[Cite as *Luszczynski v. Walters*, 2004-Ohio-4087.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84062

LEONARD LUSZCZYNSKI, ET AL.	:	
	:	ACCELERATED DOCKET
Plaintiffs-Appellees	:	
	:	JOURNAL ENTRY
-vs-	:	
	:	AND
DALE WALTERS	:	
	:	OPINION
Defendant-Appellant	:	

Date of Announcement of Decision:	AUGUST 5, 2004
Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. CV-499599
Judgment:	Reversed and remanded
Date of Journalization:	

Appearances:

For Plaintiffs-Appellees:	PAUL P. CHALKO, ESQ. 880 East 185th Street Cleveland, Ohio 44119-2792
For Defendant-Appellant:	JOSEPH G. RITZLER, ESQ. DRUE MARIE SKARYD, ESQ. 1550 North Point Tower 1001 Lakeside Avenue Cleveland, Ohio 44114

JAMES J. SWEENEY, J.

{¶1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶2} Defendant-appellant Dale Walters ("Walters") appeals from the judgment of the Cuyahoga County Court of Common Pleas which denied his Civ.R.60(B) motion for relief from judgment. For the reasons that follow, we reverse and remand.

{¶3} On April 18, 2003, plaintiffs-appellees Leonard and Susan Luszczynski ("the Luszczynskis") filed a complaint on a cognovit note against Walters. On the same day, the Luszczynskis also filed an answer confessing judgment against Walters. On May 1, 2003, the court entered judgment against Walters on the principal sum of $40,000, plus costs.

{¶4} Approximately seven months later, on November 13, 2003, Walters filed a motion for relief from judgment asserting that the cognovit note was invalid and/or that the note had been paid in full or in the alternative, partially paid.

{¶5} On December 11, 2003, the trial court denied the motion.

{¶6} Walters appeals from this judgment and raises two assignments of error, which we will address together.

{¶7} "I. The trial court erred in refusing to vacate the cognovit judgment when it refused to consider the appellant's meritorious defenses to the cognovit note, including the defenses of fraud, lack of consideration, and satisfaction of the debt.

{¶8} "II. The trial court erred when it decided that appellant's motion to vacate cognovit judgment was not timely filed."

{¶9} In these assignments of error, Walters argues that the trial court erred in denying his Civ.R. 60(B) motion for relief from judgment. He argues that his motion was timely filed and that he demonstrated a meritorious defense. We agree.

{¶10} In general, in order to prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party bears the burden to 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 Industries, Inc.* (1976), 47 Ohio St.2d 146.

{¶11} However, where the judgment sought to be vacated is a cognovit judgment, the party need only establish a meritorious defense in a timely fashion. *Medina Supply Co. v. Corrado* (1996), 116 Ohio App.3d 847, 850; *Davidson v. Hayes* (1990), 69 Ohio App.3d 28; *Matson v. Marks* (1972), 32 Ohio App.2d 319, 323-324. The decision whether to grant relief from judgment lies within the discretion of the trial court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶12} Here, the trial court denied Walters' Civ.R. 60(B) motion citing *Abrams v. AAL Industries,* Cuyahoga App. No. 82831, 2003-Ohio-6179. In *Abrams*, AAL filed its 60(B) motion two weeks short of one year after receiving notice of the cognovit judgment against it. This Court found that AAL's motion for relief from judgment, although asserting a meritorious defense, was not filed within a reasonable time. Specifically, this Court found that AAL had offered no facts explaining its delay in filing the 60(B) motion.

{¶13} Here, Walters does offer an explanation for its delay in filing the 60(B) motion. Specifically, Walters' attorney states that he inadvertently misplaced and misfiled the cognovit judgment and accompanying documents after he received them in July 2003.

{¶14} An attorney's negligence will generally be imputed to his client. *GTE*, supra at 150. However, collateral attacks on cognovit judgments, without prior notice, are "liberally permitted." *Society Natl. Bank v. Val Halla Athletic Club & Recreation Ctr., Inc.* (1989), 63 Ohio App.3d 413, 418. Because the defendant has never had the chance to be heard in cognovit proceedings, he should be given his day in court. *Abrams*, supra. Accordingly, we conclude that Walters' attorney's conduct should not be imputed to him and that his motion was filed within a reasonable time. See, also, *Pence v. Smith* (Nov. 7, 1994), Madison App. No. CA93-11-031. Therefore, the trial court's decision denying the motion because it was not timely filed was an abuse of discretion. *BancOhio Natl. Bank v. Schiesswohl* (1988), 51 Ohio App.3d 130, 132. Next, we must determine if Walters met its burden to establish a meritorious defense. Walters need only allege a meritorious defense, not prove that he will prevail on that defense. *Rose Chevrolet*, supra at 20.

{¶15} Here, Walters set forth operative facts showing that the cognovit judgment was entered in the wrong amount. Specifically, he claims that at most $33,700.89, rather than $40,000, is due and owing on the cognovit note. This assertion is supported by other documents in the record, and by the Luszczynski's own admission, and provides a valid defense to a cognovit judgment. See *Souder Associates, Inc. v. Short Stop Convenience Marts, Inc.* (Aug. 24, 1976), Franklin App. No. 75AP-634 (the taking of a confessed judgment for more than the amount due constitutes grounds for relief from judgment under Civ.R. 60(B)). Accordingly, we hold that the trial court abused its discretion by denying

Walters' motion for relief from judgment, and we sustain his first and second assignments of error. Ibid.

{¶16} Judgment reversed and case remanded for further proceedings in accordance with the law.

COLLEEN CONWAY COONEY, J., DISSENTING.

{¶17} I respectfully dissent. I would affirm the trial court's denial of Walters' Civ.R. 60(B) motion. The majority states that "Walters does offer an explanation for its delay in filing the 60(B) motion." However, Walters' explanation is not contained in the 60(B) motion, the issue before us on appeal.

{¶18} The instant case is analogous to *Abrams v. AAL Industries*, Cuyahoga App. No. 82831, 2003-Ohio-6179, in which AAL offered no facts in its motion explaining its delay in filing the motion. As this court stated in *Abrams*:

{¶19} "[W]e have consistently recognized that filing a Civ.R. 60(B) motion for relief from judgment several months after the party received actual notice of the judgment and absent any explanation for the delay is considered unreasonable. *A. Packaging Serv. Co., Inc. v. Siml* (Sept. 21, 2000), Cuyahoga App. No. 77708."

{¶20} Counsel for Walters admitted at oral argument that Walters was aware of the judgment in late June and that the 60(B) motion did not address timeliness. The authority Walters relied on in his 60(B) motion set forth a two-prong test to obtain relief from a judgment taken upon a cognovit note: (1) establish a meritorious defense, (2) in a timely application. *Matson v. Marks* (1972), 32 Ohio App. 2d 319, 327; *Society National Bank v. Val Halla Athletic Club & Rec. Center* (1989), 63 Ohio App.3d 413, 418; *Meyers v. McGuire* (1992), 80 Ohio App.3d 644. Yet, Walters made no mention of timeliness or any explanation for his seven-month delay in his eight-page motion. Therefore, I would find no abuse of the trial court's discretion and I would affirm.

It is ordered that appellant recover of appellee his 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 Court of Common Pleas 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.

ANN DYKE, P.J., CONCURS.
COLLEEN CONWAY COONEY, J., DISSENTS.
(See dissenting opinion attached).

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) 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(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).