

ORIGINAL

IN THE SUPREME COURT OF OHIO

FirstMerit Bank, N.A.,
Plaintiff-Appellant,

v.

Daniel E. Inks, et al.,
Defendants-Appellees.

Case Nos. 2013-0091 and 2013-0203
(Consolidated)

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No. 26182

MERITS BRIEF OF APPELLANT
FIRSTMERIT BANK, N.A.

Scott H. Kahn (0006779)
Gregory J. Ochocki (0063383)
Kahn & Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114
(216) 579-4114/ Fax (216) 579-0605
Email: info@mkkglaw.com

Counsel for Appellees, Daniel E. Inks, et al.

Thomas D. Warren (0077541)
Counsel of Record
Brett A. Wall (0070277)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114-3482
(216) 621-0200 / Fax (216) 696-0740
Email: twarren@bakerlaw.com
Email: bwall@bakerlaw.com
Email: plewis@bakerlaw.com
Email: ddow@bakerlaw.com

Counsel for Appellant, FirstMerit Bank, N.A.

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INTRODUCTION

It is a fundamental tenet of Ohio law that “[a]greements that do not comply with the statute of frauds are unenforceable.” *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009–Ohio–2057, 909 N.E.2d 93, ¶ 32. The Ninth District departed from that tenet by holding that a party could seek to enforce an agreement that did not comply with the statute of frauds, so long as it did so via Civ.R. 60(B) motion. That court’s judgment must be reversed because the application of the statute of frauds does not turn on the procedural mechanism a party uses to try to enforce an alleged oral agreement.

In this case, plaintiff-appellant FirstMerit Bank, N.A. made a \$3.5 million commercial loan personally guarantied by the appellees. After the loan went into default, the appellees entered into three written forbearance agreements, each of which provided that any changes or amendments had to be in writing. After the appellees breached the three written forbearance agreements, the real estate securing the loan was scheduled to be sold at sheriff’s auction in an Ashland County foreclosure proceeding. The appellees negotiated with FirstMerit in an attempt to secure yet another forbearance agreement to once again stop the sale. Those negotiations were unsuccessful and the real estate sold at auction.

Thereafter, FirstMerit obtained a cognovit judgment in the Summit County Court of Common Pleas against appellees on their guaranties and prior forbearance agreements. In response, the appellees filed a Civ.R. 60(B) motion seeking to vacate the cognovit judgment and to file a counterclaim, contending that FirstMerit had entered into an *oral* forbearance agreement with them. FirstMerit denies the existence of any oral agreement.

The alleged oral forbearance agreement would not have complied with two statute of frauds provisions—R.C. 1335.05, as the alleged agreement contemplated a release of a

mortgage, and R.C. 1335.02, as the alleged agreement constituted a loan agreement. But the Ninth District held that the appellees could seek to enforce their alleged oral forbearance agreement via a Civ.R. 60(B) motion, even though the statute of frauds would preclude them from enforcing the same agreement by filing a lawsuit.

This decision, contrary to law and logic, cannot stand. Simply put: either an oral agreement within the statute of frauds is enforceable, or it is not. The Ninth District's opinion attempts to condition the enforceability of an oral agreement on the procedural mechanism a party selects to enforce the agreement, rather than on the nature of the agreement. To the Ninth District, the appellees were free to enforce their alleged oral forbearance agreement, despite the statute of frauds, because they raised the oral agreement in a Civ.R. 60(B) motion to vacate a judgment rather than in a complaint.

This "action"/"defense" dichotomy is unprecedented in Ohio jurisprudence and is contrary to the statute of frauds' purpose. The statute of frauds prohibits the judicial enforcement of certain types of oral agreements both to prevent frauds and perjuries and to ensure that parties sufficiently solemnize important transactions. Whether a party elects to file a lawsuit, counterclaim, Civ.R. 60(B) motion, or affirmative defense, the party seeking to enforce the agreement must prove the agreement's existence and enforceability. There is, therefore, no reason for the statute of frauds to bar the enforcement of an agreement if the party files a lawsuit to enforce it, but to allow a court to enforce the same agreement so long as the party asserts it in a Civ.R. 60(B) motion or as a "defense." But in any event, the appellees' filing of a Civ.R. 60(B) motion constituted an "action" within the plain meaning of the statute of frauds, since the motion was a procedural means by which appellees affirmatively sought redress from the trial court.

By limiting the statute of frauds' reach as it did, the Ninth District's holding threatens to radically alter the statute of frauds landscape and undermine settled transactions. Parties to real estate and commercial loans will no longer be certain when an enforceable agreement has been reached. Borrowers will be given a powerful incentive to claim that their lenders made oral agreements to work out their loans, as doing so will allow them to tie their lenders up in costly, protracted litigation to resolve "he said, she said" factual disputes over the content of phone calls. Such a result will undermine the statute of frauds and chill free and open negotiations between parties to real estate and lending transactions.

The Ninth District's decision is equally problematic because it disregarded the unique purpose behind R.C. 1335.02, the statute of frauds provision governing loan agreements. R.C. 1335.02 was enacted after the savings & loan crisis to protect lenders from costly litigation based on claims premised on alleged "oral agreements." It specifically bars the enforcement of *all* oral agreements that fall within R.C. 1335.02(A)'s definition of "loan agreement," including forbearance agreements and other agreements to "delay" the repayment of money—precisely the types of agreements a borrower is likely to invoke in a Civ.R. 60(B) motion or as an affirmative defense, rather than in a separate lawsuit.

This Court should reverse the Ninth District's decision and clarify that Ohio's statute of frauds bars the enforcement of oral agreements within the statute's scope, regardless of the mechanism by which a party seeks to enforce such an agreement.

STATEMENT OF FACTS

A. Factual Background

In 2005, non-party Ashland Lakes, LLC (“Ashland Lakes”), an entity controlled by defendants-appellees Daniel Inks and David Slyman, executed and delivered a \$3.5 million dollar promissory note to FirstMerit to acquire commercial real estate in Ashland County. (Appx. 38). Defendants-appellees Daniel and Deborah Inks and David and Jacqueline Slyman personally guarantied the note. (*Id.*). As part of the bargain, the parties included cognovit features in the note and guaranties, enabling FirstMerit to take judgment, under R.C. 2323.13, against either Ashland Lakes or the appellees in the event of a default. (*Id.*).

Ashland Lakes defaulted on the note in 2009, and FirstMerit began foreclosure proceedings on the real estate that secured the loan in the Ashland County Court of Common Pleas in the case captioned *FirstMerit Bank, N.A. v. Ashland Lakes, LLC*, Case No. 09-CFR-022. (Appx. 67). FirstMerit later entered into three written forbearance agreements with Ashland Lakes and the appellees. (*Id.* at 39). Each forbearance agreement stipulated that any changes or amendments had to be in writing. (*Id.* at 81). Ashland Lakes and the appellees defaulted under the final written forbearance agreement by failing to pay as agreed, and the foreclosure proceeded. (*Id.* at 39, 67).

The Ashland County court appointed a private auctioneer to sell the properties, and he scheduled an auction for December 15, 2010. The day before, on December 14, 2010, Ashland Lakes filed for bankruptcy to stop the auction. (*Id.* at 67). FirstMerit promptly moved to dismiss the bankruptcy because it was filed in bad faith. The bankruptcy case was dismissed, with Ashland Lakes’ consent, on January 6, 2011. (*Id.*).

The auction was rescheduled for March 9, 2011. (*Id.* at 39, 68). In January 2011, Messrs. Inks and Slyman began negotiations with FirstMerit for a fourth forbearance agreement to delay the auction to allow them time to raise the money to acquire the properties for \$1.6 million dollars. (*Id.* at 70-71). On March 7, 2011, FirstMerit circulated a draft forbearance agreement containing the terms upon which the bank would agree to delay the auction. (*Id.* at 40, 82).

The draft agreement's basic terms required Ashland Lakes and the appellees to pay a \$200,000 deposit and to reimburse FirstMerit \$9,000 for an appraisal by March 7th, at which time the sale would be cancelled. (Rule 60(B) Mot. at Ex. D, Draft Forbearance Agt., § 3.) Thereafter, Ashland Lakes and the appellees would be given until April 21, 2011 to pay FirstMerit \$1.1 million and until October 15, 2011 to pay FirstMerit an additional \$300,000. (*Id.*) Assuming all those amounts were timely paid, FirstMerit would thereafter release its mortgage on the properties and release the appellees from their personal guaranties. (*Id.* §§ 9, 11).

Mr. Inks rejected FirstMerit's offer. In a letter to FirstMerit's representative, Mr. Krumel, sent later on March 7, 2011, Mr. Inks made a counteroffer that changed several of the bank's material terms, including but not limited to (a) a \$150,000 deposit, (b) a request that certain funds held by the properties' court-appointed receiver be disbursed to Ashland Lakes, and (c) a request that the bank defer payment of the \$9,000. (Appx. 82; Rule 60(B) Mot. at Ex. E, Inks Letter). In the letter, Mr. Inks asked Mr. Krumel to revise the draft agreement consistent with his terms and circulate it to the appellees for signature prior to the auction. (*Id.*).

This appeal arises from the parties' dispute about what happened next. Mr. Inks alleges that after sending Mr. Krumel his March 7th letter, he orally negotiated the disputed terms with Mr. Krumel over the phone and claims to have reached an oral agreement as to all terms with FirstMerit by the morning of March 8th. (Appx. 40). Mr. Inks alleges that Mr. Krumel then called the alleged deal off in the afternoon of March 8th because it was too late to stop the auction. (*Id.* at 40, 72).

FirstMerit denies ever reaching an agreement, oral or otherwise, with the appellees as to the terms of a forbearance agreement. (Appx. 71-72). To the contrary, Mr. Krumel stated that he did not agree to accept \$150,000 as a deposit, expressed skepticism as to the viability of the appellees' entire plan, and told Mr. Inks in the morning of March 8th that no deal could be reached. (Pl's Br. in Opp to Rule 60(B) Mot. at Ex. 1, Krumel Aff., ¶¶ 29-35; Appx. 72). Mr. Inks concedes that he never paid FirstMerit a deposit of any amount, that FirstMerit never revised the draft agreement, and that none of the parties executed a written agreement. (Rule 60(B) Mot. 10-11; Appx. 72).

On March 9, 2011, the properties were publicly auctioned and sold to third-party bidders for a cumulative total of \$1,760,000. (Appx. 68). Ashland Lakes moved to set aside those sales in the Ashland County proceeding, arguing that the appraisal was defective and that the sale was barred by the alleged oral agreement Mr. Inks claims he made with FirstMerit over the telephone. (*Id.*). The Ashland County common pleas court rejected both arguments, finding in particular that "Ashland Lakes, LLC has failed to establish that any forbearance agreement precluding the sale was ever consummated by the parties." (*Id.*). The Ashland County court's judgment was affirmed in *FirstMerit Bank, N.A. v. Ashland*

Lakes, LLC, 5th Dist. No. 11-COA-017, 2012-Ohio-549, *app. not accepted*, ___ Ohio St.3d ___, 2012-Ohio-4650, 975 N.E.2d 1029.¹

B. Procedural History

On May 17, 2011, FirstMerit filed a complaint for a cognovit judgment against the appellees based on their defaults under their personal guaranties and the last written forbearance agreement. The Summit County Common Pleas Court entered judgment for \$3,337,467.17, plus interest, costs, and attorney fees. (Judgment Entry dated May 17, 2011; Appx. 66).

Several weeks later, the appellees filed a Civ.R. 60(B) motion on the basis of the alleged oral forbearance agreement. (*See generally* Rule 60(B) Mot.; *see also* Appx. 40). In their motion, the appellees sought to vacate the cognovit judgment and then file a counterclaim to enforce the alleged oral agreement. (Rule 60(B) Mot. 9, 11). The trial court denied the motion, holding, in relevant part, that the statute of frauds set forth in R.C. 1335.02 and 1335.05 barred any alleged oral agreement as a matter of law. (Appx. 77-80).

On November 7, 2012, the Ninth District reversed, holding that the trial court erred in denying the Civ.R. 60(B) motion. The court held that to vacate the cognovit judgment, the appellees needed to do nothing more than simply allege the existence of an oral forbearance agreement. (Appx. 48-49). While the court conceded that R.C. 1335.02 and R.C. 1335.05 prohibit actions based upon loan agreements that are not in writing, it held that these statutes did not apply because the filing of a Civ.R. 60(B) motion was not

¹ For reasons not relevant here, only the sales of four of the five parcels (for a total of \$1,560,000) were confirmed; the sale of the fifth parcel (which sold for \$200,000) was not confirmed. (*See* Pl's Br. in Opp to Rule 60(B) Mot. at 4 and Exs. 6, 7).

“bringing an action,” but rather asserting a defense to the cognovit judgment previously entered. (*Id.* at 49).

The Ninth District reached this conclusion *sua sponte*, without the benefit of briefing or argument. Indeed, the appellees never argued that the statute of frauds did not apply to “defenses” raised in Civ.R. 60(B) motions. And the Ninth District never invited the parties to submit supplemental briefing on this issue before deciding the case.

On November 19, 2012, FirstMerit timely applied for reconsideration and to certify the Ninth District’s decision as conflicting with the decisions of several other appellate districts. On December 19, 2012, the Ninth District denied the application for reconsideration, but granted FirstMerit’s motion to certify its decision as being in conflict with the Tenth District as to the applicability of R.C. 1335.05. (*Id.* at 54, 59). The Ninth District certified the following question to this Court: “Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to the contract involving an interest in land orally agreed to modify the terms of their agreement.” (*Id.* at 64).

On January 16, 2013, FirstMerit filed a notice of certified conflict in this Court, docketed as Case No. 2013-0091. (*Id.* at 4). On February 4, 2013, FirstMerit filed a jurisdictional appeal from the same judgment to this Court, docketed as Case No. 2013-0203, because the Ninth District’s certified question was too narrow. (*Id.* at 1). Specifically, the certified question did not address R.C. 1335.02, another statute of frauds provision applicable to loan agreements, and was improperly framed in that it characterized a party’s attempt to enforce an oral agreement through a Civ.R. 60(B) motion as a “defense.”

On April 24, 2013, this Court certified that a conflict existed between the court of appeals' judgment and that of the Tenth Appellate District in *Nicolozakes v. Deryk Babriel Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), and ordered the parties to brief the question as certified by the Ninth District. (Apr. 24, 2013 Order, Case No. 2013-0091). Simultaneously, the Court accepted jurisdiction of FirstMerit's jurisdictional appeal in Case No. 2013-0203 and consolidated the two cases for further proceedings. (Apr. 24, 2013 Order, Case No. 2013-0203).

ARGUMENT

Proposition of Law No. 1: R.C. 1335.05 bars the enforcement of oral agreements concerning an interest in land regardless of the procedural mechanism a party employs to attempt to enforce such an oral agreement.

A. Agreements that do not comply with the statute of frauds are unenforceable, regardless of how a party attempts to enforce them.

As this Court has recognized for nearly two centuries, Ohio's statute of frauds is designed "for the prevention of frauds and perjuries." *Wilbur v. Paine*, 1 Ohio 251, 255 (1824). The statute of frauds serves this critical function by "informing the public and judges of what is needed to form a contract and by encouraging parties to follow those requirements by nullifying those agreements that do not comply." *Olympic Holding*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, ¶33. In *Olympic Holding*, this Court emphatically stated that "agreements that do not comply with the statute of frauds are unenforceable." *Id.* at ¶32. This holding came with no qualification.

An oral forbearance agreement runs afoul of R.C. 1335.05, which provides that "no action shall be brought . . . upon a contract or sale of lands . . . or interest in or concerning them" unless the agreement is in writing. This provision applies here because the alleged oral forbearance agreement contemplated the release of a mortgage. *See, e.g., Douglas Co. v.*

Gatts, 8 Ohio App.3d 186, 187 (11th Dist.1982) (an agreement “to release or discharge a mortgage is within the Statute of Frauds” and an oral agreement to do so is “void”);

Nicolozakes, 2000 WL 1877521, *4 (same); *see also* Appx. 79.

The Ninth District’s certified question characterizes the alleged oral forbearance agreement in this case as a modification of an existing agreement concerning lands. (Appx. 64). Whether the oral forbearance agreement is a modification or a new agreement is irrelevant to the statute of frauds analysis. It has long been the law that modifications or amendments to an agreement within the statute of frauds must also be in writing to be enforceable. *See, e.g., Franke v. Blair Realty Co.*, 119 Ohio St. 338, 164 N.E. 353 (1928), paragraph two of the syllabus (holding that a change to an “essential term of the written contract” must be in writing to be enforceable); *Mohammad v. Awadallah*, 8th Dist. No. 97590, 2012-Ohio-3455, ¶ 26 (requiring modifications to a note to be reduced to writing to comply with R.C. 1335.05); *Sutherland v. Fox*, 5th Dist. No. 04COA080, 2005-Ohio-1786, ¶ 23-25 (holding that R.C. 1335.04 and 1335.05 require any modifications to an oil and gas lease to be in writing).

In any event, the “defense”/“action” dichotomy set forth by the Ninth District cannot be the law. As set forth above, the Ninth District attempted to condition the enforceability of an oral agreement within the statute of frauds’ ambit on the method the party employs to enforce the agreement. To the Ninth District, an oral agreement can be enforced consistent with the statute of frauds so long as party asserts the agreement as a “defense.” (Appx. 48-50).

But this Court has held to be unenforceable any agreement that does not comply with the statute of frauds. *Olympic Holding*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d

93, ¶ 32. Its holding did not depend on what procedural mechanism the party employed to try to enforce a non-compliant agreement. Nor should it have. Regardless of whether the party files a lawsuit, a counterclaim, asserts an affirmative defense, or files a Civ.R. 60(B) motion, the party is seeking the same substantive relief—judicial enforcement of an oral agreement within the statute of frauds. In *Newman v. Newman*, the Court held that the statute of frauds was designed to protect against the risk of “uncertainty and . . . fraud attending the admission of parol testimony.” 103 Ohio St. 230, 245, 133 N.E. 70 (1921), quoting *Purcell v. Miner*, 71 U.S. (4 Wall) 513, 517 (1866). That risk is the same whether a party seeks to enforce such an agreement through a complaint, a counterclaim, a Rule 60(B) motion, or any other procedural vehicle.

Not surprisingly, Ohio courts have for years uncontroversially applied the statute of frauds to bar parties from “defensively” seeking to enforce oral agreements. *See, e.g., Nicolozakes*, 2000 WL 1877521, *4 (R.C. 1335.05 barred defense to a foreclosure claim based on allegation that plaintiff had orally agreed to release mortgage plaintiff sought to foreclose); *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333, *3 (Dec. 6, 1984) (affirming denial of Civ.R. 60(B) motion, on statute of frauds grounds, that alleged meritorious defense to judgment based on alleged oral agreement to release obligation within statute of frauds); *Fifth Third Bank v. Labate*, 5th Dist. No. 2005CA00180, 2006-Ohio-4239, ¶40-41 (denying Civ.R. 60(B) motion to vacate a cognovit judgment where the proffered defense to judgment was barred by R.C. 1335.02).

