

ORIGINAL

IN THE SUPREME COURT OF OHIO,
COLUMBUS, OHIO

THE HOME SAVINGS & LOAN)
COMPANY OF YOUNGSTOWN, OHIO)
)
Plaintiff/Appellant)
)
v.)
)
VANDELEUR INVESTORS, LLC et al.,)
)
Defendants/Appellees)

CASE NO. 11-1866

On Appeal from the Tenth
District Court of Appeals, Case No.
10AP-1180

Franklin County Court of Common
Pleas, Case No. 09CVH-08-11902

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS,
VANDELEUR INVESTORS, LLC AND JAMES J. MORO

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Proposition of Law No. I: A party seeking relief from a Cognovit Judgment pursuant to Civil Rule 60(B) must show the existence of operative facts which, if believed, would support a meritorious defense or defenses to the Judgment, but need not prove that it would actually prevail at a trial on one or more of these defenses if the Cognovit Judgment is vacated.....4

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EXPLANATION OF WHY THIS CASE IS OF GREAT GENERAL & PUBLIC INTEREST AND CONCERNS SUBSTANTIAL CONSTITUTIONAL ISSUES FOR WHICH LEAVE TO APPEAL TO THIS COURT SHOULD BE GRANTED.

This cause concerns an opinion and judgment entry overruling the Assignments of Error submitted by the Appellants, Vandeleur Investors, LLC and James J. Moro, to the Franklin County Court of Appeals, wherein that Court affirmed the Judgment of the Trial Court and denied the Appellants' Motion for Relief from Judgment made pursuant to Civ. R. 60(B). The underlying Judgment from which the Appellants sought relief was a Judgment based upon a Cognovit Note and Judgment had been entered in the sum of \$520,863.56, plus interest, costs and fees. For the reasons which follow, the Appellants respectfully submit that the Supreme Court of Ohio should accept jurisdiction of this matter.

The first issue raised in this matter concerns the proper standards to be applied in determining whether a movant has met the burden in establishing that the movant is entitled to relief from a Cognovit Judgment pursuant to Civ. R. 60(B). With respect, the Appellants submit that this issue is of a constitutional magnitude, since Cognovit Judgments necessarily involve a party's waiver of its due process rights under both the Federal and Ohio Constitutions, as well as several other constitutional provisions such as the "open courts" provisions contained in the Ohio Constitution.

While there are a plethora of cases which address the standard a movant must meet when seeking relief from judgment which has been made based upon a Cognovit Note, the cases are quite unclear as to precisely what a movant must show to be entitled to relief in a variety of areas. For example, as is more fully discussed below, the Decision in the case at bar appears to be completely at odds with several cases which

appear to hold that a movant need not establish in a Civ. R. 60(B) exercise that it will actually **prevail** on any particular meritorious defense if the Cognovit Judgment is, indeed, vacated, and the matter proceeds to trial. Rather, such a movant is only required to show the existence of facts which could support such a meritorious defense should the matter proceed to trial. A review of all the relevant documents in this matter, especially, the Decision by the Court of Appeals, reveals that the Appellants in the case at bar were held to a higher standard and, in effect, forced to try their case before the Magistrate.

The appellate decisions throughout the State of Ohio concerning this issue are less than clear and this Court has not specifically addressed such in quite some time. In as much as the State of Ohio is presently endeavoring to stabilize its economic base and build jobs, the procedure for Cognovit Notes and judgments rendered thereon in Ohio courts is both a timely and quite important issue.

