[Cite as *Diamond v. Arabica Coffee One Corp.*, 2010-Ohio-3090.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93740

CHARLES N. DIAMOND, ET AL.

PLAINTIFFS-APPELLEES

vs.

ARABICA COFFEE ONE CORP., ET AL.

DEFENDANTS-APPELLEES

[APPEAL BY DAVID M. GRAJEK]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-669432

BEFORE: Cooney, J., Kilbane, P.J., and McMonagle, J.
RELEASED: July 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, David Martin Grajek ("Grajek"), pro se, appeals the trial court's denial of his motion for relief from a cognovit judgment. We find no merit to the appeal and affirm.

{¶ 2} In September 2008, plaintiff-appellees, Charles N. Diamond ("Diamond"), David I. Reich ("Reich"), and Marvin S. Schwartz ("Schwartz") (collectively referred to as "appellees"), filed a complaint against Grajek and defendants Arabica Coffee One Corp., Michael Santoli, and Edward Frygier, with an answer confessing judgment. The court granted appellees judgment against Grajek and the other defendants, jointly and severally, in the amount of $276,347.19, plus interest of 10% per annum. This judgment was entered pursuant to a promissory note, which was executed in connection with a Stock Purchase Agreement for the sale of all rights, title, and interest in all shares of stock in Arabica Cafes, Inc. by Arabica Coffee One Corp.

{¶ 3} As further consideration for the promissory note, Grajek and defendants Santoli and Frygier executed personal guaranties for the payment of the promissory note, stating that their personal liability was to be "joint and several."

{¶ 4} Shortly after the cognovit judgments were entered, Grajek and the other defendants filed motions to vacate the cognovit judgments. On January 6,

2009, the court conducted a hearing on these motions. The court denied Grajek's motion to vacate the cognovit judgments, noting that he was unable to attend the hearing because he was in federal prison in Texas. The court, however, granted Santoli's motion for relief from judgment, and the case was returned to the regular docket. Santoli ultimately reached a settlement with appellees. Grajek now appeals the trial court's denial of his motion to vacate the cognovit judgment.[1]

{¶ 5} Grajek argues, without setting forth assignments of error, that the trial court abused its discretion in denying his motion for relief from judgment because: (1) the trial court would not allow him to attend the hearing by phone even though his failure to attend in person was due to "excusable neglect," (2) there was no contractual basis for the judgment because there was no consideration in exchange for his guaranty, and (3) there was no contractual basis for the judgments against him on the two employment claims because he was not an owner of Arabica Coffee One Corp. and therefore had no employment contract with Reich or Schwartz.

{¶ 6} The filing of a Civ.R. 60(B) motion is the mechanism by which a party may ask the court for relief from a final judgment, order, or proceeding. The decision whether to grant or deny a motion for relief from judgment pursuant to

[1]Pursuant to Civ.R. 54(B), the trial court's order relating to Grajek was subject to revision up until the time the court adjudicated all claims of the parties.

Civ.R. 60(B) is a matter within the sound discretion of the trial court, and the court's ruling will not be reversed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122.

{¶ 7} Generally, to prevail on a Civ.R. 60(B) motion, the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted, (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), and (3) the motion is made within a reasonable time and where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after judgment. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

{¶ 8} However, "because of the special circumstances of a cognovit note, courts have dispensed with the requirement of grounds for relief and allowed relief from judgment when only two of the three elements are satisfied." *Medina Supply Co. v. Corrado* (1996), 116 Ohio App.3d 847, 689 N.E.2d 600, citing *Soc. Natl. Bank v. Val Halla Athletic Club & Recreation Ctr., Inc.* (1989), 63 Ohio App.3d 413, 418, 579 N.E.2d 234. A cognovit note is "a legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." *D.H. Overmyer Co. v. Frick Co.* (1972), 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124, 61 O.O.2d 528. Judgment on a cognovit note is often entered pursuant to a warrant of attorney. "A warrant of

attorney consented to by a debtor provides for a waiver of prejudgment notice and hearing." *Dodick v. Dodick* (Jan. 25, 1996), Cuyahoga App. Nos. 67385 and 67388, at 4, citing *Fogg v. Friesner* (1988), 55 Ohio App.3d 139, 140, 562 N.E.2d 937, 939. Therefore, a movant who files for relief from a judgment taken upon a cognovit note need only establish (1) a meritorious defense and (2) that the motion was timely made. *Meyers v. McGuire* (1992), 80 Ohio App.3d 644, 646, 610 N.E.2d 542, 543-544

{¶ 9} The timeliness of Grajek's motion for relief from judgment is not at issue. The court granted the cognovit judgment on September 3, 2008. Grajek filed his motion to vacate the judgment less than one month later on September 29, 2008, which is a reasonable time.