This Court has acknowledged that a broad reading of statute of frauds provisions is warranted, and that an “action”/“defense” distinction is not. In *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 533 N.E.2d 325 (1988), the defendants attempted to defeat an

action upon a note secured by a mortgage by asserting a counterclaim alleging that the parties had orally agreed to different terms. This Court rejected the defendants' argument that the statute of frauds did not apply to their counterclaim because it was not an "action . . . brought . . . upon a contract or sale of lands" under R.C. 1335.05. This Court rejected that argument, looking to the effect of the defendants' counterclaim, not its form. It held that the defendants "do not deny that what they ultimately seek is either a cancellation of the notes and the mortgage held by [the plaintiff] and signed by them, or such an award of damages as will effect that same result by enabling them to discharge their obligations under such writings." *Id.* at 273. Because "their counterclaim, being in essence interposed to block enforcement of the writings held by [the plaintiff], has as its core object the obviation of that very interest in the land described by such writings," *id.*, this Court held that the statute of frauds barred the assertion of the counterclaim. *Id.* The Court even deemed the counterclaim a "defense," yet still applied the statute of frauds: "[W]hen a party voluntarily places his signature upon a note . . . within the Statute of Frauds, and where that party's sole defense to an action brought upon the writing is that a different set of terms was orally agreed to at the time, such defense shall not be countenanced at law regardless of the theory under which such facts are pled." *Id.*, paragraph four of the syllabus.²

For these reasons, the statute of frauds' applicability to a given case turns on what type of agreement a party seeks to enforce, and not *how* the party seeks to enforce it.

² In *Galmish v. Cicchini*, 90 Ohio St.3d 22, 29, 734 N.E.2d 782 (2000), fn. 2, the Court found that *Marion* was, in truth, a parol evidence rule case. Nevertheless, the logic of the *Marion* court's broad reading of R.C. 1335.05 as applying to a counterclaim or defense premised on an oral agreement remains undisturbed.

Because the Ninth District incorrectly concluded otherwise, this Court should reverse its judgment in this case.

B. The Ninth District incorrectly held that seeking to vacate a judgment to enforce an alleged oral forbearance agreement is not an “action.”

The Ninth District did not dispute that the statute of frauds would bar the appellees from bringing an action to enforce their alleged oral forbearance agreement. Nevertheless, the Ninth District held that the filing of a Civ.R. 60(B) motion seeking relief from judgment was not “bring[ing] an action.” As the court held, “the Slymans and the Inkses did not attempt to ‘bring an action’ against FirstMerit, they merely raised the oral forbearance agreement as a defense to FirstMerit’s action against them.” (Appx. 48-49). Accordingly, the Ninth District held, “the trial court incorrectly concluded that their defense was barred under the statute of frauds.” (*Id.* at 49).

But moving to vacate a judgment to enforce an agreement is in the nature of “bringing an action.” While R.C. 1335.05 and 1335.02 do not define the term “action,” the word has been defined elsewhere in Ohio law to encompass any proceeding in which rights are determined, not simply the filing of a civil suit. *See, e.g.*, R.C. 1301.201(B)(1) (defining “action” as “any . . . proceeding in which rights are determined”); R.C. 2307.01 (defining “action” as “an ordinary proceeding in a court of justice . . . by which a party prosecutes . . . enforcement of a legal right”); *see also Black’s Law Dictionary* 32, 1324 (9th Ed.2009) (defining “action” as “a civil or criminal judicial proceeding,” and defining “proceeding” as “any procedural means for seeking redress from a tribunal or agency”); *Selvage v. Emmett*, 181 Ohio App.3d 371, 2009-Ohio-940, 909 N.E.2d 143, ¶ 13 (4th Dist.) (“The plain meaning of ‘action’ is ‘[a] civil or criminal judicial proceeding.’”).

The Civ.R. 60(B) motion here was both a “procedural means for seeking redress” from the trial court and a “proceeding in which rights were determined.” By filing it, appellees commenced a proceeding in the nature of an “action” within the meaning of both 1335.02 and 1335.05. Indeed, Ohio courts regularly refer to Civ.R. 60(B) motions as “actions.” *See, e.g., Higbee Co. v. Primus*, 8th Dist. No. 34154, 1975 WL 182941, *1 (July 3, 1975) (denying 60(B) relief “because the action is not timely brought”); *Bodem v. Beals*, 6th Dist. No. OT-83-32, 1984 WL 7854, *5 (Apr. 27, 1984) (noting “the basis for this action is . . . Civ. R. 60(B)(4).”); *Hughes v. TransOhio Sav. Bank*, 11th Dist. No. 89-P-2055, 1990 WL 178942, *3 (Nov. 16, 1990) (referring to proceeding as a “60(B) action”); *McNair v. Dowler*, 11th Dist. No. 90-A-1574, 1991 WL 274495, *2 (Dec. 20, 1991) (“The present action is governed by Civ.R. 60(B).”).

Moreover, such a broader interpretation of “action” is appropriate here given that the appellees’ Civ.R. 60(B) motion seeks to vacate the judgment and assert a counterclaim to enforce the alleged oral forbearance agreement. (*See* Rule 60(B) Mot. 9, 11). This Court has applied the statute of frauds to a counterclaim. *Marion*, 40 Ohio St.3d 265 at 273. And functionally, a counterclaim is indistinguishable from a complaint, since a defendant asserting a counterclaim bears the burden of proof as to the counterclaim. *See, e.g., Dandrew v. Silver*, 8th Dist. No. 86089, 2005-Ohio-6355, ¶ 25; *Huntington Natl. Bank v. Wolfe*, 99 Ohio App.3d 585, 600, 651 N.E.2d 458 (10th Dist.1994); *Dan v. Testa Bros., Inc.*, 94 Ohio App. 101, 114 N.E. 525 (7th Dist.1952), paragraph two of the syllabus.

Even if the Court were to construe the Civ.R. 60(B) motion as asserting a “defense,” the analysis is functionally the same. An affirmative defense is “an assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim[.]” Black’s Law

Dictionary 482 (9th ed. 2009). While the purpose of an affirmative defense is to defeat another claim, rather than to recover damages, the defendant is nonetheless required to prove the defense by a preponderance of the evidence. *See, e.g., Olentangy Condominium Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶23; *MatchMaker Intl., Inc. v. Long*, 100 Ohio App.3d 406, 408, 654 N.E.2d 161 (9th Dist.1995).

A proceeding to adjudicate a counterclaim or affirmative defense should, therefore, be considered an “action” within the meaning of R.C. 1335.05. Regardless of whether the appellees sought to enforce their alleged oral forbearance agreement by a lawsuit, counterclaim, or affirmative defense, the appellees were required to prove the existence of their alleged oral agreement. The statute of frauds prohibits the appellees from doing so, as it functions as an “evidentiary safeguard that requires certain specific agreements to be in writing.” *Huntington Natl. Bank v. R. R. Wellington, Inc.*, 2012-Ohio-5935, 983 N.E.2d 941, ¶28 (11th Dist.). *See also Stickney v. Tullis-Vermillion*, 165 Ohio App.3d 480, 2006-Ohio-842, 847 N.E.2d 29, ¶22 (2d Dist.).

To effectively serve as an evidentiary safeguard, the Court must give the word “action” set forth in R.C. 1335.05 and 1335.02 a sufficiently broad construction to encompass Civ.R. 60(B) motions like the one the appellees asserted in this case. The more narrow construction ascribed by the Ninth District creates perverse incentives and encourages the very mischief the statute was enacted to avoid. *Cf. Wilber*, 1 Ohio at 255 (concluding that the statute of frauds must not be interpreted “to encourage fraud,” and that any “construction which would have a certain tendency to do so, would counteract the design of the legislature, by advancing the mischief intended to be prevented”). The Ninth District’s judgment must therefore be reversed.

C. The Ninth District's holding that a party can seek to enforce an otherwise unenforceable agreement through Civ.R. 60(B) would lead to absurd results, undermine settled transactions, and vitiate the statute of frauds.

In the end, it is untenable as a matter of logic and law to allow an alleged oral agreement to undo a judgment when the agreement is unenforceable under the law. Consider the following scenario. A lender brings an action to enforce a note secured by a mortgage. The borrower, claiming the existence of an oral forbearance agreement, is precluded by the statute of frauds from filing a counterclaim seeking to enforce that agreement. Instead, the borrower permits the matter to go to judgment, and then, under the Ninth District's reasoning, is permitted to move to vacate the judgment under Civ.R. 60(B) by virtue of the very oral forbearance agreement that he could not assert via counterclaim. If the Ninth District is correct, this nonsensical (and judicially wasteful) procedural scenario is the law, and the statute of frauds has little meaning.

The Ninth District's ruling also undermines settled transactions. Parties to real estate and lending transactions need clarity as to when an agreement has been reached, and the contents of that agreement. The statute of frauds "serves to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transaction occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests." *N. Coast Cookies, Inc. v. Sweet Temptations, Inc.*, 16 Ohio App.3d 342, 348, 476 N.E.2d 388 (8th Dist.1984). *See also Michel v. Bush*, 146 Ohio App.3d 208, 212, 765 N.E.2d 911 (9th Dist.2001) (same).

That clarity is lost if the Ninth District's holding is upheld, as the statute of frauds will no longer provide parties to real estate and lending contracts with clear "rules of the road" to understand when a deal has been reached, and on what terms. Without such clarity, such contracts will become vulnerable to attack by any party who chooses to allege that the written contract was somehow trumped by a subsequent oral agreement.

The delay and prejudice associated with litigating such disputes is not trivial. In this case, for example, the appellees, armed with nothing more than bald claims that the bank entered into an oral forbearance agreement with them, have tied FirstMerit up in litigation and prevented it from collecting an unpaid debt from them for more than two years.

The effect of this uncertainty is to increase the cost of doing business and to inhibit negotiations between parties to real estate and lending transactions. And such a result would undermine the public interest in facilitating the consensual resolution (where possible) of defaulted real estate loans.

Proposition of Law No. 2: A party cannot use Civ.R. 60(B) to enforce an alleged oral forbearance agreement when R.C. 1335.02 would prohibit that party from enforcing the same agreement through a complaint or counterclaim.

A. Loan agreements that do not comply with R.C. 1335.02 are unenforceable, regardless of how a party chooses to enforce them.

As set forth above, in this case, the appellees filed a Civ.R. 60(B) motion seeking to vacate a judgment and to enforce an oral forbearance agreement related to a commercial loan. R.C. 1335.02(B) provides that "no party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought[.]"

An oral forbearance agreement is a "loan agreement" within the meaning of R.C. 1335.02. "Loan agreement" is defined in the statute as:

one or more promises, promissory notes, agreements, undertakings, security agreements, mortgages, or other documents or commitments, or any combination of these documents or commitments, pursuant to which a financial institution loans or delays, or agrees to loan or delay, repayment of money, goods, or anything of value, or otherwise extends credit or makes a financial accommodation.

R.C. 1335.02(A)(3) (emphasis added).

As the trial court correctly held, forbearance agreements are loan agreements because they act to delay the repayment of money or to grant a financial accommodation. (Appx. 78). *See also U.S. Surety Corp. v. KeyCorp*, N.D. Ohio No. 1:05-CV-2337, 2007 WL 2331942, *4 (Aug. 13, 2007), *aff'd*, 283 Fed.Appx. 383 (6th Cir.2008); *Lamkin v. First Comm. Bank*, 10th Dist. No. 00AP-935, 2001 WL 300732, *8-9 (Mar. 29, 2001).

For the same reasons identified in the discussion of Proposition of Law No. 1 concerning R.C. 1335.05, the term “action” in R.C. 1335.02(B) should similarly apply broadly to any proceeding commenced by a party to enforce an oral agreement within R.C. 1335.02’s ambit, not simply the filing of a complaint.

Indeed, the case for granting a broad construction to R.C. 1335.02 is even stronger than it is to R.C. 1335.05. First, the definition of “loan agreement” encompasses types of agreements—like forbearance agreements—that are frequently asserted as counterclaims or affirmative defenses. That broad definition reveals an intent for the statute to apply broadly. Second, R.C. 1335.02(C) contains a statutory parol evidence rule (not found in R.C. 1335.05) that prohibits a court from relying on evidence of oral loan agreements. Third, the public policy motivating the enactment of R.C. 1335.02 was to limit lender liability arising from claims of oral agreements—a policy best served by giving a broad construction to R.C. 1335.02(B).

B. The text of R.C. 1335.02 supports a broad definition of the word “action,” not the constrained definition afforded by the Ninth District.

The Ninth District’s narrow interpretation of the word “action” in R.C. 1335.02 as applying only to the filing of a complaint is inconsistent with the statute’s text. To begin, for the reasons set forth in support of Proposition of Law No. 1, appellees’ filing of a Civ.R. 60(B) motion seeking to vacate the judgment in this case is in the nature of bringing an “action” and is not the mere assertion of a “defense” to a lawsuit. As set forth *supra*, in their Civ.R. 60(B) motion, appellees sought to assert the alleged oral forbearance agreement via counterclaim. (See Rule 60(B) Mot. 9, 11). This Court previously applied a statute of frauds provision to a counterclaim. *Marion*, 40 Ohio St.3d at 273.

But even if the Court were to accept the Ninth District’s characterization of appellees’ Civ.R. 60(B) motion as asserting a “defense,” such a characterization is not dispositive. The word “action” in R.C. 1335.02(B) should be read broadly enough to encompass appellees’ motion, whether it is defensive in nature or not.

As with R.C. 1335.05, the word “action” is not defined in R.C. 1335.02. Under the *noscitur a sociis* maxim of statutory interpretation, this Court can “look to accompanying words [in the statute] to deduce the undefined word’s meaning...” *Inland Prods., Inc. v. Columbus*, 193 Ohio App.3d 740, 2011-Ohio-2046, 954 N.E.2d 141, ¶ 25 (10th Dist.), quoting *The Limited, Inc. v. Commr. of Internal Revenue*, 286 F.3d 324, 332 (6th Cir.2002). See also R.C. 1.42 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”).

R.C. 1335.02 precludes an “action” on a broad range of “loan agreements” unless they meet the statute’s writing and signature requirements. R.C. 1335.02(B). Among the “loan agreements” subject to those requirements are those, like the oral forbearance

agreement at issue here, to “delay . . . repayment of money” or “make[] a financial accommodation.” R.C. 1335.02(A)(3).

Those two provisions, read together, compel a broader meaning of the word “action” than the one supplied by the Ninth District. As a practical matter, a borrower would not normally seek to enforce an oral forbearance agreement until the lender tries to enforce its rights under the loan documents—e.g., by foreclosing on a mortgage or suing on a note. It would be a rare case indeed for a borrower to file a lawsuit to enforce an oral forbearance agreement *before* the lender has allegedly violated the agreement by seeking to enforce its rights and remedies. The usual way a borrower would attempt to enforce such an agreement is via a counterclaim, Civ.R. 60(B) motion, or affirmative defense filed in a lawsuit brought by the lender, just as the appellees did in this case. If the legislature intended for R.C. 1335.02(B) to bar enforcement of oral forbearance agreements, and oral forbearance agreements are usually raised in a “defensive” context, then the word “action” must be read broadly enough to effectuate that purpose.

C. The parol evidence requirements of R.C. 1335.02(C) also manifest that an oral forbearance agreement cannot be asserted through a Civ.R. 60(B) motion.

In addition, when determining the scope of “actions” that are barred under R.C. 1335.02(B), the statute should be read together with R.C. 1335.02(C). R.C. 1335.02(C) is similar to a statutory parol evidence rule; it provides, in pertinent part, that “the terms of a loan agreement subject to this section, including the rights and obligations of the parties to the loan agreement, shall be determined solely from the written loan agreement....” *Id.* See also *Schory & Sons, Inc. v. Society Nat’l Bank*, 75 Ohio St. 3d 433, 440, 662 N.E.2d 1074 (1996) (defining the parol evidence rule as “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”).

As set forth above, the oral forbearance agreement alleged in this case falls within the definition of a “loan agreement” subject to R.C. 1335.02. R.C. 1335.02(C), in turn, requires that the terms of that “loan agreement” shall be determined “solely from the written loan agreement” and not using evidence of oral agreements. *See id.* Applying R.C. 1335.02(C) according to its plain meaning, the trial court in this case would not be permitted to hear any evidence of the terms of the appellees’ alleged forbearance agreement, regardless of whether the appellees sought to enforce the oral agreement by lawsuit, counterclaim, Civ.R. 60(B) motion, or affirmative defense, because there is no signed writing evidencing the alleged agreement.

Reading R.C. 1335.02(B) to only bar lawsuits brought to enforce oral agreements would, therefore, conflict with R.C. 1335.02(C). It is nonsensical for the legislature to permit a party to seek to enforce an oral agreement by Civ.R. 60(B) motion or affirmative defense consistent with R.C. 1335.02(B), and then to prohibit the court from hearing any evidence of the existence of that same oral agreement in R.C. 1335.02(C). The more natural and harmonious reading of the two statutory provisions requires a broader interpretation of the word “action” in R.C. 1335.02(B) to address not only lawsuits, but also counterclaims, Civ.R. 60(B) motions, and affirmative defenses.

D. The purpose of R.C. 1335.02 also supports applying the statute of frauds to the appellees’ alleged oral forbearance agreement.

Finally, allowing borrowers or guarantors to allege the existence of oral forbearance agreements through Civ.R. 60(B) motions otherwise precluded by the statute of frauds would undermine the purpose of the statute. R.C. 1335.02 was enacted following the

savings and loan crisis in order to curb lending-related litigation based on claims of oral loan agreements. *See generally* 119 H.B. No. 373, 1992 Ohio Laws 271, at preamble (prohibiting action on a loan agreement that “is not in writing and signed by the other party to the agreement...”). Many other states passed similar statutes around the same time Ohio’s was passed, and did so to “curtail the disruptive economic effect of escalating lender liability litigation.” *Fleming Irrigation, Inc. v. Pioneer Bank & Trust Co.*, 661 So.2d 1035, 1037-1038 (La. App.1995). *See also* *Hewitt v. Pitkin County Bank & Trust Co.*, 931 P.2d 456, 458-459 (Colo. App.1995); *Dixon v. Countrywide Home Loans, Inc.*, 710 F.Supp.2d 1325, 1330 (S.D.Fla.2010); *LaSalle Bank, N.A. v. Paramount Props.*, 588 F.Supp.2d 840, 853-854 (N.D.Ill.2008).

By limiting R.C. 1335.02’s protections as it did, the Ninth District’s decision threatens to undermine the purpose of this statute and the protections it offers to both lenders and borrowers. The statute creates “rules of the road” that allow lenders and borrowers to clearly understand when they have reached an enforceable agreement: when they sign a written loan agreement. This certainty gives lenders and borrowers flexibility to negotiate the workout of troubled loans and the terms of new loans without fear of specious litigation over allegations of contrary “oral agreements.”

Lenders’ ability to negotiate with borrowers will be significantly impaired if lenders must worry that a borrower could thwart a lender’s ability to enforce the terms of its loan documents by creating a “he-said, she-said” factual dispute over whether an alleged informal oral remark made by a bank agent constituted an “oral agreement.” The Ninth District’s ruling creates exactly that perverse incentive, thwarting the purpose of and public policy behind R.C. 1335.02.

CONCLUSION

For the reasons discussed above, the judgment of the Ninth Appellate District in this case should be reversed.

Respectfully submitted,



Thomas D. Warren (0077541)
Brett A. Wall (0070277)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114-3485
(216) 621-0200 / Fax (216) 696-0740
Email: twarren@bakerlaw.com
Email: bwall@bakerlaw.com
Email: plewis@bakerlaw.com
Email: ddow@bakerlaw.com

Counsel for Appellant, FirstMerit Bank, N.A.

CERTIFICATE OF SERVICE

I certify that on June 24, 2013, a true and accurate copy of this Merits Brief of

Appellant was served upon the following by regular U.S. mail, postage prepaid:

Scott H. Kahn, Esq.
Gregory J. Ochocki, Esq.
Kahn & Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114

Counsel for Appellees, Daniel E. Inks, et al.



Counsel for Appellant, FirstMerit Bank, N.A.

APPENDIX

IN THE SUPREME COURT OF OHIO

FirstMerit Bank, N.A.,

Plaintiff-Appellant,

v.

Daniel E. Inks, *et al.*,

Defendant-Appellees.

Case No.

13-0203

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No. 26182

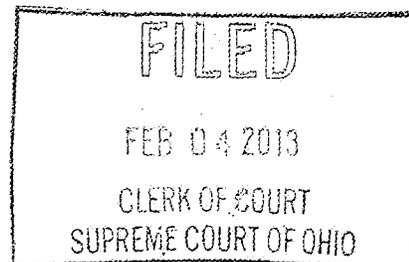
NOTICE OF APPEAL OF APPELLANT
FIRSTMERIT BANK, N.A.

Scott H. Kahn (0006779)
Gregory J. Ochocki (0063383)
McIntyre, Kahn & Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114
(216) 579-4114/ Fax (216) 579-0605
Email: info@mkkglaw.com

Counsel for Appellees, Daniel E. Inks, et al.

Thomas D. Warren (0077541)
Counsel of Record
Brett A. Wall (0070277)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114-3482
(216) 621-0200 / Fax (216) 696-0740
Email: twarren@bakerlaw.com
Email: bwall@bakerlaw.com
Email: plewis@bakerlaw.com
Email: ddow@bakerlaw.com

Counsel for Appellant, FirstMerit Bank, N.A.



NOTICE OF APPEAL OF APPELLANT FIRSTMERIT BANK, N.A.

Appellant FirstMerit Bank, N.A., hereby gives notice of appeal to the Ohio Supreme Court from the decision and judgment of the Summit County Court of Appeals, Ninth Appellate District, C.A. Case No. 26182, decided and journalized on November 7, 2012, and from the subsequent decision of the Summit County Court of Appeals denying FirstMerit's application for reconsideration of its November 7, 2012 decision, which was decided and journalized on December 19, 2012.

This case raises a question of public or great general interest.

FirstMerit timely filed a motion to certify a conflict pursuant to App.R. 25, and on December 19, 2012, the Ninth District certified its decision as being in conflict with a decision of the Tenth District. On January 16, 2013, FirstMerit filed a notice of certified conflict in this Court, which is pending as Case No. 2013-0091. Under S.Ct.Prac.R. 7.07(C)(2), FirstMerit asks the Court to accept this jurisdictional appeal and consolidate this appeal with Case No. 2013-0091.

Respectfully submitted,



Thomas D. Warren (0077541)
Brett A. Wall (0070277)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114-3485
(216) 621-0200 / Fax (216) 696-0740
Email: twarren@bakerlaw.com
Email: bwall@bakerlaw.com
Email: plewis@bakerlaw.com
Email: ddow@bakerlaw.com

Counsel for Appellant, FirstMerit Bank, N.A.

CERTIFICATE OF SERVICE

I certify that on February 1, 2013, a true and accurate copy of the foregoing was served upon the following by regular U.S. mail, postage prepaid:

Scott H. Kahn, Esq.
Gregory J. Ochocki, Esq.
McIntyre, Kahn & Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114

Counsel for Appellees, Daniel E. Inks, et al.



Counsel for Appellant, FirstMerit Bank, N.A.

ORIGINAL

NOTICE OF A CERTIFIED CONFLICT

IN THE SUPREME COURT OF OHIO

13-0091

FirstMerit Bank, N.A.,

Appellant,

vs.

Daniel E. Inks, et al.,

Appellees.

On Appeal from the Summit County Court of Appeals, Ninth Appellate District,
C.A. Nos. 25980, 26182

APPELLANT FIRSTMERIT BANK, N.A.'S NOTICE OF A
CERTIFIED CONFLICT

Scott H. Kahn (0006779)
Gregory J. Ochocki (0063383)
McIntyre, Kahn & Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114
(216) 579-4114/ Fax (216) 579-0605
Email: info@mkkglaw.com

Counsel for Appellees, Daniel E. Inks, et al.

Brett A. Wall (0070277)
Thomas D. Warren (0077541)^(*)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114-3482
(216) 621-0200 / Fax (216) 696-0740
Email: bwall@bakerlaw.com
Email: twarren@bakerlaw.com
Email: plewis@bakerlaw.com
Email: ddow@bakerlaw.com

Counsel for Appellant, FirstMerit Bank, N.A.

^(*)*Counsel of Record*

RECEIVED
JAN 16 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JAN 16 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF A CERTIFIED CONFLICT

Appellant FirstMerit Bank, N.A. gives notice of a certified conflict to the Ohio Supreme Court from the Ninth District Court of Appeals, Case Nos. 25980, 26182, decided and journalized on November 7, 2012. On December 19, 2012, the Ninth District certified the following question to this Court:

Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to a contract involving an interest in land orally agreed to modify the terms of their agreement.

The Ninth District has declared that its decision in *FirstMerit Bank, N.A. v. Daniel E. Inks, et al.* is in conflict with the Tenth District's decision in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000).

Pursuant to S.Ct.Prac.R. 8.01(B), a copy of the Ninth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully submitted,



Brett A. Wall (0070277)
Thomas D. Warren (0077541)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114-3485
(216) 621-0200 / Fax (216) 696-0740
Email: bwall@bakerlaw.com
Email: twarren@bakerlaw.com
Email: plewis@bakerlaw.com
Email: ddow@bakerlaw.com

Counsel for Appellant, FirstMerit Bank, N.A.

CERTIFICATE OF SERVICE

I certify that on January 15, 2013, a true and accurate copy of the foregoing was served upon the following by regular U.S. mail, postage prepaid:

Scott H. Kahn, Esq.
Gregory J. Ochocki, Esq.
McIntyre, Kahn & Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114

Counsel for Appellees, Daniel E. Inks, et al.



Counsel for Appellant, FirstMerit Bank, N.A.

APPENDIX

Order of the Ninth District Court of Appeals certifying a conflict in *FirstMerit Bank, N.A. v. Daniel E. Inks, et al.*, Case Nos. 25980 and 26182, issued December 19, 2012.

Decision of the Ninth District Court of Appeals in *FirstMerit Bank N.A. v. Inks*, Case Nos. 25980 and 26182, 2012-Ohio-5155.

Decision of the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000).

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COURT OF APPEALS
DANIEL M. HOFFMAN

STATE OF OHIO)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2012 DEC 19 PM 1:33

COUNTY OF SUMMIT)

SUMMIT COUNTY
CLERK OF COURTS

FIRSTMERIT BANK, N.A.

C.A. No. 25980
26182

Appellee

v.

DANIEL E. INKS, et al.

Appellants

JOURNAL ENTRY

FirstMerit Bank N.A. has moved this Court to certify a conflict between its judgment in this case and those of the Fifth District Court of Appeals in *Fifth Third Bank v. Labate*, 5th Dist. No. 2005CA00180, 2006-Ohio-4239, the Eighth District Court of Appeals in *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333 (Dec. 6, 1984), the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), and the Twelfth District Court of Appeals in *Winton Savings & Loan Co. v. Eastfork Trace Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600. We grant the motion because our judgment in this case conflicts with the judgment of the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), on the same question of law.

Article IV Section 3(B)(4) of the Ohio Constitution provides that, whenever the judges of a court of appeals determine that a judgment upon which they have agreed

conflicts with a judgment of another court of appeals, they shall certify that conflict to the Ohio Supreme Court. In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993), the Ohio Supreme Court held that, for certification under Article IV Section 3(B)(4) to be appropriate, three conditions must be satisfied:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. (Emphasis in original). The issue that FirstMerit has proposed for certification is: "Does the Statute of Frauds bar a defendant from obtaining relief from a cognovit judgment by asserting, as an alleged defense to judgment, a claim arising out of an alleged oral loan agreement that is within the Statute of Frauds?"

In *Fifth Third Bank v. Labate*, 5th Dist. Nos. 2005CA00180, 2006CA00040, 2006-Ohio-4239, Fifth Third Bank obtained a cognovit judgment against Rebecca Labate. Ms. Labate moved for relief from judgment, arguing that the bank committed fraud when it incorrectly told her that the documents she was signing contained the terms they had negotiated. She also argued that the bank "slipped" a security agreement into the stack of loan documents. *Id.* at ¶ 36. She argued that, because of the fraud, the bank should be estopped from asserting that the statute of frauds prevented the court from looking outside the written documents. The Fifth District rejected her argument because it concluded that Section 1335.02 of the Ohio Revised

Code requires loan agreements to be in writing and that the terms of such agreements to be determined solely from the written documents. *Id.* at ¶ 37, 40.

Unlike *Labate*, this case involves an agreement that was allegedly negotiated by the parties to a loan agreement after the agreement had already been breached. We, therefore, conclude that the cases do not present the same question of law.

In *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333 (Dec. 6, 1984), Robert Lemmo obtained a default judgment against his tenants. The tenants moved for relief from judgment, asserting that Mr. Lemmo had released them from the lease agreement. They also filed a counterclaim alleging that Mr. Lemmo had orally agreed to renew their lease. The Eighth District Court of Appeals upheld the denial of the tenants' motion, concluding that they had "failed to show any meritorious defense" because "proof of the oral release defense would be barred by the statute of frauds." *Id.* at *3.

In this case, FirstMerit argued that the Slymans and Inkses' oral-forbearance-agreement defense was barred under Sections 1335.02 and 1335.05 of the Ohio Revised Code. In *Lemmo*, the court did not identify which statute it was applying. We note that the General Assembly did not enact Section 1335.02 until eight years after *Lemmo* was decided. Although Section 1335.05 existed in 1984, the Eighth District may have been applying Section 1335.04, which provides that "[n]o lease . . . shall be . . . granted except . . . in writing" FirstMerit, therefore, has failed to establish that *Lemmo* and this case conflict upon the same question of law.

In *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), George Nicolozakes bought a house for Rebecca Tangeman to live in. Mr. Nicolozakes later sold the house to the Deryk Babrield Tangeman Irrevocable Trust for \$250,000, which he secured with a mortgage. When the trust defaulted, Mr. Nicolozakes foreclosed. Ms. Tangeman alleged that Mr. Nicolozakes' intent had been to give the property to her, but they disguised the transaction as a sale for tax purposes. She also alleged that, even if the transaction was a sale, Mr. Nicolozakes later renounced his interest in the property, gifting it to the trust. The Tenth District upheld an award of summary judgment to Mr. Nicolozakes, noting that Section 1335.04 of the Ohio Revised Code requires all transfers of an interest in real property to be in writing. It also concluded that Ms. Tangeman's argument that Mr. Nicolozakes had later discharged the loan was barred because "a discharge of a mortgage is an interest in land and is required to be in writing under the Statute of Frauds[.]" *Id.* at *4 (citing *Gatts v. GMBH*, 14 Ohio App. 3d 243, 247 (11th Dist. 1983)).

In *Nicolozakes*, the Tenth District determined that Section 1335.05 of the Ohio Revised Code barred Ms. Tangeman from defending against a foreclosure action by alleging that Mr. Nicolozakes had orally released her from a note and mortgage. In this case, this Court determined that the Slymans and Inkses could defend against an action to enforce a guaranty by arguing that FirstMerit and Ashland Lakes had orally modified their agreement. We conclude that the two cases conflict on the same question of law, which is whether the language in Section 1335.05 providing that

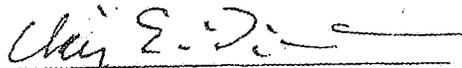
“[n]o action shall be brought . . . to charge a person . . . upon a contract or sale of lands . . . or interest in or concerning them . . . unless the agreement . . . is in writing . . .” prohibits a defendant from arguing that the parties to a contract involving land orally agreed to modify the terms of the their agreement.

In *Winton Savings & Loan Co. v. Eastfork Trace Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600, Eastfork Trace Inc. obtained a loan from Winton Savings & Loan to finance a real estate development. When Winton refused to disburse funds for two improvement projects that Eastfork wanted to perform on the land, Eastfork stopped repaying the loan. After Winton foreclosed, Eastfork filed a counterclaim, alleging that the parties had orally agreed to treat the loan as a line of credit. According to Eastfork, because the loan was a line of credit, any funds that it had repaid to Winton should have been available to it to finance the improvement projects. The trial court entered summary judgment for Winton. The Twelfth District affirmed, holding that, under Section 1335.02, whether the loan was a line of credit had to be determined solely from the parties’ written agreement. *Id.* at ¶ 10, 12.

Winton, like *Labate*, only involved the interpretation of a loan agreement at the time it was signed. In this case, the Slymans and Inkses have argued that the parties to a loan agreement orally agreed to modify the agreement years after its execution. We, therefore, conclude that the Twelfth District’s decision in *Winton* is factually distinguishable.

Upon review of FirstMerit’s motion to certify a conflict, we conclude that our decision conflicts with the decision of the Tenth District Court of Appeals in

Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000). Accordingly, we certify the following question to the Ohio Supreme Court: "Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to a contract involving an interest in land orally agreed to modify the terms of their agreement." The motion to certify a conflict is granted.


Clair E. Dickinson, Judge.

Concurs:
Carr, J.

Dissents:
Belfance, J.

[Cite as *FirstMerit Bank N.A. v. Inks*, 2012-Ohio-5155.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A.

C.A. No. 25980
 26182

Appellee

v.

DANIEL E. INKS, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2011-05-2676

Appellants

DECISION AND JOURNAL ENTRY

Dated: November 7, 2012

DICKINSON, Judge.

INTRODUCTION

{¶1} Daniel Inks, Deborah Inks, David Slyman, and Jacqueline Slyman guaranteed that Ashland Lakes LLC would repay a \$3,500,000 loan from FirstMerit Bank N.A. When Ashland Lakes defaulted, FirstMerit sued the Slymans and Inkses to recover the balance of the loan. The trial court awarded judgment to FirstMerit based on confessions of judgment entered by the Slymans and Inkses under warrants of attorney. The Slymans and Inkses have appealed, arguing that the court incorrectly awarded judgment to FirstMerit based on the confessions because the confessing lawyer did not produce the original warrants of attorney, as required under Section 2323.13(A) of the Ohio Revised Code. After filing their appeal, the Slymans and Inkses moved the trial court for relief from judgment, arguing that FirstMerit was not entitled to recover from them because it had entered into an oral forbearance agreement with Ashland Lakes. We remanded the action to the trial court so that it could rule on the motion. Following a hearing,

the court denied the motion, concluding that the Slymans and Inkses' forbearance-agreement argument was barred by the doctrine of issue preclusion and the Statute of Frauds. It also concluded that, even if their argument was not barred, they had not demonstrated that FirstMerit and Ashland Lakes entered into a forbearance agreement. The Slymans and Inkses have appealed from that decision also. We affirm the judgment in case number 25980 because the record does not establish that the original warrants of attorney were not produced at the time the lawyer confessed judgment. We reverse and remand in case number 26182 because the court applied the incorrect standard to determine whether the Slymans and Inkses are barred by res judicata from asserting their forbearance-agreement defense, the statute of frauds does not bar their defense, and the court incorrectly considered the merits of their defense in determining whether to grant relief from judgment.

BACKGROUND

{¶2} FirstMerit loaned \$3,500,000 to Ashland Lakes, which it secured with a mortgage of Ashland Lakes' property and by requiring the Slymans and Inkses to guarantee the loan. After Ashland Lakes defaulted on the loan, it entered into a series of written forbearance agreements with FirstMerit. When those agreements expired, FirstMerit foreclosed on the mortgage. It succeeded, and an auction of the property was scheduled for March 9, 2011.

{¶3} Despite the result of the foreclosure action, Ashland Lakes and FirstMerit continued to negotiate another forbearance agreement. According to Mr. Inks, at a meeting on January 7, 2011, the parties discussed an agreement under which Ashland Lakes would pay FirstMerit \$1,300,000 at an undetermined time plus an additional \$300,000 by October 15 of that year. Following the meeting, Ashland Lakes obtained a commitment letter from Westfield Bank, agreeing to finance part of the \$1,300,000. On February 14, Mr. Inks sent the commitment letter

to FirstMerit. FirstMerit determined that the letter was insufficient to move forward with a forbearance agreement, however, because it contained some contingencies that FirstMerit thought could not be satisfied.

{¶4} According to Mr. Inks, on March 3, he followed up with FirstMerit about the forbearance agreement and was told that he would receive a term sheet memorializing the terms of the agreement by the next morning. When he received the term sheet, it contained a \$200,000 deposit requirement and a \$9000 appraisal fee that the parties had not previously discussed. On March 7, he called FirstMerit and told a representative that he could only raise \$150,000 for a deposit, which the representative said was "doable." Shortly after the call, the representative delivered a written copy of the forbearance agreement, which still contained the \$200,000 deposit requirement. Mr. Inks called the representative again and was told that, if he could produce \$150,000 for the deposit and \$9000 for the appraisal by the next day, the bank would postpone the auction. Mr. Inks said that, on the morning of March 8, the representative again told him that, if he could deliver \$150,000 to him that day, he would postpone the auction. Mr. Inks told the representative that he would call him later in the day with details on how he would deliver the money. When Mr. Inks attempted to contact the representative later, however, the representative did not answer his phone. The representative finally returned his calls near the end of the day, but told him that it was too late to stop the auction.

{¶5} After the auction, Ashland Lakes moved to set it aside, arguing that FirstMerit had breached the oral forbearance agreement. The common pleas court rejected its argument, concluding that it had failed to establish that such an agreement existed. FirstMerit subsequently filed this action to recover the balance owed by Ashland Lakes from the Slymans and Inkses. The trial court entered judgment against the Slymans and Inkses based on their confessions of

judgment. The Slymans and Inkses moved for relief from judgment, but the court denied their motion. The Slymans and Inkses have appealed the court's judgment and its order denying their motion for relief from judgment.

WARRANTS OF ATTORNEY.

{¶6} The Slymans and Inkses' assignment of error in case number 25980 is that the trial court incorrectly entered judgment against them based on confessions of judgment. They have argued that the confessions were invalid because the lawyer who submitted them did not present the court with their original warrants of attorney.

{¶7} Under Section 2323.13(A) of the Ohio Revised Code, "[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession." "Warrants of attorney to confess judgment are to be strictly construed, and court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject." *Lathrem v. Foreman*, 168 Ohio St. 186, paragraph one of the syllabus (1958).

{¶8} The Slymans and Inkses have cited *Lathrem* in support of their argument that the lawyer who confessed judgment had to produce their original warrants of attorney. In *Lathrem*, the Ohio Supreme Court explained that, since Section 2323.13 "requires the production of the warrant of attorney to the court at the time of confessing judgment, . . . [if] the original warrant has been lost and can not be produced, the court, . . . lacks the power and authority to . . . enter judgment by confession" *Lathrem v. Foreman*, 168 Ohio St. 186, paragraph two of the syllabus (1958); *Huntington Nat'l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 21 ("[T]he language of [Section] 2323.13(A) . . . requires an attorney confessing

judgment to present the original warrant of attorney to the trial court at the time the attorney makes the confession[.]”).

{¶9} The record does not indicate whether the lawyer who confessed judgment presented the trial court with the original warrants of attorney or merely copies of them. The fact that the record contains only copies of the warrants is not determinative because Section 2323.13(A) allows “[t]he original or a copy of the warrant [to] be filed with the clerk.” See *Huntington Nat’l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 21 (noting that, after producing the original warrant of attorney, “the plaintiff may then choose to file either the original warrant or a copy of it with the clerk for purposes of maintaining the record.”). As the Tenth District Court of Appeals explained in *Huntington National Bank*, “[r]equiring the attorney confessing judgment to produce the original warrant of attorney provides a minimal level of assurance that the note is authentic and actually exists, while allowing the plaintiff to file a copy of the warrant with the clerk allows the plaintiff to retain control of the instrument after it is presented to the court if the plaintiff so chooses.” *Id.* at ¶ 20.

{¶10} The Slymans and Inkses bear the burden on appeal of establishing that the trial court did not have jurisdiction to enter judgment based on their confessions. *Knapp v. Edwards Labs.*, 61 Ohio St. 2d 197, 199 (1980) (“[A]n appellant bears the burden of showing error by reference to matters in the record.”); *Howiler v. Connor*, 9th Dist. No. 10648, 1982 WL 2779, *1 (Oct. 6, 1982) (“In courts of general jurisdiction a legal presumption arises in favor of jurisdiction, want of which must be affirmatively demonstrated on the record.”). The record does not indicate that the lawyer who confessed judgment for the Slymans and Inkses failed to produce the original warrants of attorney to the trial court. Accordingly, the Slymans and Inkses have not established that the trial court lacked jurisdiction to enter judgment against them. We

note that this case is distinguishable from *Huntington National Bank* because, in that case, it was undisputed that the bank “[a]t no time . . . provide[d] the trial court with the original note or commercial guaranties.” *Huntington Nat’l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 4. The Slymans and Inkses’ assignment of error in case number 25980 is overruled.

MOTION FOR RELIEF FROM JUDGMENT

{¶11} The Slymans and Inkses’ assignment of error in case number 26182 is that the trial court incorrectly denied their motion for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure. Under Civil Rule 60(B), a trial court “may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied . . . ; or (5) any other reason justifying relief from the judgment.” “The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment” Civ. R. 60(B). Interpreting Rule 60(B), the Ohio Supreme Court has held that, “[t]o prevail . . . , 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” *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976). This Court has recognized that, “[i]f the relief from judgment sought is on a cognovit note, ‘ . . . relief . . . is warranted by authority of Civ.R. 60(B)(5) [i]f the movant (1) establishes a meritorious defense, (2) in a timely application.’” *Brown-Graves Co. v. Caprice Homes Inc.*, 9th Dist. No. 20689,

2002 WL 347322, *3 (Mar. 6, 2002) (quoting *Meyers v. McGuire*, 80 Ohio App. 3d 644, 646 (1992)).

RES JUDICATA

{¶12} The Slymans and Inkses have argued that the trial court incorrectly concluded that the argument that they made in their motion for relief from judgment is barred by the doctrine of res judicata. In their motion, the Slymans and Inkses argued that they have a meritorious defense because FirstMerit entered into a forbearance agreement with Ashland Lakes. The trial court determined that they were barred from raising that defense because the same issue was decided in FirstMerit's action against Ashland Lakes and the Slymans and Inkses are in privity with Ashland Lakes.

{¶13} "Res judicata operates as 'a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.'" *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 247 (2000) (quoting *Johnson's Island Inc. v. Danbury Twp. Bd. of Trs.*, 69 Ohio St. 2d 241, 243 (1982)). The Slymans and Inkses have conceded that their forbearance-agreement defense is the same defense that Ashland Lakes raised in its motion to set aside the auction in FirstMerit's foreclosure action. They have argued, however, that they are not in privity with Ashland Lakes.

{¶14} According to the Ohio Supreme Court, "[w]hat constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required: 'In certain situations . . . a broader definition of privity is warranted. As a general matter, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.'" *Brown v. City of*

Dayton, 89 Ohio St. 3d 245, 248 (2000) (quoting *Thompson v. Wing*, 70 Ohio St. 3d 176, 184 (1994)).

{¶15} The Slymans and Inkses, citing *National City Bank v. The Plechaty Companies*, 104 Ohio App. 3d 109 (8th Dist. 1995), have argued that the guarantor of a loan is never in privity with the debtor. The case that the Eighth District Court of Appeals cited for that proposition was *Woodward v. Moore*, 13 Ohio St. 136 (1862). *Plechaty Cos.*, 104 Ohio App. 3d at 115. In *Woodward*, Ebenezer Woodward sold to Chapman & McKernan his right to collect a judgment that he had against Jonathan Hall. As part of the sale, Mr. Woodward guaranteed that, if Chapman & McKernan could not collect the judgment, he would pay them \$400. Chapman & McKernan sued Mr. Hall in Iowa. Mr. Hall defended by claiming that the suit was barred by the statute of limitations and that the judgment had been paid. Following a trial to the bench, the court found in favor of Mr. Hall. *Woodward*, 13 Ohio St. at 137.

{¶16} After Chapman & McKernan's lawsuit failed, they assigned their rights to Sydney Moore. *Woodward v. Moore*, 13 Ohio St. 136, 137-38 (1862). Mr. Moore sued Mr. Woodward on his guaranty, arguing that Mr. Woodward knew that the judgment had already been satisfied at the time he sold it to Chapman & McKernan. At trial, Mr. Moore submitted the record of the Iowa case as his only evidence. Mr. Woodward attempted to testify that the judgment was, in fact, still unpaid, but the trial court sustained an objection to his statement. A jury ruled in favor of Mr. Moore. *Id.* at 140.

{¶17} The Ohio Supreme Court reversed the judgment against Mr. Woodward. It determined that, at the time Mr. Woodward sold the judgment to Chapman & McKernan, the three of them had an understanding that the judgment could be enforced against Mr. Hall. *Woodward v. Moore*, 13 Ohio St. 136, 143 (1862). When Mr. Hall asserted the defense of

payment, therefore, Chapman & McKernan should have notified Mr. Woodward. *Id.* Because Mr. Woodward did not receive notice of the defense, “[t]he most that could be claimed of the effect . . . of the record of the proceedings [against Mr. Hall], would be to make a prima facie case for [Mr. Moore].” *Id.* at 144. “Had notice been given to Woodward of the pendency of the suit [against Mr. Hall] and of the defense set up, it might have been his duty in that action to sustain the validity of the judgment he had assigned. Having received no such notice, he is not precluded from showing in the action against him that the judgment he assigned was a valid and subsisting judgment, and that had proper diligence been used in the conduct of the suit against Hall, his defense to that suit would not have been successful.” *Id.* The Supreme Court, therefore, concluded that, under the facts of the case, *res judicata* did not bar Mr. Woodward from testifying about whether Mr. Hall had satisfied the judgment.

{¶18} Regarding whether a guarantor is bound by a suit against the debtor, the Restatement of the Law of Security provides that, “[if], in an action by a creditor against a principal, judgment is given, other than by default or confession, in favor of the creditor, and the creditor subsequently brings an action against the surety, proof of the judgment in favor of the creditor creates a rebuttable presumption of the principal’s liability to the creditor.” Restatement of the Law 1st, Security, Section 139 (1941). As explained in the comments to the rule, it “expresses a middle ground between the possible rule that a judgment against the principal is conclusive of the principal’s liability, even in an action against the surety, and that such a judgment is evidence only of the fact of its rendition. It is inequitable to bind the surety conclusively by a judgment to which he is not a party. On the other hand, it is not unfair to make a rebuttable presumption of the regularity of the judicial proceedings antecedent to the judgment and of the correctness of the judgment as evidence of the principal’s liability. Under [this] rule .

... , it is open to the surety to prove if he can that judgment should have been rendered for the principal.” *Id.* The Restatement specifically identifies two defenses that may rebut the presumption of regularity: fraud and collusion. *Id.* Some courts have also allowed a surety to present defenses that were not “actually adjudicated” in the action against the debtor. *City of Pasco v. Pacific Coast Cas. Co.*, 172 P. 566, 567 (Wash. 1918).

{¶19} Several states have explicitly adopted the Restatement’s position or taken a similar view. *Motion Picture Indus. Pension Plan v. Hawaiian Kona Coast Assocs.*, 823 P.2d 752, 758 (Hawaii App. 1991); *South County Sand & Gravel Inc. v. Nat’l Bonding & Accident Ins. Co.*, R.I. App. No. 82-327, 1989 WL 1110278, *3 (May 17, 1989); *Von Eng’g Co. v. R.W. Roberts Constr. Co. Inc.*, 457 So. 2d 1080, 1082 (Fla. App. 1984); *Indiana Univ. v. Indiana Bonding & Sur. Co.*, 416 N.E.2d 1275, 1285 (Ind. App. 1981). We agree with the Restatement approach, which is consistent with *Woodward*. In *Woodward*, the Supreme Court did not declare an inflexible rule regarding privity, but based its decision on the fact that Mr. Woodward did not know that Mr. Hall had asserted the defense of payment and did not have an opportunity to contest Mr. Hall’s assertion. Just as the Restatement approach allows a guarantor to contest the regularity of the proceedings against the debtor, the Ohio Supreme Court determined that, under the circumstances of the case, Mr. Woodward should have been allowed to demonstrate that the debt, in fact, had not yet been paid. *Woodward v. Moore*, 13 Ohio St. 136, 144 (1862); *see also Jaynes v. Platt*, 47 Ohio St. 262, 274 (1890) (holding that, in an action on an attachment bond, a judgment against the debtor “is not only the best, but the only, evidence, and, until impeached for fraud, collusion, or manifest mistake, ought to be held conclusive”).

{¶20} In this case, the trial court examined whether there was a mutuality of interest between Ashland Lakes and the Slymans and Inkses. Although that is an important part of the

privity determination, the court should also have considered whether the common pleas court in the case against Ashland Lakes gave appropriate consideration to Ashland Lakes' forbearance-agreement defense. See *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, ¶ 9 (“[M]utuality of interest, including an identity of desired result’ might also support a finding of privity.”) (quoting *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 248 (2000)). The Slymans and Inkses specifically argued in their post-hearing brief in this case that “Ashland Lakes was not provided a full and fair opportunity to litigate the issue of whether an oral settlement agreement was entered into by Ashland Lakes and [FirstMerit].” The trial court, however, failed to analyze that issue in its decision. Because the trial court did not analyze whether the Slymans and Inkses have overcome the rebuttable presumption of regularity in the case between FirstMerit and Ashland Lakes we sustain their assignment of error and remand for the trial court to decide that issue in the first instance.

STATUTE OF FRAUDS

{¶21} Independent of its privity determination, the trial court also determined that the Slymans and Inkses' forbearance-agreement defense was barred by the statute of frauds. Under Section 1335.02(B) of the Ohio Revised Code, “[n]o party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the party against whom the action is brought.” The trial court determined that the alleged forbearance agreement was a “[l]oan agreement” under Section 1335.02(A)(3) and, therefore, had to be in writing to be enforceable.

{¶22} By its plain language, Section 1335.02(B) prohibits a party from “bring[ing] an action on a loan agreement” unless the agreement is in writing. In this case, the Slymans and

Inkses did not attempt to “bring an action” against FirstMerit, they merely raised the oral forbearance agreement as a defense to FirstMerit’s action against them. Accordingly, the trial court incorrectly concluded that their defense was barred under the statute of frauds. R.C. 1335.02(B); *see also* R.C. 1335.05 (providing that “[n]o action shall be brought . . . upon a contract or sale of lands . . . unless the agreement upon which such action is brought . . . is in writing . . .”).

MERITORIOUS DEFENSE

{¶23} The trial court further determined that the Slymans and Inkses’ argument about the oral forbearance agreement was barred because the parties to the alleged agreement intended that any such agreement be in writing. It is not clear from the court’s opinion what part of the Civil Rule 60(B) analysis it was engaging in when it made this statement. The court had already concluded that the Slymans and Inkses “have asserted operative facts that demonstrate that they have a meritorious defense that could justify relief from judgment.” Nevertheless, it examined the record and determined that it was “the parties’ clear intent that any forbearance be in writing to be enforceable.” It also wrote that the “facts conclusively establish that both [the Slymans and Inkses] and FirstMerit manifested an intention not to be bound absent execution of a written agreement.”

{¶24} According to the Ohio Supreme Court, “[u]nder [Civil Rule] 60(B), a movant’s burden is only to allege a meritorious defense, not to prove that he will prevail on that defense.” *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 20 (1988). We conclude that, by determining that the parties’ course of dealings established that the alleged forbearance agreement would have had to be in writing, the trial court exceeded the scope of its authority under Rule 60(B).

The court did not merely examine whether the Slymans and Inkses had alleged a meritorious defense, it improperly evaluated whether they had proved that defense.

CONCLUSION

{¶25} The trial court correctly entered judgment for FirstMerit based on the Slymans and Inkses' confessions of judgment. The court, however, incorrectly analyzed whether the Slymans and Inkses are bound by the judgment against Ashland Lakes, incorrectly applied the statute of frauds, and incorrectly evaluated the merits of their forbearance-agreement defense. The judgment of the Summit County Common Pleas Court in case number 25980 is affirmed. The judgment of the common pleas court in case number 26182 is reversed, and this matter is remanded for proceedings consistent with this decision.

Judgments affirmed in part,
reversed in part,
and causes remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CLAIR E. DICKINSON
FOR THE COURT

CARR, P. J.
CONCURS.

BELFANCE, J.
CONCURRING IN JUDGMENT ONLY.

{¶26} I concur in the majority's resolution of case of number 25980 and concur in the judgment of its resolution of case number 26182.

{¶27} In case number 26182, the Inkses and Slymans appealed the denial of their Civ.R. 60(B) motion. The trial court incorrectly concluded that res judicata barred the Inkses and Slymans from raising their alleged meritorious defense. Because FirstMerit has not established the elements of the defense, I concur in the majority's judgment.

{¶28} "[B]efore res judicata/collateral estoppel can apply one must have a final judgment." (Internal quotations and citation omitted.) *McDowell v. DeCarlo*, 9th Dist. No. 23376, 2007-Ohio-1262, ¶ 7. Further, the party seeking to use the defense has the burden of establishing that it applies. *See Fraternal Order of Police, Akron Lodge No. 7 v. Akron*, 9th Dist. No. 23332, 2007-Ohio-958, ¶ 12. In the instant matter, FirstMerit has not demonstrated that the order which it believes has a preclusive effect is a final judgment. During the course of the proceedings below, it does not appear that a confirmation of sale decree was ever actually entered. It appears that the trial court in the foreclosure case overruled Ashland Lakes' objection to the confirmation of sale concerning the alleged oral forbearance agreement. However, it

cannot be assumed that a final judgment was rendered by pointing to the trial court's ruling. Throughout the proceedings in the instant matter, FirstMerit indicated that it expected the confirmation decrees "shortly[]" or "any day." Absent a final judgment confirming the sale, FirstMerit cannot meet its burden to demonstrate that principles of res judicata are applicable. See *Emerson Tool, LLC v. Emerson Family Ltd. Partnership*, 9th Dist. No. 24673, 2009-Ohio-6617, ¶ 13-14.

{¶29} Further, even assuming a final judgment existed in the foreclosure case, I cannot conclude that the trial court considered the applicable law concerning the specific relationship between a debtor/principal, a creditor, and a guarantor/surety and the effect that a prior judgment against the debtor/principal has in a suit between the creditor and the guarantor/surety. The Supreme Court of Ohio has stated that "where the sureties have notice of the suit, and may, or do make defense, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is prima facie only. It may be impeached for collusion, or for mistake." *State v. Colerick*, 3 Ohio 487, 487-488 (1828); see also *State v. Jennings*, 14 Ohio St. 73, 76 (1862); 52 Ohio Jurisprudence 3d, Guaranty and Suretyship, Section 269 (2012); see generally *Standard Acc. Ins. Co. v. Hattie Fid. & Cas. Co.*, 50 Ohio App. 206 (5th Dist.1935). Consistent among the above authorities is the notion that the guarantor receives notice and an opportunity to defend, prior to the judgment having a preclusive effect. *Colerick* at 487-488; *Standard Acc. Ins. Co.* at 209-210; 52 Ohio Jurisprudence 3d at Section 269. It is clear from the trial court's entry that it did not consider this law and whether FirstMerit has met its burden under the law. Accordingly, I would reverse the trial court's judgment.

APPEARANCES:

SCOTT H. KAHN and GREGORY J. OCHOCKI, Attorneys at Law, for Appellants.

BRETT A. WALL, PATRICK T. LEWIS, and SARA L. WITT, Attorneys at Law, for Appellee.

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Georga Nicolozakes, :
 :
 Plaintiff-Appellee, :
 :
 v. :
 :
 The Deryk Gabriel Tangeman :
 Irrevocable Trust, Rebecca Tangeman, :
 Trustee, :
 :
 Defendant-Appellant. :

No. 00AP-7
(REGULAR CALENDAR)

O P I N I O N

Rendered on December 26, 2000

*Jones, Day, Reavis & Pogue, Fordham E. Huffman and
Mary E. Taft, for appellee.*

*Tyack, Blackmore & Liston Co., L.P.A., and Thomas M.
Tyack, for appellant.*

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

In 1989, plaintiff, George Nicolozakes, and Rebecca Tangeman, Trustee of defendant, The Deryk Gabriel Tangeman Irrevocable Trust ("Trust"), began a relationship which proceeded from friendship to intimacy. In 1992, during the course of this relationship, plaintiff purchased residential property located at 7400 Radebaugh Road, Reynoldsburg, Ohio, as a personal residence for his frequent business trips to

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Columbus, and as a residence for Tangeman and her son, Deryk, the beneficiary of the trust.

Tangeman eventually requested that plaintiff transfer the property into her name. Plaintiff offered to sell the property to Tangeman. Tangeman declined plaintiff's offer, however, because an outstanding federal tax lien against her would immediately attach to the property and would have priority over any mortgage. Plaintiff and Tangeman eventually agreed that plaintiff would sell the property to the Trust. On July 19, 1996, the sale was carried out through the execution of a warranty deed from Georgetown Marine, Inc.¹ to the Trust. Contemporaneous with the transfer, Tangeman executed a promissory note on behalf of the Trust in the amount of \$250,000, secured by a mortgage deed on the property.

The promissory note provides, in pertinent part, as follows:

For value received, The Deryk Gabriel Tangeman Irrevocable Trust promises to pay to George Nicolozakes, solely and personally, the sum of \$250,000.00, with no interest, upon demand.

This note is made subject to the following terms and conditions:

- 1) This note is non-negotiable and cannot be assigned for the benefit of any other person.
- 2) This note shall be cancelled upon the death of George Nicolozakes.
- 3) This note shall become due and payable upon the death of Rebecca L. Tangeman, Trustee of Maker.

¹ In February 1996, plaintiff transferred title to the property to Georgetown Marine, Inc., a corporation owned by plaintiff.

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4) This note is secured by a mortgage on real property. Upon default of any payment under this note The Deryk Gabriel Tangeman Irrevocable Trust shall have the following options:

a) It may pay the face amount of this note which payment shall cause the release of the subject mortgage.

b) It may tender a deed in lieu of foreclosure of the subject mortgage which tender shall be in full satisfaction of this note and mortgage.

5) In the event of the death of Rebecca L. Tangeman, Trustee, the Maker may exercise the options set forth in paragraph 4 above.

The relationship between plaintiff and Tangeman eventually deteriorated, and on July 13, 1998, plaintiff made a demand for payment on the note. By letter dated July 31, 1998, Tangeman acknowledged the demand and proposed various payment options. By letter dated August 18, 1998, plaintiff offered to consider the payment proposals, provided Tangeman tendered the deed pursuant to his demand. When Tangeman refused to tender the deed, plaintiff, on October 23, 1998, commenced an action in foreclosure.

Tangeman admits that she is the signatory of the note, but maintains that the original transfer of the property to the Trust was intended as a personal gift to her, disguised as a sale to the Trust in order to frustrate the attachment of the undischarged federal tax lien against her. Tangeman further contends that even if the original transaction was a sale, plaintiff subsequently renounced his interest in the note and mortgage and gifted the property to Tangeman. In support of this defense, the Trust relies exclusively on parol evidence offered in the deposition testimony of Tangeman, Tangeman's friends, Wayne Miller and Debra Gross, and her attorney, David Buda.

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On July 29, 1999, plaintiff filed a motion for summary judgment based on the theory that normal contract law applies to mortgages, and that under contract law parol evidence is not admissible to interpret an unambiguous contract. By decision and entry dated September 21, 1999, the trial court denied plaintiff's motion for summary judgment, finding that certain terms of the note were ambiguous and, thus, parol evidence was admissible to construe those terms.

On October 5, 1999, plaintiff's present counsel appeared in substitution for plaintiff's original counsel. On October 8, 1999, the trial court granted plaintiff leave to file a second motion for summary judgment. Plaintiff filed his second motion for summary judgment on October 26, 1999, contending that he was entitled to judgment as a matter of law because: (1) transfers of an interest in real property, whether through sale, mortgage, or gift, are within the Statute of Frauds and require a writing; (2) parol evidence of prior or contemporaneous oral agreements is inadmissible to contradict or vary the terms of a writing within the Statute of Frauds; and (3) an agreement to renounce or cancel a mortgage must be in writing.

R.C. 1335.04, entitled "Interest in land to be granted in writing," states in pertinent part: "No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." R.C. 1335.05, entitled "Certain agreements to be in writing," states in pertinent part: "No action shall be brought whereby to charge the defendant, *** to charge a person upon an agreement made *** upon a contract or sale of lands, tenements, or hereditaments, or

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interest in or concerning them *** unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

By decision and entry filed December 15, 1999, the trial court granted plaintiff's second motion for summary judgment, finding that because the transaction concerns the transfer of real property, it falls within the Statute of Frauds; that parol evidence is inadmissible to vary the terms of the note; and that plaintiff's alleged discharge of the note and mortgage fails because it was not in writing. The court concluded: "because there is no writing evidencing the transaction as gift, nor is there any writing which evidences Nicolozakes renouncement of the Note and mortgage, both of the Trust's gift arguments are without merit." The Trust has timely appealed the trial court's judgment, and raises a single assignment of error, as follows:

The trial court erred in granting summary judgment to the plaintiff, as there were disputed issues of fact that make summary judgment improper under the law.

Civ.R. 56(C) provides, in relevant part, as follows:

*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***

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Thus, summary judgment is appropriate only where the evidence before the court demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party that conclusion is adverse to the party against whom the motion for summary judgment is made. *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willits Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66.

In reviewing a trial court's disposition of a summary judgment motion, an appellate court applies the same standard as that applied by the trial court. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107. An appellate court reviews a summary judgment disposition independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously, with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

By its assignment of error, the Trust argues that the trial court erred in granting summary judgment in favor of plaintiff because: (1) the note is ambiguous, thereby requiring parol evidence to explain its meaning; and (2) parol evidence is admissible to determine whether plaintiff orally modified the terms of the note subsequent to its execution.

As noted previously, the Statute of Frauds requires that all transfers of an interest in real property must be in writing. As this transaction concerns the transfer of

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real property, it falls within the Statute of Frauds. The note clearly states that it is payable on demand. The Trust argues that parol evidence may be considered to determine the "true meaning and purpose" of the note. We find the Trust's argument to be contradicted by the Ohio Supreme Court's decision in *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, wherein the court held in the fourth paragraph of the syllabus:

When a party voluntarily places his signature upon a note or other writing within the statute of frauds, and where that party's sole defense to an action brought upon the writing is that a different set of terms was originally agreed to at that time, such defense shall not be countenanced at law regardless of the theory under which such facts are pled. In such an event, the writing alone shall be the sole repository of the terms of the agreement.

Marion is directly on point and expressly contradicts the position espoused by the Trust. It holds that parol evidence is not admissible to contradict or alter the terms of the note, which, in this case, is the sole repository of the terms of the agreement between plaintiff and the Trust. Accordingly, the Trust's argument that parol evidence is admissible to demonstrate plaintiff's original intention to gift the property to Tangeman fails as a matter of law.

Similarly, the Trust's contention that plaintiff orally agreed, after the note was executed, to release the Trust's obligation on the note and mortgage to effect his "gift" to Tangeman also fails as a matter of law. In *Gatts v. GMBH* (1983), 14 Ohio App.3d 243, 247, the court held that a discharge of a mortgage is an interest in land and is required to be in writing under the Statute of Frauds; if an alleged discharge has not been reduced to writing, it is void. Applying the holding of *Gatts* to the facts of the instant

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case, any discharge of the note and mortgage by plaintiff was required to be in writing. As no such writing exists, the Trust is bound by the terms of the note.

In short, even construing the disputed facts in favor of Tangeman, the nonmoving party, *i.e.*, that the original transfer of the property was intended as a gift from plaintiff to Tangeman, and/or that plaintiff renounced his interest in the note and mortgage after the note was executed a gift of the property to Tangeman, such facts are rendered immaterial by operation of Ohio law governing real estate transfers. Thus, this court finds that the trial court did not err in rendering summary judgment in favor of plaintiff. Accordingly, the assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN, P.J., and KENNEDY, J., concur.

[Cite as *FirstMerit Bank N.A. v. Inks*, 2012-Ohio-5155.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A.

C.A. No. 25980
 26182

Appellee

v.

DANIEL E. INKS, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2011-05-2676

DECISION AND JOURNAL ENTRY

Dated: November 7, 2012

DICKINSON, Judge.

INTRODUCTION

{¶1} Daniel Inks, Deborah Inks, David Slyman, and Jacqueline Slyman guaranteed that Ashland Lakes LLC would repay a \$3,500,000 loan from FirstMerit Bank N.A. When Ashland Lakes defaulted, FirstMerit sued the Slymans and Inkses to recover the balance of the loan. The trial court awarded judgment to FirstMerit based on confessions of judgment entered by the Slymans and Inkses under warrants of attorney. The Slymans and Inkses have appealed, arguing that the court incorrectly awarded judgment to FirstMerit based on the confessions because the confessing lawyer did not produce the original warrants of attorney, as required under Section 2323.13(A) of the Ohio Revised Code. After filing their appeal, the Slymans and Inkses moved the trial court for relief from judgment, arguing that FirstMerit was not entitled to recover from them because it had entered into an oral forbearance agreement with Ashland Lakes. We remanded the action to the trial court so that it could rule on the motion. Following a hearing,

the court denied the motion, concluding that the Slymans and Inkses' forbearance-agreement argument was barred by the doctrine of issue preclusion and the Statute of Frauds. It also concluded that, even if their argument was not barred, they had not demonstrated that FirstMerit and Ashland Lakes entered into a forbearance agreement. The Slymans and Inkses have appealed from that decision also. We affirm the judgment in case number 25980 because the record does not establish that the original warrants of attorney were not produced at the time the lawyer confessed judgment. We reverse and remand in case number 26182 because the court applied the incorrect standard to determine whether the Slymans and Inkses are barred by res judicata from asserting their forbearance-agreement defense, the statute of frauds does not bar their defense, and the court incorrectly considered the merits of their defense in determining whether to grant relief from judgment.

BACKGROUND

{¶2} FirstMerit loaned \$3,500,000 to Ashland Lakes, which it secured with a mortgage of Ashland Lakes' property and by requiring the Slymans and Inkses to guarantee the loan. After Ashland Lakes defaulted on the loan, it entered into a series of written forbearance agreements with FirstMerit. When those agreements expired, FirstMerit foreclosed on the mortgage. It succeeded, and an auction of the property was scheduled for March 9, 2011.

{¶3} Despite the result of the foreclosure action, Ashland Lakes and FirstMerit continued to negotiate another forbearance agreement. According to Mr. Inks, at a meeting on January 7, 2011, the parties discussed an agreement under which Ashland Lakes would pay FirstMerit \$1,300,000 at an undetermined time plus an additional \$300,000 by October 15 of that year. Following the meeting, Ashland Lakes obtained a commitment letter from Westfield Bank, agreeing to finance part of the \$1,300,000. On February 14, Mr. Inks sent the commitment letter

to FirstMerit. FirstMerit determined that the letter was insufficient to move forward with a forbearance agreement, however, because it contained some contingencies that FirstMerit thought could not be satisfied.

{¶4} According to Mr. Inks, on March 3, he followed up with FirstMerit about the forbearance agreement and was told that he would receive a term sheet memorializing the terms of the agreement by the next morning. When he received the term sheet, it contained a \$200,000 deposit requirement and a \$9000 appraisal fee that the parties had not previously discussed. On March 7, he called FirstMerit and told a representative that he could only raise \$150,000 for a deposit, which the representative said was "doable." Shortly after the call, the representative delivered a written copy of the forbearance agreement, which still contained the \$200,000 deposit requirement. Mr. Inks called the representative again and was told that, if he could produce \$150,000 for the deposit and \$9000 for the appraisal by the next day, the bank would postpone the auction. Mr. Inks said that, on the morning of March 8, the representative again told him that, if he could deliver \$150,000 to him that day, he would postpone the auction. Mr. Inks told the representative that he would call him later in the day with details on how he would deliver the money. When Mr. Inks attempted to contact the representative later, however, the representative did not answer his phone. The representative finally returned his calls near the end of the day, but told him that it was too late to stop the auction.

{¶5} After the auction, Ashland Lakes moved to set it aside, arguing that FirstMerit had breached the oral forbearance agreement. The common pleas court rejected its argument, concluding that it had failed to establish that such an agreement existed. FirstMerit subsequently filed this action to recover the balance owed by Ashland Lakes from the Slymans and Inkses. The trial court entered judgment against the Slymans and Inkses based on their confessions of

judgment. The Slymans and Inkses moved for relief from judgment, but the court denied their motion. The Slymans and Inkses have appealed the court's judgment and its order denying their motion for relief from judgment.

WARRANTS OF ATTORNEY.

{¶6} The Slymans and Inkses' assignment of error in case number 25980 is that the trial court incorrectly entered judgment against them based on confessions of judgment. They have argued that the confessions were invalid because the lawyer who submitted them did not present the court with their original warrants of attorney.

{¶7} Under Section 2323.13(A) of the Ohio Revised Code, "[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession." "Warrants of attorney to confess judgment are to be strictly construed, and court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject." *Lathrem v. Foreman*, 168 Ohio St. 186, paragraph one of the syllabus (1958).

{¶8} The Slymans and Inkses have cited *Lathrem* in support of their argument that the lawyer who confessed judgment had to produce their original warrants of attorney. In *Lathrem*, the Ohio Supreme Court explained that, since Section 2323.13 "requires the production of the warrant of attorney to the court at the time of confessing judgment, . . . [if] the original warrant has been lost and can not be produced, the court, . . . lacks the power and authority to . . . enter judgment by confession" *Lathrem v. Foreman*, 168 Ohio St. 186, paragraph two of the syllabus (1958); *Huntington Nat'l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 21 ("[T]he language of [Section] 2323.13(A) . . . requires an attorney confessing

judgment to present the original warrant of attorney to the trial court at the time the attorney makes the confession[.]”).

{¶9} The record does not indicate whether the lawyer who confessed judgment presented the trial court with the original warrants of attorney or merely copies of them. The fact that the record contains only copies of the warrants is not determinative because Section 2323.13(A) allows “[t]he original or a copy of the warrant [to] be filed with the clerk.” See *Huntington Nat’l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 21 (noting that, after producing the original warrant of attorney, “the plaintiff may then choose to file either the original warrant or a copy of it with the clerk for purposes of maintaining the record.”). As the Tenth District Court of Appeals explained in *Huntington National Bank*, “[r]equiring the attorney confessing judgment to produce the original warrant of attorney provides a minimal level of assurance that the note is authentic and actually exists, while allowing the plaintiff to file a copy of the warrant with the clerk allows the plaintiff to retain control of the instrument after it is presented to the court if the plaintiff so chooses.” *Id.* at ¶ 20.

{¶10} The Slymans and Inkses bear the burden on appeal of establishing that the trial court did not have jurisdiction to enter judgment based on their confessions. *Knapp v. Edwards Labs.*, 61 Ohio St. 2d 197, 199 (1980) (“[A]n appellant bears the burden of showing error by reference to matters in the record.”); *Howiler v. Connor*, 9th Dist. No. 10648, 1982 WL 2779, *1 (Oct. 6, 1982) (“In courts of general jurisdiction a legal presumption arises in favor of jurisdiction, want of which must be affirmatively demonstrated on the record.”). The record does not indicate that the lawyer who confessed judgment for the Slymans and Inkses failed to produce the original warrants of attorney to the trial court. Accordingly, the Slymans and Inkses have not established that the trial court lacked jurisdiction to enter judgment against them. We

note that this case is distinguishable from *Huntington National Bank* because, in that case, it was undisputed that the bank “[a]t no time . . . provide[d] the trial court with the original note or commercial guaranties.” *Huntington Nat’l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 4. The Slymans and Inkses’ assignment of error in case number 25980 is overruled.

MOTION FOR RELIEF FROM JUDGMENT

¶11 The Slymans and Inkses’ assignment of error in case number 26182 is that the trial court incorrectly denied their motion for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure. Under Civil Rule 60(B), a trial court “may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied . . . ; or (5) any other reason justifying relief from the judgment.” “The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment” Civ. R. 60(B). Interpreting Rule 60(B), the Ohio Supreme Court has held that, “[t]o prevail . . . , 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” *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976). This Court has recognized that, “[if] the relief from judgment sought is on a cognovit note, ‘ . . . relief . . . is warranted by authority of Civ.R. 60(B)(5) [if] the movant (1) establishes a meritorious defense, (2) in a timely application.’” *Brown-Graves Co. v. Caprice Homes Inc.*, 9th Dist. No. 20689,

2002 WL 347322, *3 (Mar. 6, 2002) (quoting *Meyers v. McGuire*, 80 Ohio App. 3d 644, 646 (1992)).

RES JUDICATA

{¶12} The Slymans and Inkses have argued that the trial court incorrectly concluded that the argument that they made in their motion for relief from judgment is barred by the doctrine of res judicata. In their motion, the Slymans and Inkses argued that they have a meritorious defense because FirstMerit entered into a forbearance agreement with Ashland Lakes. The trial court determined that they were barred from raising that defense because the same issue was decided in FirstMerit's action against Ashland Lakes and the Slymans and Inkses are in privity with Ashland Lakes.

{¶13} "Res judicata operates as 'a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.'" *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 247 (2000) (quoting *Johnson's Island Inc. v. Danbury Twp. Bd. of Trs.*, 69 Ohio St. 2d 241, 243 (1982)). The Slymans and Inkses have conceded that their forbearance-agreement defense is the same defense that Ashland Lakes raised in its motion to set aside the auction in FirstMerit's foreclosure action. They have argued, however, that they are not in privity with Ashland Lakes.

{¶14} According to the Ohio Supreme Court, "[w]hat constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required: 'In certain situations . . . a broader definition of privity is warranted. As a general matter, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.'" *Brown v. City of*

Dayton, 89 Ohio St. 3d 245, 248 (2000) (quoting *Thompson v. Wing*, 70 Ohio St. 3d 176, 184 (1994)).

{¶15} The *Slymans and Inkses*, citing *National City Bank v. The Plechaty Companies*, 104 Ohio App. 3d 109 (8th Dist. 1995), have argued that the guarantor of a loan is never in privity with the debtor. The case that the Eighth District Court of Appeals cited for that proposition was *Woodward v. Moore*, 13 Ohio St. 136 (1862). *Plechaty Cos.*, 104 Ohio App. 3d at 115. In *Woodward*, Ebenezer Woodward sold to Chapman & McKernan his right to collect a judgment that he had against Jonathan Hall. As part of the sale, Mr. Woodward guaranteed that, if Chapman & McKernan could not collect the judgment, he would pay them \$400. Chapman & McKernan sued Mr. Hall in Iowa. Mr. Hall defended by claiming that the suit was barred by the statute of limitations and that the judgment had been paid. Following a trial to the bench, the court found in favor of Mr. Hall. *Woodward*, 13 Ohio St. at 137.

{¶16} After Chapman & McKernan's lawsuit failed, they assigned their rights to Sydney Moore. *Woodward v. Moore*, 13 Ohio St. 136, 137-38 (1862). Mr. Moore sued Mr. Woodward on his guaranty, arguing that Mr. Woodward knew that the judgment had already been satisfied at the time he sold it to Chapman & McKernan. At trial, Mr. Moore submitted the record of the Iowa case as his only evidence. Mr. Woodward attempted to testify that the judgment was, in fact, still unpaid, but the trial court sustained an objection to his statement. A jury ruled in favor of Mr. Moore. *Id.* at 140.

{¶17} The Ohio Supreme Court reversed the judgment against Mr. Woodward. It determined that, at the time Mr. Woodward sold the judgment to Chapman & McKernan, the three of them had an understanding that the judgment could be enforced against Mr. Hall. *Woodward v. Moore*, 13 Ohio St. 136, 143 (1862). When Mr. Hall asserted the defense of

payment, therefore, Chapman & McKernan should have notified Mr. Woodward. *Id.* Because Mr. Woodward did not receive notice of the defense, “[t]he most that could be claimed of the effect . . . of the record of the proceedings [against Mr. Hall], would be to make a prima facie case for [Mr. Moore].” *Id.* at 144. “Had notice been given to Woodward of the pendency of the suit [against Mr. Hall] and of the defense set up, it might have been his duty in that action to sustain the validity of the judgment he had assigned. Having received no such notice, he is not precluded from showing in the action against him that the judgment he assigned was a valid and subsisting judgment, and that had proper diligence been used in the conduct of the suit against Hall, his defense to that suit would not have been successful.” *Id.* The Supreme Court, therefore, concluded that, under the facts of the case, res judicata did not bar Mr. Woodward from testifying about whether Mr. Hall had satisfied the judgment.

