THE CASE AND FACTS

This case arises from a breach of a contract for the purchase of certain business assets. Appellant Baker Motors, Inc. (hereinafter “Baker” or “Appellant”) operated as an automobile towing company in Lakewood, Ohio. George Baker, Sr. founded Baker Motors in 1941 and ran the business until his son, George Baker, Jr. took over operations in 1968. Baker, Jr. ran the business until its sale to Appellee Baker Motors Towing, Inc. (hereinafter “BMT” or “Appelles”) in January 2007. BMT is an Ohio business incorporated by Mark Lundy for the sole purpose of the purchase and operation of BMT’S business.

In the years preceding the sale, Baker began to accumulate outstanding federal and state tax liabilities due to significant changes in state law regarding the methods by which Ohio towing companies could dispose of unclaimed vehicles. These changes directly and substantially affected the income and profits of towing companies within the State of Ohio. The significant reduction in Baker’s income directly impeded its ability to pay outstanding taxes.

Due to Mr. Baker’s increasing age and declining health, he decided to sell the business in 2005. Several potential purchasers contacted Baker to discuss a sale. Eventually, Mark Lundy convinced Baker that his company, BMT, was the most suitable buyer. Lundy spent over one year working alongside the employees and management of Baker before any sale documents were executed. Lundy learned the workings of the business and was familiar with its strengths and weaknesses. In that capacity, Lundy was also informed of the outstanding tax liabilities of Baker.

Due to the potential ramifications of these outstanding tax issues, this information was provided to all serious suitors. For his part, Lundy engaged the law firm of Ulmer & Berne to review the outstanding tax matters and possible implications of a sale between the parties.

Ulmer was heavily involved in crafting contractual provisions specifically designed to address the tax issues. Counsel for the parties spent several months intensely negotiating the contractual language to be included in the Agreement. The Agreement and its counterparts were executed by the parties on January 10, 2007. Although Defendants' Motion to Vacate denies any knowledge of the outstanding tax issues, the facts tell a very different story.

In May 2007, approximately four months after the sale, BMT received correspondence from the State of Ohio indicating that BMT qualified as a "successor entity" under Ohio law. The correspondence further stated that by virtue of this qualification, BMT may be liable to the State for any outstanding Bureau of Workers Compensation ("BWC") premiums due by Baker. The letter concluded by informing BMT that it had a right to appeal the State's determination of his status as "successor employer". It is important to note that the May 2007 letter did not demand payment from BMT, did not state that a balance due existed, nor did it threaten action against BMT.

Notwithstanding the terms of the Agreement, BMT continuously defaulted in its obligation to pay the monthly payments to Baker. In fact, beginning with the first payment due under the Agreement in February 2007, BMT never made a timely payment to Baker. Counsel for Baker issued written warnings to BMT regarding the tardiness of the payments. Finally, on August 17, 2007, Baker sent correspondence to BMT demanding that all past due payments be paid immediately. Lundy failed to heed the warnings of this correspondence and paid, if at all, untimely and/or partial payments through February 2008.

As a result of Lundy's continued breach, Appellant Baker Motors, Inc. obtained a Confession of Judgment on a Cognovit Note against Appellees Mark Lundy and Baker Motors Towing, Inc on April 25, 2008. The Confession of Judgment was granted as part of the sale of

Baker Motors, a Lakewood towing company, from George Baker and Baker Motors, Inc. to Mr. Mark Lundy and Baker Motors Towing, Inc. BMT failed to make numerous monthly payments to Baker subsequent to the sale, beginning with the first payment due under the Asset Purchase Agreement (hereinafter the "Agreement"). The amount awarded to Baker through the Confession of Judgment totals \$123,163.73, plus interest and costs. Service of the judgment was perfected on BMT on May 5, 2008.

BMT filed a Motion to Vacate Judgment and Request for an Oral Hearing on May 28, 2008, with a Supplemental Brief filed on June 6, 2008. Baker filed its Objection to said Motion on June 20, 2008. BMT also filed a Reply to Plaintiff's Objection on July 3, 2008. On August 8, 2008, an oral hearing was held on BMT's Motion to Vacate. Testimony of each party was taken during the hearing. After due consideration of all matters, the common pleas court entered an order denying BMT's Motion to Vacate on August 11, 2008. BMT timely filed a Notice of Appeal on September 9, 2008.

After hearing oral arguments, the Court of Appeals for the Eighth District of Ohio reversed and remanded the judgment of the Cuyahoga County Court of Common Pleas, finding that BMT and Lundy alleged operative facts that would constitute a meritorious defense if found to be true. Specifically, the court of appeals found that BMT alleged a defense to Baker's claims when it argued that its payment obligations were suspended under the Agreement.

The court of appeals erred in ruling that the common pleas court abused its discretion and in ordering the court of common pleas to vacate the judgment on the cognovit note and guaranty.

In support of its positions on this issue, the Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: In order to find an abuse of discretion, an appellate court must determine that the trial court's decision denying an appellant's motion was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment.

In this case, the issue is whether the court of appeals appropriately applied the "abuse of discretion" standard of review on an appeal from a denial of a motion to vacate judgment.

To prevail on a motion brought pursuant to Civil Rule 60(B), the moving party must demonstrate that: "(1) the party has a meritorious defense to present if relief is granted; (2) that the party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5); and (3) the motion is made within a reasonable time." GTE Auto. Elec. v. ARC Indus., 47 Ohio St. 2d 146 (Ohio 1976). In the case of a cognovit judgment, a number of courts within the State of Ohio have applied a less stringent test due to the fact that a defendant did not have the chance to be heard in court. First Natl. Bank of Pandora v. Freed, 2004 Ohio App. LEXIS 3209 (Ohio Ct. App. 3rd Dist. 2004). Under the less stringent level of review, a defendant only needs to show that he or she has a meritorious defense, and that the motion is made within a reasonable time. Id. However, a motion for relief from judgment under Civil Rule 60(B) is addressed to the sound discretion of a trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. World Tire Corp. v. Webb, 2007 Ohio App. LEXIS 4517 at *28 (Ohio Ct. App. 5th Dist. 2007).

An abuse of discretion consists of more than an error of law or judgment, rather it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Blakemore v. Blakemore, 5 Ohio St. 3d 217, 219 (Ohio 1983). Reversal under an abuse of discretion standard is only appropriate if the abuse of discretion renders the result so palpably and grossly violative of fact

and logic that it evidences not the exercise of reason, but rather of passion or bias. Gursky v. Gurksy, 2003 Ohio App. LEXIS 5087 at *6 (Ohio Ct. App. 11th Dist. 2003).

In this case, the court of appeals held that the common pleas court abused its discretion when it denied Appellees' Motion to Vacate Judgment. The court of appeals went on to find that Appellees alleged operative facts which would constitute a meritorious defense if found to be true. Specifically, the court of appeals found that BMT should be entitled to the opportunity to demonstrate that the Ohio Bureau of Workers' Compensation's assertion of a statutory lien against the assets purchased by BMT suspended BMT's payment obligation under the Agreement. However, the court of appeals failed to explain how the common pleas court's denial of the motion to vacate was unreasonable, arbitrary or unconscionable.

The court of appeals erred in finding that the common pleas court abused its discretion in denying the motion to vacate, particularly when the parties presented substantial written and oral testimony to support their arguments. Most notably, Appellant alleged that Appellees were in default of the Agreement from the first payment due under the agreement in January of 2007. As Appellees were already in breach of the agreement, any alleged subsequent breach by Appellant would not constitute a meritorious defense. The common pleas court correctly weighed the evidence and denied Appellees' Motion to Vacate Judgment. The court of appeals erred in finding the court of common pleas abused its discretion and failed to explain how the common pleas court's denial was unreasonable, arbitrary or unconscionable.

CONCLUSION

Based on the foregoing, this case involves matters of public or great general interest. The Appellant requests that this Honorable Court accept jurisdiction in this case so that the important issue presented will be reviewed on the merits.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, Paul Knott, 1370 Ontario Street, 1810 The Standard Building, Cleveland, Ohio 44113 on August 25th, 2009.



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JUL 13 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92049

BAKER MOTORS, INC.

PLAINTIFF-APPELLEE

vs.

BAKER MOTORS TOWING, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-657912

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

RELEASED: July 2, 2009

JOURNALIZED:

JUL 13 2009

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Appendix Page One

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FILED AND JOURNALIZED
PER APP. R. 22(E)

JUL 13 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JUL 2 - 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DE

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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).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

KENNETH A. ROCCO, P.J.:

Defendants-appellants, Baker Motors Towing, Inc. (“BMT”) and Mark Lundy, appeal from a common pleas court order denying their motion to vacate a cognovit judgment entered against them. They argue their motion was timely and asserted meritorious defenses to the claims of plaintiff-appellee, Baker Motors, Inc. (“BMI”). We find the common pleas court abused its discretion by denying the motion to vacate. Accordingly, we reverse and remand with instructions to vacate the judgment.

Procedural History

On April 25, 2008, BMI filed its complaint for judgment on (1) a cognovit note that BMT executed in favor of BMI, and (2) Lundy’s personal guaranty of BMT’s obligation, which also contained a confession of judgment. The court immediately entered judgment against both BMT and Lundy in the amount of \$123,163.73 plus interest and attorney’s fees.

On May 28, 2008, BMT and Lundy moved the court to vacate the judgment entered against them. They asserted that the court should vacate the judgment because their motion was timely and they had a meritorious defense and counterclaim to assert.

In the motion to vacate, BMT and Lundy alleged that BMT had purchased the assets of BMI in January 2007. The asset purchase agreement required

BMT to pay BMI \$20,000 at closing and to provide a cognovit promissory note for the remainder of the purchase price. Lundy guaranteed the balance due to BMI. A separate real estate purchase agreement provided for the transfer of certain real property from Anna Baker to Cheryl Lundy.

According to the motion to vacate, on May 16, 2007, Lundy received notice that the Ohio Bureau of Workers' Compensation ("OBWC") had determined that BMT was the successor corporation of BMI, and was "responsible for all existing and future financial rights and obligations associated with [BMI]." On June 7, 2007, the OBWC invoiced BMT for \$254,161.73 in premiums that BMI had failed to pay. BMT asserted that the OBWC claimed a statutory lien on all of BMT's property.

BMT stopped making payment under the asset purchase agreement after a partial payment in March 2008. It claimed the right to do so under sections three¹ and eleven² of the asset purchase agreement, section two³ of the first

¹Generally speaking, in paragraph three of the asset purchase agreement, BMI warranted that the assets it sold to BMT were free from any adverse claims or liens.

²In paragraph eleven, BMI agreed to indemnify BMT and hold it harmless from any liability for damages resulting from an adverse claim.

³The first amendment to the asset purchase agreement stated that BMT was required to give BMI notice if any governmental authority initiated any action with respect to a lien against the assets "arising from or related to the operation of the Business prior to Closing." The agreement gave BMI one hundred and eighty days after this notice to resolve a claim; all payment due pursuant to the note and guaranty

amendment to the asset purchase agreement, and section six of the cognovit note.

The court conducted a hearing on the motion to vacate, at which it heard the testimony of Mark Lundy; Michelle Mergen of the OBWC; George Baker, the president of BMI; and his wife, Anna Baker. On August 11, 2008, the court denied the motion to vacate. This appeal followed.

Law and Analysis

We review the common pleas court's ruling on the motion to vacate for abuse of discretion. See, e.g., *CitiMortgage, Inc. v. Guthrie*, 175 Ohio App.3d 115, 2008-Ohio-583, ¶ 14. "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.

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. However, where, as here, the movant seeks to vacate a cognovit

were suspended during this time. If BMI did not resolve the claim, then BMT's payment obligations ceased, and the contract was deemed paid in full.

judgment, the parties agree that a less stringent standard applies because the movant did not have an opportunity to be heard before the judgment was entered. “[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.

BMI concedes that the defendants’ motion was timely, but asserts that they have not demonstrated that they have a meritorious defense. Thus, our review here is limited to the question whether the trial court abused its discretion by determining that BMT had not demonstrated a meritorious defense.

BMT claims that it demonstrated three meritorious defenses to BMI’s claims: (1) that its performance was excused by BMI’s breach of its warranty that the assets were free and clear of all liens and adverse claims; (2) that it had the right to set off the amounts claimed by the OBWC against the balance due to BMI under the contract; and (3) that its payment obligations were suspended once BMT notified BMI of the state’s claims.

The defenses available to the maker of a cognovit note are extremely limited. The “defense of non-default” 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.” *First Nat’l Bank of Pandora v. Freed*, Hancock App. No. 5-03-36, 2004-Ohio-3554, ¶9-10.

A counterclaim or set-off is not a meritorious defense to a cognovit judgment. *Kistner v. Cameo Countertops, Inc.*, Lucas App. No. L-04-1128, 2005-Ohio-1883, ¶6. Rather, “a counterclaim or set-off is, in effect, a claim ‘that would reduce or satisfy the amount due on the note’; and relief from cognovit judgment is ‘granted only to the defendant who has a *defense* to the action.’” (Emphasis in original.) *Natl. City Bank v. Mulinex*, Lucas App. No. L-05-1066, 2005-Ohio-5460, ¶20, quoting *Cambridge Prod. Credit Assn. v. Shaner* (May 8, 1987), Perry App. No. CA-351.⁴

BMT’s contention that BMI breached its warranty of title is not a defense but a counterclaim. It does not call into question “the integrity and validity of

⁴Of course, a judgment debtor retains the right to prosecute a counterclaim in a separate action. *Cent. Natl. Bank of Cleveland v. Std. Loan & Fin. Co.* (1964), 5 Ohio App.2d 101, 105. See *Shuford v. Owens*, Franklin App. No. 07AP-1068, 2008-Ohio-6220, ¶20.

the creation of the debt or note” or “the state of the underlying debt at the time of confession of judgment.” Consequently, it is not a defense to BMI’s claim.⁵

Similarly, BMT’s claim that it may set off its liability to the OBWC against its liability to BMI is not a defense to liability under the note, but a means of reducing liability.

On the other hand, however, BMT alleged a defense to BMI’s claims when it argued that its payment obligations were suspended under the contract. This argument goes to the “state of the underlying debt at the time of confession of judgment.” It contends that non-payment was not a breach. This defense is supported by section two of the first amendment to the asset purchase agreement, which states that if a state government agency “shall at any time * * * initiate any action against [BMT] and/or any of the Sale Assets with respect to any liens against [BMI] and/or any of the Sale Assets arising from or related to the operation of the Business prior to Closing, [BMT] shall give [BMI] prompt notice thereof.” The contract gives BMI one hundred and eighty days from the date of the notice to resolve all issues with the governmental authority. During

⁵A breach only excuses the other party from performing where the contract consists of an exchange of promises, and performance by one is a condition to performance by the other. See Restatement, Second, of the Law of Contracts, §347. No reasonable construction of the contract can make “non-breach” of the warranty of title a condition precedent to BMT’s payments.

this time, “any and all payment obligations of [BMT] (and Mark Lundy, as guarantor) under the Note shall be suspended.”

In opposition to BMT’s argument, BMI asserts, among other things, that the OBWC did not initiate any action against BMT that would have allowed BMT to provide notice to BMI under section two. BMI also argues that BMT did not provide it with proper notice. “The movant’s burden [on a motion for relief from judgment] is to allege a meritorious defense, not to prevail with respect to the truth of the meritorious defense.” *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247 note 3; see, also, *Moore v. Emmanuel Family Training Ctr.* (1985), 18 Ohio St.3d 64, 67. “[T]he movant is not required to prove that she will ultimately prevail if relief is granted. Rather, the burden on the moving party is only 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. BMT and Lundy alleged operative facts that would constitute a meritorious defense if found to be true. Therefore, the common pleas court abused its discretion by denying the motion to vacate. Accordingly, we reverse and remand with instructions to vacate the judgment on the cognovit note and guaranty.

Cognovit notes are disfavored; hence, the burden is reduced on a motion to vacate a cognovit judgment. *Lykins Oil Co. v. Pritchard*, 169 Ohio App.3d 194, 2006-Ohio-5262, ¶1; *Gerold v. Bush*, Erie App. No. E-07-013, 2007-Ohio-

5885, ¶ 15-16. BMT has clearly met this reduced burden here by presenting a defense which, if proven, would defeat liability on the note. The OBWC asserted a \$250,000 statutory lien against the assets purchased by BMT. This lien was based on BMI's failure to pay its premiums, and thus appears to arise from or relate to the operation of the business prior to the closing of the asset purchase agreement. Juxtaposed against this diminution in the value of BMT's assets is BMT's total remaining debt to BMI on the cognovit note of \$123,000. At the time the complaint was filed, BMT had missed fewer than two full payments; less than \$2,000 was then due and payable. BMT is entitled to the opportunity to demonstrate that the OBWC's assertion of a lien against its assets suspends (and may ultimately eliminate) its payment obligation, thus precluding BMI from obtaining a judgment on the cognovit note.

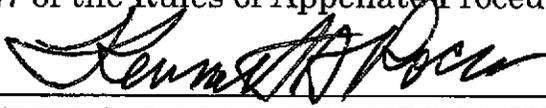
Reversed and remanded.

It is ordered that appellants recover from appellee 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.



KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MARY J. BOYLE, J., CONCUR