The Second Proposition of Law presented herein concerns specifically what is required of a Trial Court in a Decision and Judgment regarding Objections to a Magistrate's Decision. In the case at bar, Order appealed from constituted both a "Decision" and "Judgment Entry" concerning the Appellants' Objections to the Magistrate's Decision herein. There is virtually nothing contained in the court's ruling that conveys to the Appellants, or for that matter a reviewing court, how the Trial Court in the case at bar came to the result that it did. Consequently, whether or not the Trial Court actually conducted the independent review required by the Civil Rules with regard to Objections to the Decision of a magistrate, is impossible to tell. Considering that Magistrates in the State of Ohio are now employed in everything from Domestic Relations Courts to civil cases involving hundreds of thousands of dollars, such as the

case at bar, the Appellants respectfully submit that clarification of precisely what is required of trial courts in this regard is much needed and, obviously, will have a great impact.

STATEMENT OF THE CASE

On August 7, 2009, a Cognovit Judgment by the Appellee was both sought and granted by the Trial Court and Judgment was entered in the amount of \$520,863.65, plus interest, costs and fees. This also included an award of attorney fees. Well within the one year time limit, the Appellants filed a Motion for Relief from Final Judgment on February 25, 2010. The matter was then assigned to a Magistrate for further proceedings. After conducting a hearing, the Magistrate ultimately denied the Appellants' Motion.

The Appellants filed timely Objections to the Magistrate's Decision. In an Entry filed on November 23, 2010, the Trial Court denied the Appellants' Objections and adopted the Decision of the Magistrate.

The Appellants then perfected a timely appeal to the Franklin County Court of Appeals. The matter was fully briefed and argued. On September 20, 2011, the Court of Appeals rendered the Decision now appealed from, which affirmed the Decision of the Trial Court. This appeal follows.

STATEMENT OF FACTS

The Appellants entered into, *inter alia*, a Cognovit Note with the Appellees for the purpose of constructing a home on a piece of residential real estate. The Appellant, Vandeleur Investors, LLC (Vandeleur), was the principle on the Cognovit Note and James J. Moro signed the document as a "member" of Vandeleur. Subsequently, the

Appellee alleged that the Cognovit Note fell into default, sought a Judgment on such and obtained such as previously described.

Subsequently, the Appellants sought relief from judgment pursuant to Civ. R. 60(B). There is no question that said Motion was filed in a timely fashion. In their Motion, the Appellants raised three meritorious defenses, including: (a) a claim for fraudulent inducement as to the personal guarantee of James J. Moro; (b) a claim that the character of the loan constituted a consumer loan and, consequently, a Cognovit Judgment could not be taken thereon; and (c) that the Appellant, Vandeleur, was entitled to certain payments and offsets which should have been employed to reduce the balance of the Judgment granted.

Although this cause focuses upon questions of law, such other facts as are necessary to clarify and support such will be included in the "Argument" section below.

ARGUMENT

Proposition of Law No. I: A party seeking relief from a Cognovit Judgment pursuant to Civil Rule 60(B) must show the existence of operative facts which, if believed, would support a meritorious defense or defenses to the Judgment, but need not prove that it would actually prevail at a trial on one or more of these defenses if the Cognovit Judgment is vacated.

In the case at bar, the Appellants are unable to specifically determine the reasoning behind the Trial Court's rejection of the Appellants' Objections to the Magistrate's Decision, as is more fully addressed below. Adding insult to injury, the Court of Appeals affirmed the Trial Court's Judgment in this regard, which involved over a half a million dollars, in a four page Decision which cited absolutely no authority whatsoever other than a generic reference to Civ. R. 60(B). Frankly, in over 25 years of appellate practice, Counsel for Appellants has never seen a Decision which cites

absolutely no authority whatsoever. In any event, the Appellants respectfully submit that the Decision by the Court of Appeals in the case at bar reveals that the Appellants were being held to a standard whereby the Appellants were required to show that they would actually prevail upon their meritorious defenses at a trial if the Cognovit Judgment in question was vacated. With respect, the Appellants submit that this is an improper standard.

At the hearing before the Magistrate, the Appellants presented the known facts that they would rely upon at trial in support of their claim that meritorious defenses were available to Appellants. One must remember that the Appellants were seeking relief from a Cognovit Judgment and, consequently, no sort of discovery, pretrial conferences, etc., that one normally associates with trial preparation were not available to the Appellants.

While perhaps legal, judgments upon Cognovit Notes are generally disfavored due to the fact that a Defendant is deprived of both notice and the opportunity to answer the Complaint prior to the time that a trial court enters Judgment on the Note. *Fifth Third Bank v. Schoessler's Supply Room, LLC*, 2010-Ohio-4074.

Due to potential abuse and the harsh results associated with Cognovit procedure, Ohio Courts employ a modified scrutiny of Motions for Relief from Cognovit Judgments made under Civ. R. 60(B). Generally speaking, relief from judgment pursuant to Civ. R. 60(B) is only available in the presence of: (1) a meritorious claim or defense; (2) entitlement to relief pursuant to one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) a timely Motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* 2006-Ohio-5262. However, if the judgment in question involves a Cognovit procedure, the movant need not prove that it is entitled to relief specifically pursuant to one of the grounds stated

in Civ. R. 60(B). *Producer's Credit Corp. v. Voge* 2003-Ohio-1076. Application of the wrong standard by a trial court in its analysis of a Motion for Relief from Judgment where the Judgment is based upon a Cognovit Note, has been held to be reversible error. *Fifth Third Bank v. Worst Brothers Properties, Ltd.* 2010-Ohio-5807.

In the case at bar, there is no question that the Appellants' Motion was filed in a timely fashion. Thus, the only remaining question concerns whether or not the Appellants established operative facts supporting potential meritorious defenses. It is in this area that the courts below erred and which is in great need of clarification by this Court. Obviously, the Magistrate, the Trial Court, and the Court of Appeals below in the case at bar felt that the evidence presented by the Appellants was neither credible nor sufficient. However, other reviewing courts have held that in ruling on a Motion made pursuant to Civ. R. 60(B), it is not the function of a trial court to either "determine the credibility of witnesses or weigh the evidence." *Marchinko v. Lyon* (April 12, 1995), Summit App. No. 16866, unreported. At the hearing before the Magistrate, the Appellants presented a variety of factual evidence supporting the various "meritorious defenses" that they intended to present at trial.

For example, an issue existed as to the personal liability of the Appellant, James J. Moro. In this regard, Mr. Moro signed all of the various documents associated with the transaction followed by the word "member", indicating that he was signing in his capacity with the LLC. The Court of Appeals simply erred in finding that the guarantee provision did not contain this language. Moreover, Mr. Moro asserted that he was misled as to his personal liability in this regard by the Appellee.

In its very short analysis of this issue, the Court of Appeals for example noted Mr. Moro's sophistication in business matters, considered other aspects of the transaction, and concluded that the Magistrate's finding that this testimony was "incredible" was "correct." Obviously and undeniably, both the Magistrate and the Court of Appeals engaged in a weighing exercise in making this determination. Moreover, despite the fact that some of the documentary evidence may have weighed against this meritorious defense, other courts have held that, in the context of Civ. R. 60(B) exercises, parties to a legal transaction are always permitted to show that they understand that a purported contract did not bind them. *Id., citing National City Bank, Akron v. Dona Idson* (1994), 95 Ohio App. 3d 241.

Additionally, the Appellants presented factual evidence in support of the "meritorious defense" that the amount of the Judgment rendered did not correspond with the amount actually owed due to credits and payments made. Interestingly, and without any citation to any authority whatsoever, the Court of Appeals held that "the safeguards with respect to garnishment proceedings will protect Moro from an incorrect sum being collected." However, other reviewing courts have determined that the amount of the Cognovit Judgment does constitute a "meritorious defense" pursuant to Civ. R. 60(B)! *Harwood v. Weiss* 2005-Ohio-5543.

Based upon the foregoing, it is quite clear that clarification is needed by this Court as to the appropriate standards to be employed by a trial court in proceedings for relief for judgment pursuant to Civ. R. 60(B) concerning a Cognovit Judgment. The rule of law must be applied consistently throughout the State of Ohio concerning this issue, especially considering the difficult economic times being experienced in the present day.