{¶18} Regarding whether a guarantor is bound by a suit against the debtor, the Restatement of the Law of Security provides that, “[if], in an action by a creditor against a principal, judgment is given, other than by default or confession, in favor of the creditor, and the creditor subsequently brings an action against the surety, proof of the judgment in favor of the creditor creates a rebuttable presumption of the principal’s liability to the creditor.” Restatement of the Law 1st, Security, Section 139 (1941). As explained in the comments to the rule, it “expresses a middle ground between the possible rule that a judgment against the principal is conclusive of the principal’s liability, even in an action against the surety, and that such a judgment is evidence only of the fact of its rendition. It is inequitable to bind the surety conclusively by a judgment to which he is not a party. On the other hand, it is not unfair to make a rebuttable presumption of the regularity of the judicial proceedings antecedent to the judgment and of the correctness of the judgment as evidence of the principal’s liability. Under [this] rule .

... , it is open to the surety to prove if he can that judgment should have been rendered for the principal.” *Id.* The Restatement specifically identifies two defenses that may rebut the presumption of regularity: fraud and collusion. *Id.* Some courts have also allowed a surety to present defenses that were not “actually adjudicated” in the action against the debtor. *City of Pasco v. Pacific Coast Cas. Co.*, 172 P. 566, 567 (Wash. 1918).

{¶19} Several states have explicitly adopted the Restatement’s position or taken a similar view. *Motion Picture Indus. Pension Plan v. Hawaiian Kona Coast Assocs.*, 823 P.2d 752, 758 (Hawaii App. 1991); *South County Sand & Gravel Inc. v. Nat’l Bonding & Accident Ins. Co.*, R.I. App. No. 82-327, 1989 WL 1110278, *3 (May 17, 1989); *Von Eng’g Co. v. R.W. Roberts Constr. Co. Inc.*, 457 So. 2d 1080, 1082 (Fla. App. 1984); *Indiana Univ. v. Indiana Bonding & Sur. Co.*, 416 N.E.2d 1275, 1285 (Ind. App. 1981). We agree with the Restatement approach, which is consistent with *Woodward*. In *Woodward*, the Supreme Court did not declare an inflexible rule regarding privity, but based its decision on the fact that Mr. Woodward did not know that Mr. Hall had asserted the defense of payment and did not have an opportunity to contest Mr. Hall’s assertion. Just as the Restatement approach allows a guarantor to contest the regularity of the proceedings against the debtor, the Ohio Supreme Court determined that, under the circumstances of the case, Mr. Woodward should have been allowed to demonstrate that the debt, in fact, had not yet been paid. *Woodward v. Moore*, 13 Ohio St. 136, 144 (1862); *see also Jaynes v. Platt*, 47 Ohio St. 262, 274 (1890) (holding that, in an action on an attachment bond, a judgment against the debtor “is not only the best, but the only, evidence, and, until impeached for fraud, collusion, or manifest mistake, ought to be held conclusive”).

{¶20} In this case, the trial court examined whether there was a mutuality of interest between Ashland Lakes and the Slymans and Inkses. Although that is an important part of the

privity determination, the court should also have considered whether the common pleas court in the case against Ashland Lakes gave appropriate consideration to Ashland Lakes' forbearance-agreement defense. See *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, ¶ 9 (“[M]utuality of interest, including an identity of desired result’ might also support a finding of privity.”) (quoting *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 248 (2000)). The Slymans and Inkses specifically argued in their post-hearing brief in this case that “Ashland Lakes was not provided a full and fair opportunity to litigate the issue of whether an oral settlement agreement was entered into by Ashland Lakes and [FirstMerit].” The trial court, however, failed to analyze that issue in its decision. Because the trial court did not analyze whether the Slymans and Inkses have overcome the rebuttable presumption of regularity in the case between FirstMerit and Ashland Lakes we sustain their assignment of error and remand for the trial court to decide that issue in the first instance.

STATUTE OF FRAUDS

{¶21} Independent of its privity determination, the trial court also determined that the Slymans and Inkses' forbearance-agreement defense was barred by the statute of frauds. Under Section 1335.02(B) of the Ohio Revised Code, “[n]o party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the party against whom the action is brought.” The trial court determined that the alleged forbearance agreement was a “[l]oan agreement” under Section 1335.02(A)(3) and, therefore, had to be in writing to be enforceable.

{¶22} By its plain language, Section 1335.02(B) prohibits a party from “bring[ing] an action on a loan agreement” unless the agreement is in writing. In this case, the Slymans and

Inkses did not attempt to “bring an action” against FirstMerit; they merely raised the oral forbearance agreement as a defense to FirstMerit’s action against them. Accordingly, the trial court incorrectly concluded that their defense was barred under the statute of frauds. R.C. 1335.02(B); *see also* R.C. 1335.05 (providing that “[n]o action shall be brought . . . upon a contract or sale of lands . . . unless the agreement upon which such action is brought . . . is in writing . . .”).

MERITORIOUS DEFENSE

{¶23} The trial court further determined that the Slymans and Inkses’ argument about the oral forbearance agreement was barred because the parties to the alleged agreement intended that any such agreement be in writing. It is not clear from the court’s opinion what part of the Civil Rule 60(B) analysis it was engaging in when it made this statement. The court had already concluded that the Slymans and Inkses “have asserted operative facts that demonstrate that they have a meritorious defense that could justify relief from judgment.” Nevertheless, it examined the record and determined that it was “the parties’ clear intent that any forbearance be in writing to be enforceable.” It also wrote that the “facts conclusively establish that both [the Slymans and Inkses] and FirstMerit manifested an intention not to be bound absent execution of a written agreement.”

{¶24} According to the Ohio Supreme Court, “[u]nder [Civil Rule] 60(B), a movant’s burden is only to allege a meritorious defense, not to prove that he will prevail on that defense.” *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 20 (1988). We conclude that, by determining that the parties’ course of dealings established that the alleged forbearance agreement would have had to be in writing, the trial court exceeded the scope of its authority under Rule 60(B).

The court did not merely examine whether the Slymans and Inkses had alleged a meritorious defense, it improperly evaluated whether they had proved that defense.

CONCLUSION

{¶25} The trial court correctly entered judgment for FirstMerit based on the Slymans and Inkses' confessions of judgment. The court, however, incorrectly analyzed whether the Slymans and Inkses are bound by the judgment against Ashland Lakes, incorrectly applied the statute of frauds, and incorrectly evaluated the merits of their forbearance-agreement defense. The judgment of the Summit County Common Pleas Court in case number 25980 is affirmed. The judgment of the common pleas court in case number 26182 is reversed, and this matter is remanded for proceedings consistent with this decision.

Judgments affirmed in part,
reversed in part,
and causes remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CLAIR E. DICKINSON
FOR THE COURT

CARR, P. J.
CONCURS.

BELFANCE, J.
CONCURRING IN JUDGMENT ONLY.

{¶26} I concur in the majority's resolution of case of number 25980 and concur in the judgment of its resolution of case number 26182.

{¶27} In case number 26182, the Inkses and Slymans appealed the denial of their Civ.R. 60(B) motion. The trial court incorrectly concluded that res judicata barred the Inkses and Slymans from raising their alleged meritorious defense. Because FirstMerit has not established the elements of the defense, I concur in the majority's judgment.

{¶28} "[B]efore res judicata/collateral estoppel can apply one must have a final judgment." (Internal quotations and citation omitted.) *McDowell v. DeCarlo*, 9th Dist. No. 23376, 2007-Ohio-1262, ¶ 7. Further, the party seeking to use the defense has the burden of establishing that it applies. See *Fraternal Order of Police, Akron Lodge No. 7 v. Akron*, 9th Dist. No. 23332, 2007-Ohio-958, ¶ 12. In the instant matter, FirstMerit has not demonstrated that the order which it believes has a preclusive effect is a final judgment. During the course of the proceedings below, it does not appear that a confirmation of sale decree was ever actually entered. It appears that the trial court in the foreclosure case overruled Ashland Lakes' objection to the confirmation of sale concerning the alleged oral forbearance agreement. However, it

cannot be assumed that a final judgment was rendered by pointing to the trial court's ruling. Throughout the proceedings in the instant matter, FirstMerit indicated that it expected the confirmation decrees "shortly[]" or "any day." Absent a final judgment confirming the sale, FirstMerit cannot meet its burden to demonstrate that principles of res judicata are applicable. See *Emerson Tool, LLC v. Emerson Family Ltd. Partnership*, 9th Dist. No. 24673, 2009-Ohio-6617, ¶ 13-14.

{¶29} Further, even assuming a final judgment existed in the foreclosure case, I cannot conclude that the trial court considered the applicable law concerning the specific relationship between a debtor/principal, a creditor, and a guarantor/surety and the effect that a prior judgment against the debtor/principal has in a suit between the creditor and the guarantor/surety. The Supreme Court of Ohio has stated that "where the sureties have notice of the suit, and may, or do make defense, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is prima facie only. It may be impeached for collusion, or for mistake." *State v. Colerick*, 3 Ohio 487, 487-488 (1828); see also *State v. Jennings*, 14 Ohio St. 73, 76 (1862); 52 Ohio Jurisprudence 3d, Guaranty and Suretyship, Section 269 (2012); see generally *Standard Acc. Ins. Co. v. Hattie Fid. & Cas. Co.*, 50 Ohio App. 206 (5th Dist.1935). Consistent among the above authorities is the notion that the guarantor receives notice and an opportunity to defend, prior to the judgment having a preclusive effect. *Colerick* at 487-488; *Standard Acc. Ins. Co.* at 209-210; 52 Ohio Jurisprudence 3d at Section 269. It is clear from the trial court's entry that it did not consider this law and whether FirstMerit has met its burden under the law. Accordingly, I would reverse the trial court's judgment.

APPEARANCES:

SCOTT H. KAHN and GREGORY J. OCHOCKI, Attorneys at Law, for Appellants.

BRETT A. WALL, PATRICK T. LEWIS, and SARA L. WITT, Attorneys at Law, for Appellee.

STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL E. MORRISAN

)ss: 2012 DEC 19 PM 1:35

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A.

SUMMIT COUNTY
CLERK OF COURTS

Appellee

C.A. No. 25980
26182

v.

DANIEL E. INKS, et al.

Appellants

JOURNAL ENTRY

FirstMerit Bank N.A. has applied for reconsideration of this Court's decision. We review the application to determine if it calls to our attention an obvious error in our decision or if it raises an issue that we did not properly consider. *Garfield Hts. City Sch. Dist. v. State Bd. of Educ.*, 85 Ohio App. 3d 117, 127 (10th Dist. 1992).

FirstMerit has argued that this Court incorrectly concluded that the statute of frauds does not bar the Slymans and Inkses' oral-forbearance-agreement defense. In our decision, we determined that the statute of frauds did not bar the defense because Section 1335.02(B) of the Ohio Revised Code only prohibits a party from "bring[ing] an action." Similarly, Section 1335.05 provides that "[n]o action shall be brought" on certain types of agreements unless they are in writing. We reasoned that a party does not "bring an action" when all it does is assert a defense. *FirstMerit Bank N.A. v. Inks*, 9th Dist. Nos. 25980, 26182, 2012-Ohio-5155, ¶ 22.

FirstMerit has argued that the Slymans and Inkses' motion for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure should be considered

an “action” under Sections 1335.02 and 1335.05. It notes that neither section defines the term “action.” According to FirstMerit, we should apply the definition set forth in Section 1301.01, which “includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.”

The definition of “action” in Section 1301.01(A) only applies to “Chapters 1301. [through] 1310. of the Revised Code[.]” Those are the chapters of the Revised Code incorporating the uniform commercial code. While Chapter 1335 is part of Title 13, it is not one of the chapters incorporating the uniform commercial code, therefore, there is no reason to apply the uniform commercial code’s definitions to it. Instead, we note that the term “action” usually means “[a] civil or criminal judicial proceeding. — Also termed *action at law*.” Black’s Law Dictionary 32 (9th Ed. 2009). The definition of “action at law” is “[a] civil suit stating a legal cause of action and seeking only a legal remedy.” *Id.* In our decision, we applied the usual definition when we determined that merely raising a forbearance-agreement defense in a motion for relief from judgment does not constitute bringing an “action” under Section 1335.02 or 1335.05. FirstMerit has not established that we failed to properly consider this issue or that our decision contains an obvious error regarding it.

FirstMerit has next argued that Ohio courts routinely refer to Civil Rule 60(B) motions as actions. It notes that one of the requirements for a Rule 60(B) motion is “timely action.” *Colley v. Bazell*, 64 Ohio St. 2d 243, 246 (1980). In *Colley*, however, the Ohio Supreme Court used the words “timely action” as short-hand for the requirement it set out in *GTE Automatic Elec. Inc. v. Arc Indus. Inc.*, 47 Ohio St.

2d 146 (1976), that a Civil Rule 60(B) motion must be “made within a reasonable time, and, where the grounds for relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.” Although the word “action” can refer to a judicial proceeding, it can also mean “[t]he process of doing something; conduct or behavior.” Black’s Law Dictionary 32 (9th ed. 2009). A party can act in a timely manner under Civil Rule 60(B) without its conduct constituting an “action” under Chapter 1335 of the Ohio Revised Code.

FirstMerit has also argued that the Slymans and Inkses’ Rule 60(B) motion is barred under the statute of frauds because one of actions that they intend to take after receiving relief from judgment is to file a counterclaim seeking to enforce performance of the forbearance agreement. Whether the Slymans and Inkses will be able to prosecute a counterclaim after obtaining relief from judgment, however, is not relevant regarding whether they were entitled to relief under Rule 60(B). The Slymans and Inkses only had to demonstrate that they have a “meritorious defense . . . to present if relief is granted[.]” *GTE Automatic Elec. Inc. v. Arc Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976).

FirstMerit has also argued that this Court failed to address whether the Slymans and Inkses’ arguments were barred under Section 1335.02(B) or Section 1335.05. We considered both arguments, however, in paragraph 22 of our opinion. *FirstMerit Bank N.A. v. Inks*, 9th Dist. Nos. 25980, 26182, 2012-Ohio-5155, ¶ 22.

FirstMerit has next argued that this Court failed to consider case law from other districts. Just because another district court of appeals has reached a different

conclusion on the same issue, however, does not mean that this Court's opinion contains an obvious error or that this Court did not properly consider an issue. To the extent that FirstMerit has argued that this Court's decision conflicts with the decisions of other districts, we will address those arguments in our ruling on FirstMerit's motion to certify a conflict.

FirstMerit has next argued that this Court should have interpreted the statute of frauds broadly to further its purpose. According to FirstMerit, following the savings and loans crisis, Section 1335.02 "was specifically designed to curb lending-related litigation based on claims of 'oral' agreements for loans." FirstMerit has argued that this Court's decision undermines the protections that the statute affords to borrowers and lenders. It has argued that allowing an oral agreement to be asserted defensively risks creating the sort of uncertainty and fraud that the act was designed to prevent.

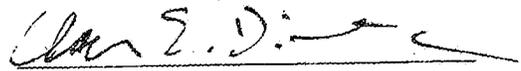
In this case, the Slymans and Inkses admitted that Ashland Lakes LLC obtained a loan from FirstMerit and that they guaranteed that loan. They argued that the loan had not been breached, however, because FirstMerit and Ashland Lakes entered into a forbearance agreement. We do not agree that the alleged purpose of Section 1335.02 is threatened by their assertion of that defense.

FirstMerit's next argument is that this Court failed to consider the effect that the parol evidence rule will have on the viability of the Slymans and Inkses' defense. According to FirstMerit, before granting a motion for relief from judgment, this Court should consider whether the Slymans and Inkses will be able to prove their defense. It has argued that the parol evidence rule will bar any evidence that the Slymans and

Inkses may attempt to present regarding the alleged forbearance agreement. The Ohio Supreme Court has held, however, that, “[u]nder [Civil Rule] 60(B), a movant’s burden is only to allege a meritorious defense, not to prove that he will prevail on that defense.” *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 20 (1988). We, therefore, reject FirstMerit’s argument.

FirstMerit has also argued that our decision is inconsistent with this Court’s decision in *Fifth Third Bank v. Reddish*, 9th Dist. No. 02CA0016-M, 2002-Ohio-5030. In *Reddish*, Fifth Third Bank foreclosed on property owned by Robert and Latricia Reddish. The Reddishes counterclaimed, arguing that the bank had orally agreed to modify the loan. This Court determined that the “plain language” of Section 1335.05 barred the Reddishes’ counterclaim. *Id.* at ¶ 25. This Court does not appear to have analyzed whether the Reddishes could assert their oral-modification argument as a defense to the bank’s claim independent of their counterclaim. *Id.* at ¶ 20-26. We, therefore, do not believe that *Reddish* controls the resolution of this case.

Upon review of FirstMerit’s application for reconsideration, we conclude that it does not call to our attention an obvious error in our decision or raise an issue that we did not properly consider. *Garfield Hts. City Sch. Dist. v. State Bd. of Educ.*, 85 Ohio App. 3d 117, 127 (10th Dist. 1992). The application for reconsideration is denied.


Clair E. Dickinson, Judge.

Concurs:

Carr, J.

Belfance, J.

STATE OF OHIO)

COURT OF APPEALS
DANIEL M. HORTON

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

2005 DEC 19 PM 1:33

SUMMIT COUNTY
CLERK OF COURTS

FIRSTMERIT BANK, N.A.

Appellee

C.A. No. 25980
26182

v.

DANIEL E. INKS, et al.

Appellants

JOURNAL ENTRY

FirstMerit Bank N.A. has moved this Court to certify a conflict between its judgment in this case and those of the Fifth District Court of Appeals in *Fifth Third Bank v. Labate*, 5th Dist. No. 2005CA00180, 2006-Ohio-4239, the Eighth District Court of Appeals in *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333 (Dec. 6, 1984), the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), and the Twelfth District Court of Appeals in *Winton Savings & Loan Co. v. Eastfork Trace Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600. We grant the motion because our judgment in this case conflicts with the judgment of the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), on the same question of law.

Article IV Section 3(B)(4) of the Ohio Constitution provides that, whenever the judges of a court of appeals determine that a judgment upon which they have agreed

conflicts with a judgment of another court of appeals, they shall certify that conflict to the Ohio Supreme Court. In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993), the Ohio Supreme Court held that, for certification under Article IV Section 3(B)(4) to be appropriate, three conditions must be satisfied:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. (Emphasis in original). The issue that FirstMerit has proposed for certification is: "Does the Statute of Frauds bar a defendant from obtaining relief from a cognovit judgment by asserting, as an alleged defense to judgment, a claim arising out of an alleged oral loan agreement that is within the Statute of Frauds."

