[Cite as *Buehler v. Mallo*, 2010-Ohio-6349.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Raymond W. Buehler, Jr., Trust[ee], Lawrence A. Mallo Revocable Trust dated February 2, 2004,	:	
Plaintiff-Appellee,	:	No. 10AP-84 (C.P.C. No. 09CVH-11-17399)
v.	:	(REGULAR CALENDAR)
John W. Mallo,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 23, 2010

Vorys, Sater, Seymour & Pease, LLP, William D. Kloss, Jr., and *Michael J. Hendershot*, for appellee.

Schottenstein, Zox & Dunn Co., L.P.A., Alan G. Starkoff, and *Katherine G. Manghillis*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, John W. Mallo, from a judgment of the Franklin County Court of Common Pleas denying appellant's motion for relief from a cognovit judgment.

{¶2} On November 20, 2009, plaintiff-appellee, Raymond W. Buehler, as trustee of the Lawrence A. Mallo Revocable Trust, filed a complaint for a cognovit judgment against appellant. The complaint alleged that appellant and appellee had entered into a

stock purchase agreement in July 2007, and that appellant had signed and delivered to appellee a cognovit promissory note establishing the terms under which appellee would loan appellant $3,000,000. The complaint further alleged that an event of default had occurred under the terms of the note as a result of appellant's failure to provide payment following the sale of two properties. A copy of the cognovit promissory note was attached to the complaint, as well as the affidavit of appellee, and copies of a stock purchase agreement and a pledge agreement.

{¶3} On November 20, 2009, Yale R. Levy, an attorney, filed an answer on behalf of appellant, confessing judgment in favor of appellee. The trial court filed an entry granting judgment on the cognovit note in favor of appellee.

{¶4} On December 7, 2009, appellant filed a motion for relief from judgment, asserting that the trial court was without authority to render a judgment on the cognovit note because the note did not satisfy the requirements of R.C. 2323.13(D); specifically, that the typeface used for the cognovit warning language was smaller than the typeface used in the document's title, "Cognovit Promissory Note." Appellant further asserted that the judgment was void because the terms of the note were not facially sufficient to support the judgment.

{¶5} Appellee filed a memorandum in opposition to appellant's motion for relief from judgment. On January 14, 2010, the trial court filed a decision and entry denying appellant's motion for relief from judgment.

{¶6} On appeal, appellant sets forth the following assignment of error for this court's review:

> FIRST ASSIGNMENT OF ERROR: The trial court erred in overruling the Appellant's Motion for Relief from the Cognovit Judgment.

{¶7} Under his single assignment of error, appellant asserts that the trial court erred in denying his motion for relief from the cognovit judgment. Specifically, appellant argues that the trial court's judgment entry is void because: (1) the note is facially insufficient to support a confession of judgment; and (2) the note does not satisfy the requirements under R.C. 2323.13(D).

{¶8} In general, in order to prevail on a motion brought under Civ.R. 60(B), a 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 set forth in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. In cases involving a motion for relief from judgment taken on a cognovit note, a movant "need only establish (1) a meritorious defense and (2) that the motion was timely made." *Medina Supply Co. v. Corrado* (1996), 116 Ohio App.3d 847, 851. A trial court's decision denying a motion for relief from judgment is reviewed under an abuse of discretion standard. Id. at 850.

{¶9} A trial court's jurisdiction over cognovit notes is governed by R.C. 2323.12 and 2323.13, and these statutory requirements must be met in order for a valid judgment to be granted upon a cognovit note, or for a court to have subject-matter jurisdiction over it. *Klosterman v. Turnkey-Ohio, L.L.C.*, 10th Dist. No. 08AP-774, 2009-Ohio-2508, ¶19. Our review of the issue of subject-matter jurisdiction is de novo. Id., citing *Cheap Escape Co., Inc. v. Tri-State Constr., L.L.C.*, 10th Dist. No. 07AP-335, 2007-Ohio-6185, ¶18.

{¶10} In *Classic Bar & Billiards, Inc. v. Fouad Samaan,* 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶8, this court described the nature of a cognovit note as follows:

> A cognovit note contains provisions designed to cut off defenses available to a debtor in the event of default. * * * The holder of a cognovit note in default obtains a judgment without a trial of possible defenses which the signers of the note might otherwise assert. * * * This is so because, under a cognovit note, the debtor consents in advance to the holder obtaining a judgment without notice or hearing. * * * An attorney, whom the note holder may designate, appears on behalf of the debtor and, pursuant to provisions of the cognovit note, confesses judgment and waives the debtor's right to notice of the proceedings. * * *

(Citations omitted.)