In consideration of the problems posed by this case, the Appellants respectfully request that this Court accept jurisdiction of the matter.

Proposition of Law No. II: Failure by a trial court to conduct an independent review of a magistrate's decision may be inferred, where the record reveals that: (1) the decision and judgment entry of the trial court does not reveal the basis of its denial of the objections to the magistrate's decision; (2) the magistrate specifically makes findings concerning credibility, in a proceeding where the existence of evidence supporting a defense is at issue rather than the weight of such evidence; and (3) the use of the "credibility" standard by the magistrate actually constitutes an error of law.

Once again, it is very difficult to argue this particular issue due to the lack of any substance whatsoever to the Trial Court's combined Decision and Judgment Entry. For the convenience of this Court, such is attached to this Memorandum. Further, the Appellants respectfully submit that Ohio law is much less than clear as to what precisely must be contained in either a Decision or Judgment Entry which denies or overrules Objections to the Decision of a Magistrate.

Ohio law is clear that a trial court must conduct an independent review of the Magistrate's Decision. *McCarty v. Hayner* 2009-Ohio-4540. Moreover, a reviewing court will presume that a trial court actually conducted an independent review unless the party challenging such "shows" that the trial court failed to conduct such. *Id.* It is also reasonably well settled that the fact that a trial court simply adopts a Magistrate's Decision and enters Judgment thereon does not necessarily show that the trial court did not exercise independent judgment. *Rokakis v. Western Reserve Leasing Company*, 2011-Ohio-1926.

The policy considerations involved, in this rather perplexing state of the law are probably founded upon the competing interests involved to wit: a trial court's need to

exercise judicial economy verses a party's right to have a Magistrate's Decision independently reviewed by a trial court. Certainly, there is no simple solution to this quagmire.

The Appellants respectfully submit that there certainly is some overlap between this issue and the issues discussed in Proposition of Law I, *supra*. Frankly, it is difficult to imagine how an appellant could show that the trial court failed to exercise an independent review and independent judgment when, at least in most cases, a trial court does not conduct a hearing of its own and, therefore, the actual actions of the trial court are done behind closed doors in a fashion so that no record is actually created. Thus, without specifically so stating, case law in the State of Ohio has effectively established a nearly un rebuttable presumption in terms of a trial court having conducted an independent review.

At this juncture, the Appellants offer a solution to this quagmire by seeking a ruling that a trial court's failure to conduct an independent review may be gleaned from fairly obvious factual and legal errors contained in the Magistrate's Decision. For example, in the case at bar, the trial court adopted, *inter alia*, the Magistrate's finding that the evidence presented by the Appellants was not "credible." However, as is fully addressed *infra*, findings concerning credibility have no place in determining whether or not evidence exists which, if believed, would establish a meritorious defense to a Cognovit Judgment.

The standard now sought would not impose undue burdens on the trial court. It would merely establish that, should a trial court fail to give any reasoning or factual findings whatsoever in adopting a Magistrate's Decision, it essentially does so at its own

risk. The Appellants are certainly not seeking a “per se” rule that requires any sort of extensive findings by a trial court. Rather, the Appellants are simply seeking a rule which reasonably establishes some means for a party to show that a trial court has not conducted an independent review and exercised independent judgment in adopting a Magistrate’s Decision. The Appellants respectfully submit that such a rule would serve to balance the various policy considerations involved and nothing more.

CONCLUSION

In light of the above, the Appellants respectfully request that this Court accept jurisdiction of this matter and certify the Record from the Tenth District Court of Appeals.

Respectfully submitted,



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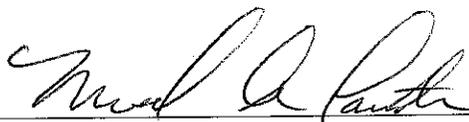
CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction**, is being served via regular U.S. Mail, postage prepaid on this 3rd day of

November, 2011, upon:

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

SEP 20 PM 12:40
CLERK OF COURTS

The Home Savings & Loan Company
of Youngstown, Ohio,

Plaintiff-Appellee,

v.

Vandeleur Investors, LLC et al.,

Defendants-Appellants.

No. 10AP-1180
(C.P.C. No. 09CVH-08-11902)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 20, 2011

Bricker & Eckler LLP, Anthony M. Sharett and Kenneth C. Johnson, for appellee.

Richard L. Goodman Co., L.P.A., and Richard L. Goodman, for appellants.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Vandeleur Investors, LLC, and James J. Moro are appealing from the failure of the trial court to grant them relief from the judgment entered against them. They assign two errors for our consideration:

1. The trial court erred as a matter of law, abused its discretion, and its decision is against the manifest weight of

the evidence, when it denied Defendants' motion for relief from cognovit judgment without considering all the facts presented at the hearing and without considering the relaxed standards associated with opening a cognovit judgment.

II. The trial court erred as a matter of law, abused its discretion, and it[s] decision is against the manifest weight of the evidence, when it simply overruled the objections to the Magistrate's Decision without any analysis or specific findings and adopted such Magistrate's Decision without independently assessing the facts and conclusions contained in the Magistrate's Decision.

{¶2} Home Savings and Loan Company of Youngstown, Ohio, filed suit against Vandeleur Investors, LLC, and James Moro on August 7, 2009. Judgment was granted the same day based upon a confession of judgment provision in the note signed by Moro which obligated both Moro and Vandeleur Investors, LLC. Stated in common terms, the note executed by Moro and Vandeleur Investors, LLC, was a cognovit note.

{¶3} Over six months later, Moro and Vandeleur Investors, LLC filed a motion seeking relief from the judgment. The motion was referred to a magistrate to conduct appropriate proceedings. The magistrate conducted an evidentiary hearing at which Moro testified and exhibits were received. The magistrate then issued a general decision overruling the motion.

{¶4} Counsel for Moro and Vandeleur Investors, LCC filed a request for findings of fact and conclusions of law. On July 20, 2010, the magistrate issued a detailed decision, again overruling the judgment.

{¶5} Counsel for Moro and Vandeleur Investors, LLC filed objections to the magistrate's decision, which were overruled.

{¶6} Turning to the assignments of error, the documents before the trial court clearly demonstrate that Moro executed the cognovit note on behalf of Vandeleur Investors, LLC. He signed the note as "James J. Moro, member." The documents related to the loan list Moro as a guarantor of the loan. His signature with respect to the guaranty provision is simply "James J. Moro." The loan was part of a construction loan agreement, not a consumer transaction.

{¶7} To set aside a judgment under Civ.R. 60(B), the party seeking relief must allege a meritorious defense. No meritorious defense is demonstrated by the testimony before the trial court. Moro may have believed that he was somehow shielded from liability on the loan by signing some of the paperwork "James J. Moro, member." His belief does not make it so. The affidavit signed by Moro at the time of the filing of the Civ.R. 60(B) motion complains that Moro was misled as to whether or not he was assuming personal liability on the construction. However, the paperwork clearly contains a series of places where Moro is referred to as "guarantor." As noted earlier, he signed the guaranty provision in his own name. Moro is clearly a sophisticated businessman who had to know that when he signed a loan guaranty in his own name, that he was obligating himself personally. Further, since Vandeleur Investors, LLC had no assets, he had to know that a savings and loan company would want something more than a document signed on behalf of an insolvent LLC to secure a loan of significant amount. The magistrate found Moro's testimony on this issue incredible and was correct to do so.

{¶8} Counsel for Moro alleges that a second defense was also meritorious, namely that the transaction was a consumer transaction. There is likewise no basis for

the allegation. The loan of over \$500,000 was clearly a construction loan, not a loan involving a consumer transaction.

{¶9} Counsel further alleges that the amount of the judgment was incorrect. This allegation does not mean that the fact of the cognovit judgment is incorrect, only that Home Savings and Loan is entitled to collect only a portion of the judgment. The safeguards with respect to garnishment proceedings will protect Moro from an incorrect sum being collected.

{¶10} Moro does not deny that a significant sum is still due on this loan. No formal answer was tendered to the trial court, only allegations in the memoranda filed in conjunction with the two motions filed. None of their allegations demonstrate a meritorious defense, as opposed to a hypothetical defense.

{¶11} Both the magistrate and the trial judge who reviewed the magistrate's decision carefully addressed the pertinent legal and factual issues. Unfortunately for Moro, the issues were straightforward and easily resolved against his interests.

{¶12} Both assignments of error are overruled.

{¶13} The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs.
SADLER, J., concurs in judgment only.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
CLEVELAND COURTS

SEP 20 PM 12:46

The Home Savings & Loan Company
of Youngstown, Ohio,

Plaintiff-Appellee,

v.

Vandeleur Investors, LLC et al.,

Defendants-Appellants.

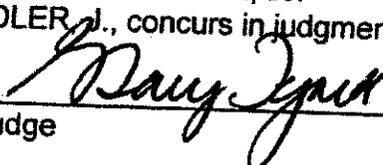
No. 10AP-1180
(C.P.C. No. 09CVH-08-11902)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 20, 2011, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

TYACK and CONNOR, JJ.
SADLER, J., concurs in judgment only.

By _____
Judge



IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO,

Plaintiff,

vs.

VANDELEUR INVESTORS, LLC, et al.,

Defendants.

CASE NO. 09 CVH-081902

JUDGE HORTON

CLERK OF COURTS
2010 NOV 23 PM 4:30
COURT OF COMMON PLEAS
FRANKLIN CO, OHIO

**DENYING DEFENDANTS' OBJECTIONS TO THE MAGISTRATE'S DECISION
FILED AUGUST 3, 2010 AND ADOPTING THE MAGISTRATE'S DECISION
RENDERED JULY 20, 2010**

Dated this 23rd day of November, 2010

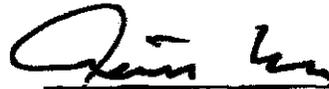
This matter is before the Court on Defendants Vandeleur Investors, LLC and James Moro's Objections to the Magistrate's Decision filed on August 3, 2010. Plaintiff filed a Memorandum Contra on August 13, 2010. The objections are considered submitted to the Court for decision pursuant to Civ. R. 53(D)(3).

On July 20, 2010, the Magistrate issued a Decision that denied Defendants' Motion for Relief from Judgment from the Final Cognovit Judgment. Defendants raise numerous objections to the Magistrates' Findings of Fact and Conclusions of Law. On July 8, 2010, a hearing was conducted by the Magistrate. This Court will now review the Magistrate's July 20, 2010 decision *de novo*. See *Shihab & Assoc. Co., L.P.A. v. Ohio Dept. of Transp.*, 168 Ohio App. 3d 405.

Defendants' Objections to the Magistrate's Decision rendered July 20, 2010 filed on August 3, 2010 are DENIED. Upon independent review and careful consideration of the Magistrate's July 20, 2010 Decision, Defendants' arguments, Plaintiff's response and the appropriate law, this Court concludes that Defendants' objections are not well taken. Finding no errors of law or other defects on the face of Magistrate's Decision, this Court hereby approves and ADOPTS the July 20, 2010 Decision pursuant to Civ. R. 53(D)(4)(a). Accordingly, Defendants' Motion for Relief from Final Cognovit Judgment is DENIED.

Pursuant to Civ. R. 58(B), the Clerk of Courts is hereby directed to serve upon all parties notice and the date of this judgment.

IT IS SO ORDERED.



TIMOTHY S. HORTON, JUDGE

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✓