In *Fifth Third Bank v. Labate*, 5th Dist. Nos. 2005CA00180, 2006CA00040, 2006-Ohio-4239, Fifth Third Bank obtained a cognovit judgment against Rebecca Labate. Ms. Labate moved for relief from judgment, arguing that the bank committed fraud when it incorrectly told her that the documents she was signing contained the terms they had negotiated. She also argued that the bank "slipped" a security agreement into the stack of loan documents. *Id.* at ¶ 36. She argued that, because of the fraud, the bank should be estopped from asserting that the statute of frauds prevented the court from looking outside the written documents. The Fifth District rejected her argument because it concluded that Section 1335.02 of the Ohio Revised

Code requires loan agreements to be in writing and that the terms of such agreements to be determined solely from the written documents. *Id.* at ¶ 37, 40.

Unlike *Labate*, this case involves an agreement that was allegedly negotiated by the parties to a loan agreement after the agreement had already been breached. We, therefore, conclude that the cases do not present the same question of law.

In *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333 (Dec. 6, 1984), Robert Lemmo obtained a default judgment against his tenants. The tenants moved for relief from judgment, asserting that Mr. Lemmo had released them from the lease agreement. They also filed a counterclaim alleging that Mr. Lemmo had orally agreed to renew their lease. The Eighth District Court of Appeals upheld the denial of the tenants' motion, concluding that they had "failed to show any meritorious defense" because "proof of the oral release defense would be barred by the statute of frauds." *Id.* at *3.

In this case, FirstMerit argued that the Slymans and Inkses' oral-forbearance-agreement defense was barred under Sections 1335.02 and 1335.05 of the Ohio Revised Code. In *Lemmo*, the court did not identify which statute it was applying. We note that the General Assembly did not enact Section 1335.02 until eight years after *Lemmo* was decided. Although Section 1335.05 existed in 1984, the Eighth District may have been applying Section 1335.04, which provides that "[n]o lease . . . shall be . . . granted except . . . in writing . . ." FirstMerit, therefore, has failed to establish that *Lemmo* and this case conflict upon the same question of law.

In *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), George Nicolozakes bought a house for Rebecca Tangeman to live in. Mr. Nicolozakes later sold the house to the Deryk Babrield Tangeman Irrevocable Trust for \$250,000, which he secured with a mortgage. When the trust defaulted, Mr. Nicolozakes foreclosed. Ms. Tangeman alleged that Mr. Nicolozakes' intent had been to give the property to her, but they disguised the transaction as a sale for tax purposes. She also alleged that, even if the transaction was a sale, Mr. Nicolozakes later renounced his interest in the property, gifting it to the trust. The Tenth District upheld an award of summary judgment to Mr. Nicolozakes, noting that Section 1335.04 of the Ohio Revised Code requires all transfers of an interest in real property to be in writing. It also concluded that Ms. Tangeman's argument that Mr. Nicolozakes had later discharged the loan was barred because "a discharge of a mortgage is an interest in land and is required to be in writing under the Statute of Frauds[.]" *Id.* at *4 (citing *Gatts v. GMBH*, 14 Ohio App. 3d 243, 247 (11th Dist. 1983)).

In *Nicolozakes*, the Tenth District determined that Section 1335.05 of the Ohio Revised Code barred Ms. Tangeman from defending against a foreclosure action by alleging that Mr. Nicolozakes had orally released her from a note and mortgage. In this case, this Court determined that the Slymans and Inkses could defend against an action to enforce a guaranty by arguing that FirstMerit and Ashland Lakes had orally modified their agreement. We conclude that the two cases conflict on the same question of law, which is whether the language in Section 1335.05 providing that

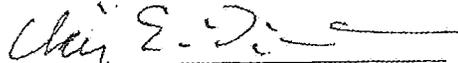
"[n]o action shall be brought . . . to charge a person . . . upon a contract or sale of lands . . . or interest in or concerning them . . . unless the agreement . . . is in writing . . ." prohibits a defendant from arguing that the parties to a contract involving land orally agreed to modify the terms of the their agreement.

In *Winton Savings & Loan Co. v. Eastfork Trace Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600, Eastfork Trace Inc. obtained a loan from Winton Savings & Loan to finance a real estate development. When Winton refused to disburse funds for two improvement projects that Eastfork wanted to perform on the land, Eastfork stopped repaying the loan. After Winton foreclosed, Eastfork filed a counterclaim, alleging that the parties had orally agreed to treat the loan as a line of credit. According to Eastfork, because the loan was a line of credit, any funds that it had repaid to Winton should have been available to it to finance the improvement projects. The trial court entered summary judgment for Winton. The Twelfth District affirmed, holding that, under Section 1335.02, whether the loan was a line of credit had to be determined solely from the parties' written agreement. *Id.* at ¶ 10, 12.

Winton, like *Labate*, only involved the interpretation of a loan agreement at the time it was signed. In this case, the Slymans and Inkses have argued that the parties to a loan agreement orally agreed to modify the agreement years after its execution. We, therefore, conclude that the Twelfth District's decision in *Winton* is factually distinguishable.

Upon review of FirstMerit's motion to certify a conflict, we conclude that our decision conflicts with the decision of the Tenth District Court of Appeals in

Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000). Accordingly, we certify the following question to the Ohio Supreme Court: "Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to a contract involving an interest in land orally agreed to modify the terms of their agreement." The motion to certify a conflict is granted.


Clair E. Dickinson, Judge.

Concurs:
Carr, J.

Dissents:
Belfance, J.

DANIEL M. HARRIGAN

2011 OCT 28 PM 3:18

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

FIRSTMERIT BANK, N.A.

Plaintiff,

-vs-

DANIEL E. INKS, et al.

Defendants.

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CASE NO.: CV 2011-05-2676

JUDGE JUDITH HUNTER

ORDER
(final and appealable)

This matter came before the Court on Motion of Defendants Daniel E. Inks, Deborah A. Inks, David J. Slyman, and Jacqueline Slyman (Guarantors) to Vacate the Cognovit Judgment rendered in favor of Plaintiff Firstmerit Bank and against the above guarantors on May 17, 2011.

The Court has been advised, having reviewed the Motion, affidavit of Daniel Inks, and exhibits; Plaintiff's brief in opposition, affidavit of Thomas Krupel, and exhibits, two deposition transcripts; hearing testimony and exhibits; post-hearing briefs, post-hearing proposed findings of fact and conclusions of law; transcript from the September 21, 2011 hearing; the pleadings; docket; and applicable law. Upon due consideration, the Court finds said Motion not well taken and it is denied.

PROCEDURAL HISTORY

On May 17, 2011, Plaintiff filed a Complaint for Cognovit Judgment against the above referenced Defendant Guarantors, answer on Defendants' behalf based upon warrants of

confession, and affidavit of Thomas Krumel, Senior Vice President for Firstmerit Bank. On the same day the Court granted Cognovit Judgment against the above referenced Defendant Guarantors, jointly and severally, in the amount of \$3,337,467.17 total, plus interest, court costs, and attorney fees.

Approximately two weeks thereafter, the Defendants filed their Civ. R.60(B) Motion to Vacate the Cognovit Judgment. After limited remand from the Ninth District Court of Appeals, this matter was ultimately set for evidentiary hearing on September 21, 2011. Michael Charnas, Ryan Gilbert, and Daniel Inks all testified as witnesses for the Defendants. Defendants also introduced the testimony of Marc Byrnes and Michael Lavelle by way of deposition transcript. FirstMerit did not produce any witnesses on its behalf at the hearing. This matter is now ripe for review.

FINDINGS OF FACT

1. FirstMerit is a national banking association organized and existing under the laws of the United States. FirstMerit maintains a place of business in Akron, Ohio.
2. Ashland Lakes, LLC (Ashland Lakes) is a limited liability company organized and existing under the laws of the State of Ohio. Ashland Lakes is not a party to this action.
3. 50% of the membership interest in Ashland Lakes is owned by Defendant David Slyman. The other 50% of the membership interest in Ashland Lakes is owned by two entities in which Defendant Daniel Inks owns 50%. Mr. Inks serves as Ashland Lakes' "managing member."
4. Defendants Jacqueline Slyman and Deborah Inks are married to Mr. Slyman and Mr. Inks, respectively.
5. Ashland Lakes, Mr. Inks, and Mr. Slyman signed a Promissory Note, dated June 27, 2005, executed and delivered to FirstMerit in the original principal amount of \$3,500,000.00.

(Note). The Note was secured by a mortgage interest on real property owned by Ashland Lakes in Ashland County, Ohio. Defendants personally guaranteed the obligations of Ashland Lakes, Mr. Inks, and Mr. Slyman to FirstMerit with respect to the Note as evidenced by the Modification and Extension Agreement, and individual guaranties, all dated October 24, 2005.

6. After Ashland Lakes defaulted on the Note/Modification and Extension Agreement on January 12, 2009 FirstMerit commenced a foreclosure action on the properties in the Ashland County Court of Common Pleas, in the case captioned FirstMerit Bank, N.A. v. Ashland Lakes, LLC, et al., Case No. 09-CFR-022

(Foreclosure Case).

7. FirstMerit entered into three separate written forbearance agreements with Ashland Lakes and Defendants - dated as of February 6, 2009, June 12, 2009, and December 12, 2009.

8. Ashland Lakes and Defendants defaulted under all of the Prior Forbearance Agreements, including defaulting under the December Forbearance Agreement, by failing to repay the Note in full on or before June 30, 2010.

9. After Ashland Lakes and Defendants defaulted under the December Forbearance Agreement, the Ashland County Court appointed a private auctioneer to conduct a public auction of the Properties. The auctioneer scheduled the auction for December 15, 2010.

10. On December 14, 2010, Ashland Lakes filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the Northern District of Ohio, Case No. 10-22080 to block the auction.

11. FirstMerit moved to dismiss the Bankruptcy Case. In response, Ashland Lakes consented to the dismissal of its case, and the Bankruptcy Court dismissed the case on January 6, 2011.

12. Thereafter, the auctioneer rescheduled the auction for March 9, 2011. At the auction, the Properties sold for \$1,760,000, and on March 25, 2011, FirstMerit filed motions in the Foreclosure Case to confirm the auction sales.

13. On April 7, 2011, Ashland Lakes, represented by the same attorney who represents Defendants here, filed a Motion to Set Aside the Sheriff's Sale and in Opposition to FirstMerit's Motion to Confirm Sheriff's Sale (combined objection to the confirmation of the auction sales and a motion to set aside the auction sales). Ashland Lakes objected to the sales confirmation on two grounds: first, that FirstMerit was legally prohibited from conducting the auction by virtue of an oral forbearance agreement; and second, that certain defects were contained in the appraisal upon which the auctioneer relied to establish the minimum sale price. Mr. Inks provided an affidavit on behalf of Ashland Lakes in support of its confirmation objection. A copy of said affidavit was attached as Exhibit A to the Defendants' Civ.R. 60(B) Motion in this case.

14. On April 15, 2011, the Ashland Court denied Ashland Lakes' Motion with respect to the alleged oral forbearance agreement. The Ashland Court specifically held: "Furthermore, the Court finds that Defendant Ashland Lakes, LLC has failed to establish that any forbearance agreement precluding the sale was ever consummated by the parties. The Court therefore finds that assertion by Defendant to lack merit."

15. The Ashland Court thereafter scheduled a hearing on Ashland Lakes' objections to the appraisals. Mr. Inks testified at the April 25, 2011 hearing.

16. By Judgment Entry June 3, 2011, the Ashland Court ultimately denied the balance of Ashland Lake's objections (including the objections to the appraisals) and granted FirstMerit's

Motions to Confirm the sale. The Court directed FirstMerit to submit proposed confirmation decrees.

17. Ashland Lakes has appealed the April 15 and June 3, 2011 Judgment Entries. The appeal remains pending.

18. Defendants' Civ.R. 60(B) Motion generally alleges they are entitled to relief from the cognovit judgment due to non-default (Ashland Lakes and the Bank entered into a settlement agreement) and novation. FirstMerit argues in opposition: (1) the Guarantor Defendants are collaterally estopped from arguing the oral settlement agreement between FirstMerit and Ashland Lakes, (2) that the settlement agreement must be in writing, and (3) no oral settlement agreement was reached between the FirstMerit and Ashland Lakes.

19. In connection with Defendants' Rule 60(B) Motion, the following operative facts were generally alleged:

(a) Ashland Lakes and the Bank (FirstMerit) agreed to settle their dispute at a January 7, 2011 meeting. One of the terms to this agreement was that the Bank agreed not to pursue any legal proceedings against the Guarantor Defendants (Daniel E. Inks, Deborah A. Inks, David J. Slyman and Jacqueline Slyman). (As part of this agreement) the Bank agreed to accept \$1.6 Million from Ashland Lakes: \$1.3 Million as soon as replacement financing could be secured, and \$300,000 in October 2011 once Ashland Lakes had sold two homes on the property.

(b) On March 7, 2011, Daniel Inks and FirstMerit representative Thomas Krumel conducted a telephone conversation wherein they reached an settlement agreement with sufficient particularity to form a binding contract. Inks and Krumel discussed Inks' March 7, 2007 e-mail to Krumel and reached a mutual determination on each of the line items.

(c) On March 8, 2011, the parties took the following actions, consistent with the formation of an oral settlement agreement reached the day before:

(i) Mr. Krumel telephoned Westfield Bank at 8:00 A.M. on March 8, 2011, the day after the oral settlement agreement was reached.

(ii) Mr. Krumel also called Dan Inks on March 8, 2011, asking about the \$159,000 Ashland Lakes was to deposit with the Bank and indicating he was perturbed with Westfield for failing to return his call.

(iii) Ashland Lakes' stood ready, willing and able to perform its obligations under the oral settlement agreement:

- (1) It obtained a firm loan commitment from Westfield Bank,
- (2) It obtained \$150,000 in new equity from Michael Charnas,
- (3) It obtained \$150,000 in new equity from Michael Lavelle,
- (4) It secured a loan from Marc Byrnes to cover the \$150,000 deposit required by the Bank and agreed upon by the parties.

(iv) On March 8, 2011, Ashland Lakes attempted to contact Mr. Krumel four or five times to receive instructions on how to deposit \$150,000 as required by the Bank and to make the \$9,000 payment for the Bank's appraisal.

(v) Mr. Krumel did not return Ashland Lakes' calls until close of business.

20. Upon review of the evidence, the Court finds that no written or verbal agreement was entered into at the January 7, 2011 meeting or shortly thereafter. The parties merely discussed a broad framework of a potential settlement pursuant to which Defendants and Ashland Lakes would pay FirstMerit \$1,300,000 at an indeterminate time, funded through a combination of debt

financing the sale of a portion of the Properties, for a total of \$1,600,000 in satisfaction of those parties' indebtedness to FirstMerit. This broad understanding was never put in writing, nor was Defendants' assertion that FirstMerit agreed not to pursue any legal proceedings against the Guarantor Defendants.

21. The record establishes that the parties did not discuss several terms of the proposed transaction, including, without limitation, when the \$1,300,000 payment was to be made, how exactly it was to be funded, how certain rent monies being held by the court-appointed receiver of the Properties would be disbursed, or terms of the commitment letter from Westfield Bank. Furthermore, Defendants have failed to produce a writing, signed by FirstMerit, memorializing the terms of the alleged agreement from that meeting.

22. With respect to Defendants' allegation that between the time of the January 7, 2011 initial meeting and March 7, 2011 FirstMerit entered into a valid and enforceable forbearance agreement with Ashland Lakes, it appears that the parties merely continued to discuss the terms for a potential forbearance agreement and that no definite terms were ever agreed upon. See generally, the e-mail exchanges between Inks, Krumel, Gilbert, and the attorneys for FirstMerit and Ashland Lakes.

23. Mr. Inks alleges that, in various telephone conversations later in the afternoon of March 7, 2011, Mr. Krumel supposedly agreed over the phone to accept the \$150,000 deposit - a contention Mr. Krumel denies. Mr. Inks also alleged during the hearing, for the first time, that Mr. Inks agreed to pay \$9,000 for the appraisal, agreed that FirstMerit would represent and warrant the conclusions of the appraisal in the Draft Forbearance Agreement, and that FirstMerit supposedly agreed to allow Mr. Inks to retain the rent money being held by the receiver. But then Mr. Inks claimed that on the morning of March 8, 2011, FirstMerit said it would not

represent and warrant the conclusions of the appraisal in the Draft Forbearance Agreement, and Mr. Inks then claimed that he agreed that FirstMerit did not have to do so. Mr. Krumel denies agreeing by telephone to any of these changed terms.

24. However, it is undisputed that, no later than 4:00 PM on March 8, 2011, Mr. Krumel spoke to Mr. Inks by telephone and advised him that FirstMerit would not agree to a forbearance and that the auction would proceed as scheduled.

25. It is further undisputed that the draft forbearance agreement was never "revised" in written form and/or signed by either party prior to the March 9, 2011 auction.

CONCLUSIONS OF LAW

1. Civ. R. 60(B) provides relief from final judgment for the following reasons:
 - (1) Mistake, inadvertence, surprise, or excusable neglect;
 - (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B);
 - (3) Fraud, whether heretofore denominated intrinsic or extrinsic, misrepresentation or other misconduct of an adverse party;
 - (4) The judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
 - (5) Any other reason justifying relief from the judgment.
2. Civ. R. 60(B) is the procedural tool used to vacate all judgments, including cognovit notes (or promissory notes). *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 101. Normally, to prevail on a motion for relief from judgment pursuant to Civ. R. 60(B), the movant must affirmatively demonstrate: 1.) it is entitled to relief under one of the grounds set forth in Civ. R.

60(B) above, 2.) it has a meritorious defense or claim to present if relief is granted, and 3.) the motion is timely filed within the time limit set by Civ. R. 60(B). *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150-51. If a party fails to prove any of these three elements, the trial court must deny the motion. *Rose Chevrolet, Inc.* (1988), 36 Ohio St.3d 17, 20.

3. A party's burden, however, is lessened when filing a motion to vacate judgment on a cognovit note. *Waldman Financial v. Digital Color Imaging, Inc.*, 2006 Ohio 4077, P9, Ninth App. Dist. No. C.A. 23101. In such a case, the movant need only affirmatively demonstrate the second and third elements for relief from judgment under Civ. R. 60(B) - that there is a meritorious defense and that the motion was timely. *Id.*, citing *Medina Supply Co., Inc. v. Corrado* (1996), 116 Ohio App.3d 847, 850-851.

4. As the pending Motion to Vacate Judgment relates to a cognovit note, Defendants do not have to establish the first element of the *GTE Automatic Electric* test - that they are entitled to relief under one of the grounds set forth in Civ. R. 60(B)(1) through (5).

5. As to the second element the *GTE Automatic Electric* test, the Court concludes that Defendants' Motion was timely made. The Motion was filed within two weeks from the date of the Cognovit Judgment.

6. As to the third element the *GTE Automatic Electric* test, Defendants' allege the meritorious defense that the parties (Ashland Lakes, Defendants, and FirstMerit) entered into the oral forbearance agreement in which FirstMerit agreed not to exercise its rights and remedies under the loan documents, including the right to pursue legal proceedings against the Guarantor Defendants. Upon review, although the parties are at odds whether an oral forbearance agreement was ultimately entered into, the Court finds that Defendants have asserted operative

facts that demonstrate that they have a meritorious defense that could justify relief from judgment. See e.g., *Cook Family Invests. v. Billings*, 2006 Ohio 764, Ninth Dist. C.A. Nos. 05CA008689 and 05CA008691, at P19 (a moving party is not required to prove that he will ultimately prevail if relief is granted). However, upon review of Plaintiff's other arguments with respect to the alleged oral forbearance agreement, the Court finds Defendants' defense is barred by issue and claim preclusion, barred by the statute of frauds and contrary to statute.

