

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fifth Third Bank,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-251
	:	(C.P.C. No. 10CVH-06-9345)
Pezzo Construction, Inc. et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on September 30, 2011

Kemp, Schaeffer & Rowe Co., LPA, Richard G. Murray, II and Michael N. Schaeffer, for appellee.

Dana & Pariser Co., LPA, and Robert J. Mann; Sam Shihab & Associates, LLC, and Sam M. Shihab, for appellants.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Defendants-appellants are appealing the decision of the Franklin County Court of Common Pleas denying defendants' motion for relief from judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} Defendants, Pezzo Construction, Inc., TGA One, LLC, Onofrio Pezzo, and Joanne Pezzo, collectively ("defendants") assert the following assignments of error:

[I.] The lower court erred in failing to vacate a cognovit judgment which was void ab initio due to plaintiff's failure to provide required documents which were a condition precedent to taking a cognovit judgment.

[II.] The lower court erred in failing to vacate the cognovit judgment when the [defendants] had meritorious defenses to the cognovit judgment.

[III.] The lower court erred in failing to vacate the cognovit judgment when plaintiff never provided written notice of default on four of the notes upon which it took the cognovit judgment.

[IV.] The lower court erred in failing to vacate the cognovit judgment when plaintiff was precluded from utilizing the tax and indebtedness ratio covenants as grounds for declaring a default.

[V.] The lower court erred in failing to vacate the cognovit judgment when plaintiff breached the covenant of good faith.

[VI.] The lower court erred in failing to vacate the cognovit judgment when judgment was taken against Mr. Pezzo and Mrs. Pezzo on guarantees that had been superseded and were no longer valid.

{¶3} The subject of this case is various promissory notes executed and delivered by defendant, Pezzo Construction, Inc., to plaintiff-appellee, Fifth Third Bank ("Fifth Third"). Pezzo Construction transferred to TGA One, LLC, certain property with TGA becoming liable on the notes and mortgages pertaining to the properties. Mr. Onofrio Pezzo and Mrs. Joanne Pezzo are the owners of TGA One, LLC, and the principals of Pezzo Construction.

{¶4} Fifth Third on or about April 9, 2010, issued a "Notice of Default" to all defendants. The default was based on defendants' failure to fulfill two covenants that are

similarly found in each note. The first, was a covenant regarding tax obligations, and provides in pertinent part: "Borrower shall pay when due all taxes." The second, was a financial covenant requiring that the borrower maintain a minimum specified "Indebtedness to Tangible Net Worth" ratio.

{¶5} On June 23, 2010, Fifth Third filed a complaint for cognovit judgment, resulting in a judgment being granted against defendants on June 24, 2010. Defendants were served with notice of the cognovit judgment on July 2, 2010. On July 25, 2010, defendants filed a motion to vacate the cognovit judgment. The trial court issued its decision on February 16, 2011, denying the motion to vacate, finding that the judgment is not void ab initio and that defendants failed to establish a meritorious defense. Defendants have timely filed this appeal.

{¶6} A recourse in challenging a cognovit judgment is through the filing of a motion to vacate pursuant to Civ.R. 60(B). *First Natl. Bank of Pandora v. Freed*, 3d Dist. No. 5-03-36, 2004-Ohio-3554.

{¶7} To prevail on a motion brought under Civ.R. 60(B), 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 the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146.

{¶8} Where the relief from judgment sought is on a cognovit note, "[t]he prevailing view is that relief from a judgment taken upon a cognovit note, without prior notice, is warranted by authority of Civ.R. 60(B)(5) when the movant (1) establishes a meritorious defense, (2) in a timely application." *Meyers v. McGuire* (1992), 80 Ohio App.3d 644, 646.

{¶9} The decision whether to grant or deny a motion for relief from judgment 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. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Defendants' first assignment of error asserts the trial court erred in failing to vacate the cognovit judgment due to Fifth Third's failure to provide supplemental documentation that was required by the notes.

{¶11} A cognovit judgment is valid if the warrant of attorney to confess judgment and all note terms are strictly construed against the person obtaining the judgment, and court proceedings, based upon such warrant, must conform to every essential detail with the statutory law governing the subject. *Lathrem v. Foreman* (1958), 168 Ohio St. 186.

{¶12} The outstanding balance must be known in order to support a cognovit judgment. In the instant case, the notes at issue provide in pertinent part: "the outstanding balance on this Note shall appear on a supplemental bank record and is not necessarily the face amount of this Note, which record shall evidence the balance due

pursuant to this Note at any time." (Exhibit A, section 1 of Fifth Third's complaint.) There were no supplemental bank records provided with Fifth Third's initial complaint for cognovit judgment. Defendants argue that the lack of supplemental records failed to comply with the requirements of the note.

{¶13} The trial court found that the balance of the notes can be determined from their own plain language and no additional documentation was required. The notes have clear and starting points, concise monthly payments and related express terms. The balance of the notes can be calculated directly from their face. Defendants do not dispute the amount of the judgment. Defendants have failed to establish that the sums due and owing herein are not accurate, or that they are not determinable from the face of the notes.

{¶14} The trial court did not abuse its discretion in determining the judgment amount or that supplemental bank records were not required to be filed with the complaint.

{¶15} The first assignment of error is overruled.

{¶16} The second assignment of error asserts that the trial court erred in failing to vacate the cognovit judgment when defendants had meritorious defenses.

{¶17} Relief from a cognovit judgment requires the establishment of a meritorious defense. *Meyers, supra*. Examining this case under the following assignments of error we find that defendants have not established any meritorious defense and the trial court did not abuse its discretion in coming to the same conclusion. The second assignment of error is overruled.

{¶18} The third assignment of error asserts that the trial court erred in failing to vacate the cognovit judgment when Fifth Third never provided written notice of default on four of the notes to defendants on April 9, 2010.

{¶19} Specifically defendants are referring to typographical errors found in the notice as to the effective dates for four of the notes. These errors are insufficient to show that the April 9, 2010 notice was ineffective. Defendants did receive the notice. The notice made specific reference to all the loan numbers and their original sums. The notice also showed which covenant defaults the notice was regarding and which notes were in default. The notice was sufficient. The trial court did not abuse its discretion in determining that the typographical errors did not defeat the purpose of the notice and precluded defendants from curing the defaults.

{¶20} The third assignment of error is overruled.

{¶21} The fourth assignment of error asserts that the trial court erred in failing to vacate the cognovit judgment when Fifth Third was precluded from utilizing the tax and indebtedness ratio covenants, which were both found in all five notes, as grounds for declaring a default.

{¶22} Defendants argue that Fifth Third had full knowledge that defendants were in violation of the tax payment covenants since 2003 and in violation of the indebtedness ratio covenants since March 2007. Defendants argue that this knowledge waived these covenants from the notes when Fifth Third issued, renewed, modified, or extended them.

{¶23} Defendants also argue that Pezzo Construction paid a \$2,500 fee when it closed on an October 29, 2009 loan specifically for violating the indebtedness ratio

covenant. And, that \$34,000 in other payments could possibly be in exchange for forgiveness of the tax and indebtedness ratio covenants.

{¶24} We must examine the agreements and notes to determine whether Fifth Third had knowledge of the defaults, or whether acceptance of the fees waives the covenants. It is a long held tenet of law that in construing an agreement between parties, the goal is to give effect to the intention of the parties as expressed therein. The intent of the parties can be found in the language that they chose to employ. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202. If a contract is unambiguous, courts will not give the contract a construction other than that which the plain language of the contract provides. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51.

{¶25} The notes require that any waiver of the defendants' obligations or the rights of Fifth Third be in writing, and that each note provides that "A waiver on one occasion shall not constitute a waiver on another occasion." (Plaintiff's Complaint, Exhibit A at 17, Exhibit B at 16, Exhibit C at 16, Exhibit D at 16, Exhibit E at 16.) The trial court found that Fifth Third did not offer any waiver in writing of any covenant on any note.

{¶26} The trial court was correct in its interpretation of the various agreements. We agree that, at no time, did Fifth Third waive its rights in writing to declare the notes in default. The October 29, 2009 note specifies any waiver of the terms must be in writing, and defendants have not offered a waiver in writing. Also Fifth Third did not waive its rights absent any writing. Based on the unambiguous language of the notes, defendants

payment of fees for failure to comply with the indebtedness ratio covenant does not constitute waiver.

{¶27} The fourth assignment of error is overruled.

{¶28} The fifth assignment of error asserts that the trial court erred in failing to vacate the cognovit judgment when Fifth Third breached the covenants of good faith by writing, extending and/or modifying notes with knowledge that defendants were breaching the covenants of the notes.

{¶29} Defendants state that Fifth Third had accepted payments in lieu of covenant breach. Fifth Third did accept fees so that defendants would avoid default for a specific period. At no time did Fifth Third waive the covenants. It is undisputed that defendants were in default when Fifth Third filed for cognovit judgment. Fifth Third properly exercised its rights under the notes to declare a default and seek judgment and did not fail to act in good faith.

{¶30} The fifth assignment of error is overruled.

{¶31} The sixth assignment of error asserts that the trial court erred in failing to vacate judgments against Mr. and Mrs. Pezzo. it is argued that an October 15, 2009 "Continuing Guaranty Agreement" was signed by Mr. and Mrs. Pezzo in their corporate capacity rather than their personal capacity.

{¶32} The trial court applied *Baltes Commercial Realty v. Harrison*, 2d Dist. No. 23177, 2009-Ohio-5868 (that the designations of "president" and "vice-president" are merely descriptive of the character or capacity of the person signing the document, and an individual signing the guaranty cannot deny personal liability if the language of the

guaranty is clear and unambiguous). The trial court found that the plain language of the October 15, 2009 "Continuing Guaranty Agreement" shows that Mr. and Mrs. Pezzo in their individual capacity, are jointly and severally liable for the debt of Pezzo Construction. The trial court did not abuse its discretion when coming to this conclusion.

{¶33} The sixth assignment of error is overruled.

{¶34} Having overruled all the assignments of error, the decision of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