{¶11} We will first address appellant's contention that the trial court's entry is void because the note does not comply with R.C. 2323.13(D). Appellant argues that R.C. 2323.13 must be strictly construed and applied under Ohio law.

{¶12} R.C. 2323.13(D) states in relevant part:

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

{¶13} Appellant contends that the warning language in the instant case is not the most clear and conspicuous part of the note; rather, appellant argues, the typeface used in the cognovit warning language is smaller than the typeface used at the top of the document on the title page, which states: "Cognovit Promissory Note." According to appellant, the words "Cognovit Promissory Note" are in a large type size, with a bold font, and are underlined, giving those words prominence; appellant maintains that the warning language, while also in bold font and underlined, is in a smaller type size, and the warning language is not enclosed in a box with thick black margins.

{¶14} In a case cited by appellant in the instant appeal, this court addressed a similar argument in *Huntington Natl. Bank v. Burda*, 10th Dist. No. 08AP-658, 2009-Ohio-1752, ¶13, in which the appellant asserted that "the words 'Sky Bank,' which appear on the top of the first page of each promissory note, are more clear and conspicuous than the statutorily-required warning." In *Burda*, while we acknowledged that "the large type size and boldness of the font give the words 'Sky Bank' prominence," this court nevertheless held that the warning language was more clear and conspicuous. Id. at ¶13. This court noted that the warrant of attorney language mandated by the statute constituted "the only paragraph in the promissory notes that is formed entirely of bolded, capitalized words and surrounded by a black box," and "the warning appears in a larger type size than the majority of the other text in the promissory notes." Id. at ¶12. We concluded that, "in combination, the use of bolding, capitalization, type size, and a black box make the warning the most clear and conspicuous part of the promissory notes." Id. This court also observed in *Burda* that, "[i]n creating a warning that appears more clearly and conspicuously than anything else, a drafter of a cognovit note may employ multiple

methods--capitalization, italicization, underlining, bolding, framing the warning with a border, or a distinctive type style." Id. at ¶11.

{¶15} In *Medina Supply Co.* at 851, the court rejected the appellant's argument that the warning language of a cognovit note did not appear more clearly and conspicuously than "the title of the note, 'NOTE' [which] is in capitals and also underlined, whereas the warning is merely in capitals with no underlining." The court found this argument "specious," holding that "a four-letter title is an inadequate basis for comparison to a paragraph," and noting that "the warning is the only paragraph set off entirely in capital letters." Id. The court thus found that "in type, location, and proportion, the warning satisfies the law." Id.

{¶16} In the instant case, the trial court noted that the warning language "contains verbatim the warning required by R.C. 2323.13(D)," and that the warning paragraph appears directly above the space provided for appellant's signature "in such a way that one could not sign this document without seeing the warning required by R.C. 2323.13(D)." The court further noted that, in contrast to the body of the document, which is typed in ordinary font, the warning language is typed in all capital letters, is bolded, and underlined.

{¶17} We agree with the trial court's analysis and find unpersuasive appellant's contention that the warning was not the most conspicuous part of the promissory note. Rather, despite the slightly larger font size on the title page, identifying the document as a "COGNOVIT PROMISSORY NOTE," we conclude that the warning was "more clear and conspicuous" than any other part of the document. *Burda* at ¶13. See also *Klosterman* at ¶23 (cognovit warning language contained in the note complies with R.C. 2323.13(D)

as the warning is "in bold print and set apart from the other terms of the note," appears "immediately above the signature lines," and "quotes the statutory warning verbatim").

{¶18} We next consider appellant's contention that the note is facially insufficient to support a confession of judgment. Appellant argues that the principal balance of the note was not due until May 1, 2010, more than six months after the cognovit judgment was entered. Appellant contends that, because the payment obligation on the face of the note was not due until that date, additional facts are needed to support the confession of judgment. Appellant further argues that acceleration of the payment obligation under the note is conditioned upon the occurrence of an event of default; appellant maintains that whether one of the events of default has occurred which would trigger the accelerated payment of the amount due on the note cannot be determined without reference to additional evidence.

{¶19} In order for a valid judgment to be entered upon a cognovit note, "the terms of the note itself must be sufficient to facially support the judgment for which confession is made." *Bank One, N.A. v. Devillers,* 10th Dist. No. 01AP-1258, 2002-Ohio-5079, ¶37, citing *Gunton Corp. v. Banks*, 10th Dist. No. 01AP-988, 2002-Ohio-2873, ¶29.

{¶20} In the instant case, appellee attached to its complaint the following documents: (1) a copy of the cognovit promissory note containing appellant's signature and dated July 17, 2007; (2) a copy of the stock purchase agreement; (3) a copy of the pledge agreement; (4) a copy of an addendum to operating agreement; and (5) the affidavit of appellee.

{¶21} The cognovit promissory note states in pertinent part:

> At the option of Holder, the entire unpaid principal balance of this Note, together with all other sums payable in accordance with this Note, shall be, immediately due and payable, without notice or demand (which Maker hereby expressly waives), upon the occurrence of any of the following events (each an "Event of Default"), whether or not within the control of Maker: (a) Maker becomes insolvent or a receiver or custodian, as that term is defined under the Bankruptcy Code of 1978, as amended, Title 11, U.S.C. (the "Bankruptcy Code"), of any of Maker's property is appointed or exists; (b) Maker makes any assignment for the benefit of creditors or any petition initiating any case is filed by or against Maker under any applicable chapter of the Bankruptcy Code; (c) Maker dies; or (d) an Event of Default shall occur under the Pledge Agreement.
>
> Maker, hereby expressly waives presentment for payment, notice of dishonor, protest and notice of protest, and agrees that the time for the payment or payments of any part of this Note may be extended without releasing or otherwise affecting his liability on this Note.

{¶22} Section 1.3 of the stock purchase agreement states as follows:

> Terms of Cognovit Promissory Note. The Note executed by Buyer in favor of Seller shall be a cognovit promissory note in the principal amount of Three Million Dollars ($3,000,000.00), payable in full on or before May 1, 2010. In the event that, prior to May 1, 2010, J&L Property Leasing, LLC ("J&L"), a validly existing Ohio limited liability company, closes on the sale of any real property owned by J&L, the Buyer and the Seller shall have an immediate obligation to cause J&L to distribute to its members all of the net proceeds received by J&L from such real property sale transaction (*i.e.*, the amount received by J&L following payment of any and all liens, commissions, legal fees and any other closing costs relating to the sold property) and, immediately thereafter, to pay to Seller, as a payment against the outstanding principal balance of the Note, fifty percent (50%) of the amount received by Buyer from such distribution. Buyer's obligation under the preceding sentence shall only apply if, and to the extent that, there is a remaining balance on the Note at the time of any such J&L real property sale transaction.

{¶23} In his affidavit, appellee averred, in part, the following: (1) on January 25, 2008, J&L sold real property located at 3615 West Dublin Granville Road, Dublin, Ohio; (2) on June 5, 2009, J&L sold real property located at 4990 Paradise Road, Las Vegas, Nevada; (3) despite the obligation to do so, appellant failed to pay the real property proceeds for the above properties as required by the terms of the stock purchase agreement and the cognovit note; (4) as a result of the failures of payment, an event of default has existed since January 25, 2008, and all principal, interest, and other indebtedness outstanding under the note became immediately due and payable as of that date.

{¶24} This court has previously held that "where an understanding of the material terms of a note requires reference to other documents referred to in the note, the supporting documents must be submitted in order to obtain a valid cognovit judgment." *Devillers* at ¶37, citing *Citizens Fed. S. & L. Assn. of Dayton v. Core Investments* (1992), 78 Ohio App.3d 284. In *Citizens,* this court held that, in the absence of supporting proof, "such as an affidavit," showing that the appellee was a "note holder" as required under the terms of the note attached to the complaint, the trial court erred in granting judgment on the note. Id. at 287.

{¶25} In the present case, the trial court found that the supporting documents submitted with the complaint, i.e., the note, and documents referenced in the note (the stock purchase agreement and the pledge agreement), as well as the affidavit of appellee, sufficiently established the default. We agree that all supporting documents necessary in "understanding of the material terms" of the note were submitted in order for the trial court to render a valid judgment, and we find no error by the trial court in rejecting

appellant's facial challenge. *Devillers* at ¶37. In light of the above, and having found that the warrant of attorney complied with R.C. 2323.13(D), we find no merit to appellant's contention that the trial court lacked jurisdiction to render judgment on the note. Further, in the absence of any claimed meritorious defense, the trial court did not abuse its discretion in denying appellant's motion for relief from the judgment.

{¶26} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and CONNOR, J., concur.

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