7. First, this matter is barred by the doctrine of claim and issue preclusion. Ashland Lakes raised the identical claim in its Ashland Lakes' Motion to Set Aside the Sheriff's Sale and in Opposition to FirstMerit's Motion to Confirm Sheriff's Sale, and relied on the same Inks Affidavit that Defendants rely on herein. The Ashland County Court specifically held that no such agreement was made and denied the Motion.

8. While Ashland Lakes has appealed the April 15 and June 3 Judgment Entries, the mere filing of an appeal does not act to negate any preclusive effect those orders have. *Cully v. Lutheran Med. Ctr.* (1987), 37 Ohio App.3d 64, 65 ("it is well-settled that the pendency of an appeal does not prevent the judgment's effect as res judicata in a subsequent action.").

9. The Ashland County Court's orders preclude re-litigation of the enforceability of the alleged oral forbearance agreement in this case. Claim and issue preclusion apply to final orders. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus (claim preclusion); *Fort Frye Teachers' Ass'n, OEA/NEA v. State Employment Relations Bd.* (1998), 81 Ohio St.3d 392, 395 (issue preclusion). An order confirming a judicial sale is a final order under established law. See *Citizens Loan & Sav. Co. v. Stone* (1965), 1 Ohio App.2d 551, 552 and *Citizens Mortgage Corp. v. McDaniel* (Oct. 30, 1981), 4th Dist. No. 748, 1981 WL 6046, at *1. In this case, the June 3rd Judgment Entry granted FirstMerit's confirmation Motions and directed FirstMerit to

submit confirmation decrees for entry. The Court finds these orders to have sufficient finality to have a preclusive effect.

10. Furthermore, the Defendants stand in privity with Ashland Lakes, and as such, are bound by the Ashland County Court's determination and are precluded from re-litigating the issue of the existence and enforceability of the alleged oral agreement here.

11. While Defendants were not parties to the underlying foreclosure case, they are in privity with Ashland Lakes and are equally bound by the Ashland County Court's judgment. Generally speaking, "what constitutes privity in the context of res judicata is somewhat amorphous." *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248. However, the Supreme Court has "applied a broad definition to determine whether the relationship between the parties is close enough to invoke the doctrine" and thus, "a mutuality of interest, including an identity of desired result, may create privity." *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, at ¶8 (quoting *Brown*, 89 Ohio St.3d at 248). The Court notes that Defendants' were listed as guarantors in the revised Draft Forbearance Agreement referenced to and attached to Krumel's March 3, 2011 e-mail to Inks.

12. The Court finds that privity exists between Defendants and Ashland Lakes, both because Mr. Inks and Mr. Slyman own and/or control Ashland Lakes, and because all Defendants had the ability to participate, and in the case of Mr. Inks did participate, in the underlying foreclosure case. In addition, had Ashland Lakes prevailed in the Ashland County case, that Court's judgment would have given Defendants a direct benefit.

13. Defendants share a very close relationship with Ashland Lakes. Under Ohio law, the owners of closely held entities, such as close corporations, partnerships, and companies, generally stand in privity with their entities. See, e.g., *Polivchak v. Polivchak Co.*, 8th Dist. No.

91794, 2010-Ohio-1656, at ¶20 (holding that a partner of a partnership was in privity with the partnership, such that the partner was barred from re-litigating a cognovit judgment entered against the partnership but not against her); *Business Data Systems, Inc. v. Gourmet Café Corp.*, 9th Dist. No. 23808, 2008-Ohio-409, at ¶31 (agreeing that “a corporation is in privity with its shareholders”); and *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶10 (observing that an association and its members may be in privity). In this case, Ashland Lakes is a single purpose entity owned 50% by Mr. Slyman and 50% by two entities in which Mr. Inks has a 50% interest. Mr. Inks is also Ashland Lakes’ “managing member.” The Court concludes that a sufficient relationship exists to establish privity.

14. Moreover, Defendants share a “mutuality of interest” with Ashland Lakes. See, e.g., *O’Nesti*, supra at ¶9 (“[I]ndividuals who raise identical legal claims and seek identical rather than individually tailored results may be in privity.”); and *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248 (finding that a “mutuality of interest, including an identity of desired result,” creates privity). Defendants allege that both they and Ashland Lakes were parties to the same purported oral forbearance agreement with FirstMerit in the underlying Foreclosure Case. Defendants allege that, under this alleged agreement, both they and Ashland Lakes were to receive debt forgiveness. Mr. Inks was personally involved in the consortium that planned to acquire the properties pursuant to the alleged oral agreement. And Defendants seek, in this proceeding, the identical relief that Ashland Lakes sought in the Foreclosure Case: judicial enforcement of the alleged oral forbearance agreement against FirstMerit. Thus, Defendants share a “mutuality of interest” with Ashland Lakes and are equally bound by the Ashland County Court’s judgment in the underlying foreclosure case. See, e.g., *State ex rel. Schachter v. Ohio Public Employees Retirement Bd.* (2009), 121 Ohio St.3d 526, 2009-Ohio-1704, at ¶¶36-37 (finding that adverse

PERS service credit determination against one employee of the Legal Defender Office had preclusive effect against another employee who participated in the other employee's hearing, particularly since a determination against PERS would have benefitted both employees, and *Daniel v. Shorebank Cleveland*, 8th Dist. No. 92832, 2010-Ohio-1054, at ¶18 (observing that all three co-borrowers under a loan would be in privity with one another with respect to a judgment in favor of the bank, even if not all of the co-borrowers were parties to the prior proceeding, because all co-borrowers sought the same result).

15. This mutuality of interest is further evidenced by Mr. Ink's direct involvement in the Ashland County case. Mr. Inks directly participated in the Foreclosure Case, submitting an affidavit on Ashland Lakes' behalf—the same Inks Affidavit he filed in this case—and testifying for Ashland Lakes at the hearing on the Confirmation Objection. In addition, Defendants are represented by the same attorneys who represented Ashland Lakes in the Foreclosure Case, and all Defendants therefore knew, or should have known, about the Foreclosure Case proceedings and could have participated. This level of participation is sufficient to establish privity, see, e.g., *Schachter*, 2009-Ohio-1704, at ¶¶ 38-39 (finding privity existed where a non-party participated in the proceedings or had the opportunity to join the proceedings but chose not to), particularly where, as here, Defendants would have benefitted had Ashland Lakes prevailed on the merits of its Confirmation Objection.

16. Defendants, as privies of Ashland Lakes, are barred from re-litigating the foreclosure agreement's existence as a matter of claim and issue preclusion based on the Ashland County Court's April 15 and June 3 Judgment Entries in the foreclosure case. As such, Defendants' alleged defense is barred by the doctrine of issue and claim preclusion.

17. The Court also finds Defendants' alleged defense is barred by the Statute of Frauds.

Defendants' have alleged that Ashland Lakes and FirstMerit entered into the alleged oral forbearance agreement. However, this defense lacks merit because forbearance agreements fall within the statute of frauds and must be in writing to be enforceable.

18. Ohio's Statute of Frauds expressly applies to commercial loans like the loan at issue in this case. R.C. 1335.02(B) provides, in pertinent part, that "[n]o party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought..." Courts have regularly applied R.C. 1335.02 to bar enforcement of alleged oral agreements to make loans or to modify the terms of existing loans. See, e.g., *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank* (1996), 75 Ohio St.3d 433, 438-39 (barring the enforcement of an alleged verbal promise to finance a real estate development); *Lamkin v. First Community Bank* (Mar. 29, 2001), 10th Dist. No. 00AP-935, 2001 WL 300732, **20-21 (rejecting oral modification regarding his payment obligations occurred as a result of conversations with the bank's loan officer); *Fifth Third Bank v. Labate*, 2006-Ohio-4239, Fifth Dist. No. 2005CA00180 & 2006CA00040, at ¶41 (rejecting a defense to a cognovit judgment based on an alleged oral promise to refinance a loan); and *Fifth Third Bank v. Reddish*, 2002 Ohio 5030, Ninth Dist. C.A. No. 02CA0016-M, at P25 (rejecting an alleged oral agreement to recast the payments and change the variable interest rate into a fixed interest rate).

19. Forbearance agreements, like the alleged oral agreement here, are "loan agreements" as defined by R.C. 1335.02 and fall within the statute of frauds. As a result, a forbearance agreement must be in writing, and oral forbearance agreements are unenforceable as a matter of law. See, e.g., *United States Sur. Co. v. Keycorp* (N.D. Ohio Aug. 13, 2007), 2007 U.S. Dist. Lexis 58996, *11 (surety's action against bank based upon the purported oral forbearance is

barred under the statute of frauds because it constitutes a loan agreement, which is not in writing nor signed by the party to be charged).

20. Ohio's Statute of Frauds also applies to the discharge of a mortgage as it is an interest in land. R.C. 1335.05 requires a contract for sale of land to be in writing. Oral agreements to release or discharge a mortgage is void. *Douglas Co. v. Gatts* (1982), 8 Ohio App.3d 186, 187. See also, *Gatts v. E.G.T.G.* (1983), 14 Ohio App.3d 243, 249-250 (rejecting an alleged discharge of mortgage by accord and satisfaction denied because the discharge was not reduced to writing) and *Nicolozakes v. The Deryk Gabriel Tangeman Irrevocable Trust* (Dec. 26, 2000), Tenth App. Dist. No. 00AP-7, 2000 Ohio App. Lexis 6135 (rejecting an alleged oral agreement after the note was executed to release defendant's obligation on the note and mortgage to effectuate a gift to defendant's trustee). Here, the alleged oral forbearance agreement contemplated the discharge of the mortgage upon the completion of the other terms of the agreement. See Draft Forbearance Agreement, Section 6(c), page five. As this alleged discharge was not reduced to writing, the oral forbearance agreement violated the statute of frauds and is unenforceable.

20. Defendants' effort to take the alleged oral agreement out of the statute of frauds by characterizing it as a "settlement agreement" also lacks merit. Ohio courts recognize a narrow exception to the statute of frauds for settlement agreements that are made in open court and on the record. See, e.g., *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, paragraph one of the syllabus; and *State Dep't of Natural Resources v. Hughes* (Nov. 30, 2000), 6th Dist. No. E-00-002, 2000 WL 1752645, *3, unreported. But this exception does not apply to cases where the putative "settlement agreement" was negotiated out of court without judicial involvement. In those cases, the agreement must be in writing to be enforceable if it otherwise falls within the statute of frauds, regardless of whether it is a "settlement agreement" or not. *Sherman v. Haines*

(1995), 73 Ohio St.3d 125, 129 (holding that an alleged oral settlement agreement that violated the statute of frauds was unenforceable as a matter of law); *Condominiums at Stonebridge Owners' Association, Inc. v. Patton*, 8th Dist. No. 94139, 2010-Ohio-3616, at ¶13 (indicating that the statute of frauds bars enforcement of a verbal settlement agreement that involved the sale of real estate); and *Thomas v. Thomas* (1982), 5 Ohio App.3d 94, 99 (finding that an un-executed marital separation agreement, negotiated out-of-court, is unenforceable under the statute of frauds). Although Defendants cite the lone case of *Bankers Trust Company of California v. Wright*, 2010 Ohio 1697, Sixth Dist. No. F-09-009 for the proposition that a oral settlement agreement in a foreclosure action is enforceable, that decision has only persuasive authority. Furthermore, the agreement at issue was a loan modification, and as such, it did not contemplate the discharge of a mortgage. Therefore, R.C. 1335.05 did not come into play, contrary to the case herein.

21. The agreement Defendants seek to enforce is, at best, an out-of-court agreement. Defendants do not claim, nor can they, that this so-called "settlement agreement" was entered into on the record before a court of record, or was memorialized by a judgment entry entered by such a court. As a result, the alleged "settlement agreement" does not fall within the narrow statute of frauds exception that exists for those oral agreements that are entered into on the record in open court. As such, Defendants' alleged defense is barred by the Statute of Limitations.

22. Lastly, Defendants' agreement is also barred by the parties' clear intent that any forbearance be in writing to be enforceable. First, the parties had entered into three prior forbearance agreements, all of them in writing, in which Defendants agreed that FirstMerit would not waive or modify any of its rights or remedies except in a writing signed by the bank. Second, during the parties' negotiations, Mr. Inks repeatedly insisted that any deal be in writing

to be enforceable. As a result, Defendants' alleged meritorious defense contradicts their prior course of dealings and Mr. Ink's stated demand that the forbearance agreement be in writing.

23. It is undisputed that FirstMerit, Ashland Lakes, and Defendants were parties to three prior forbearance agreements, pursuant to which FirstMerit agreed to forbear from exercising its rights and remedies and to otherwise grant Defendants financial accommodations. Each prior forbearance agreement was in writing. Further, in the last such agreement, Defendants expressly agreed that:

"No Waiver. The failure or delay of FirstMerit in enforcing any right or obligation or any provision of this Agreement in any instance shall not constitute a waiver thereof in that or any other instance. FirstMerit may only waive such right, obligation, or provision by an instrument signed by it.

* * *

Amendments in Writing. No amendment, modification, rescission, waiver, or release of any provision of this Agreement shall be effective unless the same shall be in writing and signed by the parties thereto."

24. The last obligation by FirstMerit to forbear terminated, at the latest, when Defendants failed to repay the Note by June 30, 2010. Defendants seek to enforce an alleged agreement by the bank to forbear or grant financial accommodations beyond June 30, 2010. To do so, a written forbearance or loan modification agreement, signed by FirstMerit, was required. No such agreement exists, and any alleged oral forbearance agreement is unenforceable per the parties' contract and cannot form the basis for relief from Judgment.

25. In addition, Mr. Inks' testimony concerning the parties' negotiations in March 2011 established that the parties required any agreements to be in writing. See also, Ink's March 7 letter to Krumei. Under Ohio law, "when parties intend that their agreement shall be reduced to writing and signed, no contract exists until the written agreement is executed." *Curry v. Nestle*

USA, Inc. (C.A. 6, July 27, 2000), No. 99-3877, 2000 WL 1091490, *7 (internal quotation omitted). See also *Owens v. Bailar*, Second Dist. No. 2008CA29, 2009-Ohio-2741, at ¶20 (finding that where party to mediation did not manifest an intent to be bound absent a signed agreement, an alleged oral mediation agreement was unenforceable).

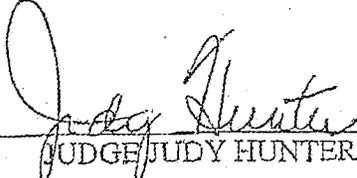
26. Mr. Inks admits that on March 3, 2011, he telephoned Mr. Krumel and asked Krumel to describe, in writing, the terms on which FirstMerit would agree to cancel the auction. Mr. Inks admits that Mr. Krumel sent him a Term Sheet on March 4, 2011, containing such terms, and that the Term Sheet expressly conditioned any agreement on a written agreement, signed by the FirstMerit. Mr. Inks further admits that Mr. Krumel then sent him, on March 7, 2011, a written forbearance agreement—the Draft Forbearance Agreement. Mr. Inks then sent Mr. Krumel a letter on the afternoon of March 7th that rejected the bank's terms, made a counteroffer, and insisted that the Draft Forbearance Agreement be revised consistent with his counteroffer's terms by the morning of March 8th, so the deal could be "signed by the various parties and close[d]" prior to the auction.

27. Taken together, these facts conclusively establish that both Defendants and FirstMerit manifested an intention not to be bound absent execution of a written agreement. While Mr. Inks now claims that he dropped any requirement that a written agreement be made within a half hour after sending his March 7 Letter that expressly contained such a requirement, this claim does not vitiate the "no waiver/amendments in writing" requirement.

28. Both Defendants' prior dealings with FirstMerit and Defendants' conduct during the parties' unsuccessful forbearance negotiations demonstrate that the parties did not intend to be legally bound absent a written agreement. As such, Defendants' alleged defense is barred by the parties' clear intent that any forbearance be in writing to be enforceable.

29. Based upon the above, the Court finds Defendants' Civil Rule 60(B) Motion for Relief from Judgment not well taken and it is denied. There is no just reason for delay.

So Ordered.



JUDGE JUDY HUNTER

cc via fax: Attorney Patrick Lewis
Attorney Scott Kahn

1335.02 Actions on loan agreements.

(A) As used in this section:

(1) "Debtor" means a person that obtains credit or seeks a loan agreement with a financial institution or owes money to a financial institution.

(2) "Financial institution" means either of the following:

(a) A federally or state-chartered bank, savings bank, savings and loan association, or credit union, or a holding company, subsidiary, or affiliate of a bank, savings bank, or savings and loan association;

(b) A licensee under sections 1321.01 to 1321.19 of the Revised Code, or a registrant under sections 1321.51 to 1321.60 of the Revised Code, or a parent company, subsidiary, or affiliate of a licensee or registrant.

(3) "Loan agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, mortgages, or other documents or commitments, or any combination of these documents or commitments, pursuant to which a financial institution loans or delays, or agrees to loan or delay, repayment of money, goods, or anything of value, or otherwise extends credit or makes a financial accommodation. "Loan agreement" does not include a promise, promissory note, agreement, undertaking, or other document or commitment relating to a credit card, a charge card, a revolving budget agreement subject to section 1317.11 of the Revised Code, an open-end loan agreement subject to section 1321.16 or 1321.58 of the Revised Code, or an open-end credit agreement subject to section 1109.18 of the Revised Code.

(B) No party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the party against whom the action is brought. However, a loan agreement need not be signed by an officer or other authorized representative of a financial institution, if the loan agreement is in the form of a promissory note or other document or commitment that describes the credit or loan and the loan agreement, by its terms, satisfies all of the following conditions:

(1) The loan agreement is intended by the parties to be signed by the debtor but not by an officer or other authorized representative of the financial institution.

(2) The loan agreement has been signed by the debtor.

(3) The delivery of the loan agreement has been accepted by the financial institution.

(C) The terms of a loan agreement subject to this section, including the rights and obligations of the parties to the loan agreement, shall be determined solely from the written loan agreement, and shall not be varied by any oral agreements that are made or discussions that occur before or contemporaneously with the execution of the loan agreement. Any prior oral agreements between the parties are superseded by the loan agreement.

(D) This section does not apply to any loan agreement in which the proceeds of the loan agreement are used by the debtor primarily for personal, household, or family purposes and either of the following applies:

(1) The proceeds of the loan agreement are less than forty thousand dollars;

(2) A security interest securing the loan agreement is or will be acquired in the primary residence of the debtor.

Effective Date: 01-01-1997

1335.05 Certain agreements to be in writing.

No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

No action shall be brought to charge a person licensed by Chapter 4731. of the Revised Code to practice medicine or surgery, osteopathic medicine or surgery, or podiatric medicine and surgery in this state, upon any promise or agreement relating to a medical prognosis unless the promise or agreement is in writing and signed by the party to be charged therewith.

Effective Date: 07-01-1976

RULE 60. Relief From Judgment or Order

(A) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

[Effective: July 1, 1970.]