{¶ 10} To establish a meritorious defense, the party seeking relief from a cognovit judgment must allege operative facts with enough specificity to allow the trial court to decide whether a meritorious defense exists. *Syphard v. Vrable* (2001), 141 Ohio App.3d 460, 751 N.E.2d 564. In order to be entitled to a hearing on a motion for relief from judgment, "the movant must do more than make bare allegations that he is entitled to relief." *Kay v. Marc Glassman*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102. "'Where the movant's motion and accompanying materials fail to provide the operative facts to support relief under Civ.R. 60(B), the trial court may refuse to grant a hearing and summarily dismiss the motion for relief from judgment * * *.'" *Saponari v.*

Century Limousine Serv., Inc., Cuyahoga App. No. 83018, 2003-Ohio-6501, quoting *Bates & Springer, Inc. v. Stallworth* (1978), 56 Ohio App.2d 223, 382 N.E.2d 1179; see, also, *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14, 371 N.E.2d 214 (trial court does not abuse its discretion by failing to conduct an evidentiary hearing on a Civ.R. 60(B) motion when the court has sufficient evidence before it to decide whether a meritorious defense was presented).

{¶ 11} Further,"[b]y definition, a cognovit provision in a promissory note cuts off every defense, except payment, which the maker of the note may have against enforcement of the note." *Saponari* at ¶17; see, also*, Ohio Carpenters' Pension Fund v. La Centre*, Cuyahoga App. Nos. 86597 and 86789, 2006-Ohio-2214, ¶14-16; *B & I Hotel Mgt. LLC v. Ditchman Holdings, L.L.L.P.*, Cuyahoga App. No. 84265, 2004-Ohio-6294, ¶32.

{¶ 12} The cognovit provision at issue here is a classic cognovit provision, which waives all defenses other than payment. Specifically, the provision provides in bold letters above Grajek's signature:

> "GUARANTOR authorizes any attorney-at-law to appear in any court of record in the State of Ohio, or appear in any other state, territory or district of the United States, after the Obligations (including without limitation the Note) guaranteed hereunder becomes due, by acceleration or otherwise, and further GUARANTOR authorizes any such attorney-at-law to confess a judgment against GUARANTOR in favor of CREDITORS (or any other Holder) for the amount due with respect to such Obligations (including without limitation the Note guaranteed hereunder), together with the costs of collection as aforesaid, and thereupon to release all errors and waive all rights of appeal, provided, however, that none of the CREDITORS may execute on the judgment so confessed until the GUARANTOR has been

> notified of the judgment and given a 24-hour period to satisfy the judgment voluntarily. GUARANTOR waives the issuing and service of legal process with respect to nay such legal action.
>
> * *
>
> "WARNING– BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE. (OHIO REVISED CODE SECTION 2323.13)."

{¶ 13} Grajek asserted in his motion to vacate the cognovit judgment that there was no consideration. He also claimed, without submitting any evidentiary support, that he is not an owner of Arabica Coffee One and therefore not a party to the employment contract with Reich or Schwartz. However, Grajek waived these defenses when he signed the note that contained the above-quoted cognovit provision. A breach of contract claim is not a defense to an action on a cognovit note, and Grajek has not claimed that he paid the debt or even that there is something invalid about the note itself. Grajek failed to allege any operative facts that would justify relief from the cognovit judgment under Civ.R. 60(B). Therefore, we find the court did not abuse its discretion when it summarily denied his motion to vacate without permitting him to attend the hearing on his motion by phone.

{¶ 14} Accordingly, Grajek's assignments of error are overruled.

{¶ 15} Judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR