[Cite as *25400 Euclid Ave., L.L.C. v. Universal Restaurant Holdings L.L.C.*, 2009-Ohio-6467.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92905

25400 EUCLID AVENUE, L.L.C.

PLAINTIFF-APPELLEE

vs.

UNIVERSAL RESTAURANT HOLDINGS, L.L.C., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-657048

BEFORE: Celebrezze, J., Stewart, P.J., and Dyke, J.

RELEASED: December 10, 2009

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), 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellants, Universal Restaurant Holdings, L.L.C. ("Universal") and Claude Harris ("Harris"),[1] appeal the lower court's denial of their motion for relief from judgment regarding a $725,000 cognovit note and judgment. After a thorough review of the record, and for the following reasons, we affirm the judgment of the lower court.

{¶ 2} In early 2007, Harris saw a commercial real estate advertisement in a local newspaper for a large residential apartment building named Richmond Tower ("Richmond"), located at 25400 Euclid Avenue in Euclid, Ohio. The building was owned by appellee, 25400 Euclid Ave, L.L.C., ("Euclid"), of which George Pappas, Sr. ("Pappas") was the majority member. Harris inquired with the real estate broker representing the building and went on a few tours of the premises. Harris obtained business records from Pappas's son, William Pappas, who was keeping the books for Euclid.

{¶ 3} On May 10, 2007, Harris signed a letter of intent setting forth the basic terms and conditions for the purchase of Richmond. The parties entered into an agreement of sale for the building, which was drafted by George Pappas, Jr., an attorney residing in Florida. This agreement was executed on June 9, 2007, wherein Harris, through Universal, agreed to

[1] Claude Harris was the majority member of Universal Restaurant Holdings, L.L.C. at the time of this transaction.

purchase the building from Euclid for $4.5 million. The deal was structured so that Pappas would receive an eight-percent stake in Universal in exchange for $350,000. Universal was to pay $725,000 at closing and provide Euclid with a cognovit note in the amount of $725,000. Universal was to assume the existing $2.7 million mortgage.

{¶ 4} According to George Pappas, Jr., on July 6, 2007, after problems with the financing arose, the agreement was modified by reducing the cash payment due at closing to $325,000, with the remaining $400,000 to be placed in escrow and released on January 5, 2008. This arrangement was memorialized in an addendum to the sales agreement, but Harris disputes signing this addendum or ever agreeing to its terms. This addendum also required Harris to sign over certain rights in Universal to Pappas in a unit pledge agreement. The unit pledge agreement provided Pappas with certain rights on default, including taking control of Universal by voting Harris's shares. Euclid claims this unit pledge agreement and related documents were signed July 6, 2007, but Harris claims he signed them at the end of September or beginning of October 2007. After Universal missed the first interest payment due on the cognovit note, and after it discovered problems at Richmond, the parties entered into a compromise and settlement agreement dated December 27, 2007. Under this agreement, Euclid would not seek a judgment on the cognovit note for the past delinquencies; Universal would

deposit $244,000 instead of $400,000 in escrow to be released to Euclid on January 5, 2008; Harris and Universal would release all claims of fraud and misrepresentation against Euclid; and the cognovit note would be amended and restated so that the missed interest payments, totaling $18,770, would be due January 5, 2008. Also, the cognovit note was amended so that interest payments would be made monthly rather than quarterly — due on the last day of each month. Otherwise, the $725,000 cognovit note was unchanged. Pappas also forgave $50,000 and further gave Universal a credit of $26,525 for damages to several apartments and missing equipment. Universal also agreed to execute a cognovit note to Pappas for roughly $80,000, which resulted in the postponement of payment of this amount until July 5, 2008.

{¶ 5} Universal never made an interest payment on time, and funds were not deposited into escrow or released on the agreed-upon date. Universal did make monthly interest payments on the amended and restated cognovit note, but they were always late. The March 2008 interest payment, made on April 11, 2008, was made 11 days late. Universal did not make the $18,770 payment at any time prior to Euclid obtaining judgment on the amended and restated cognovit note. Euclid moved for judgment on this $725,000 cognovit note on April 16, 2008, and judgment was entered on that date in the amount of $743,770 — $725,000 for the amount of the cognovit

note and $18,770 for the amount of missed interest payments. A certificate of judgment was filed on June 18, 2008.

{¶ 6} On May 22, 2008, after learning of the judgment, Universal paid the $18,770 interest payment on the cognovit note.[2] Also on this date, Universal paid $244,000 to Euclid, the funds that were supposed to be deposited into escrow on or before January 5, 2008. Euclid applied these payments to the judgment on the cognovit note.

{¶ 7} On July 9, 2008, Universal moved the trial court for relief from judgment under Civ.R. 60(B) arguing that it had a valid defense in that it was not in default at the time judgment was sought by Euclid. Universal's motion was denied on February 3, 2009 after a three-day hearing, and it timely filed a notice of appeal.

{¶ 8} On appeal, in its sole assignment of error, Universal claims that "[t]he trial court committed prejudicial error by failing to vacate the cognovit judgment of April 16, 2008, where Universal adduced compelling evidence at the hearings of this matter to establish grounds for vacation of said cognovit judgment."

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[2] Harris also took several other steps to retain Richmond, including engaging in a series of encumbrances and transfers for no value.

Law and Analysis

I. Standard of Review

{¶ 9} When reviewing the denial of a motion for relief from judgment, an appellate court applies an abuse of discretion standard of review. *Shuford v. Owens*, Franklin App. No. 07AP-1068, 2008-Ohio-6220, ¶15, citing *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, ¶15. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, citing *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 10} Normally, "[t]o prevail on [a] motion 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, 150-51, 351 N.E.2d 113. However, "[t]his burden is somewhat lessened when the judgment the movant seeks to vacate has been taken by confession on warrant of attorney without prior notice. *McCullough v. Luteman* (1919), 15 Ohio App. 207, 209, 32 Ohio C.C. (N.S.) 168, 170. In such a situation, the existence of a valid defense would constitute grounds for relief. *Matson v. Marks* (1972), 32 Ohio App.2d 319, 61 O.O.2d 476, 291 N.E.2d 491; *Prinz v. Horvat* (Mar. 1, 1989) Summit App. No. 13708, unreported, 1989 WL 16908." *Society Natl. Bank v. Val Halla Athletic Club & Recreation Ctr., Inc.* (1989), 63 Ohio App.3d 413, 418, 579 N.E.2d 234.

{¶ 11} Therefore, "when requesting relief from a cognovit judgment the existence of a valid defense to all or part of the claim constitutes a ground for relief." *Natl. City Bank v. Reat Corp.* (1989), 64 Ohio App.3d 212, 215, 580 N.E.2d 1147, 1148, citing *Matson v. Marks* (1972), 32 Ohio App.2d 319, 323, 291 N.E.2d 491; *Cautela Bros. Cement Contractors v. McFadden* (1972), 32 Ohio App.2d 329, 332, 291 N.E.2d 539; *Minor v. O'Neil, Inc.* (Apr. 23, 1981), Cuyahoga App. No. 43183.

II. Cognovit Note

{¶ 12} "A cognovit is an instrument signed by a defendant in an action actually commenced confessing the plaintiff's demand to be just, and empowering the defendant to sign judgment against him in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit." Indermaur, Principles of the Common Law (11 Ed.1909) 11. A cognovit clause in a note is a "contractual provision by which a debtor agrees to jurisdiction in certain courts, waives notice requirements, and authorizes the entry of an adverse judgment in the event of a default or breach." Black's Law Dictionary (8 Ed. 2004). When seeking judgment on a cognovit note, the warranty of attorney in the note allows notice to be waived and gives a creditor the ability to obtain judgment without trial when the debtor is in breach of the terms of the cognovit note. See R.C. 2323.13.

III. A Valid Defense

{¶ 13} At the hearing held to determine if appellants should be granted relief from judgment, they advanced several theories as to why they were not in default at the time Euclid sought judgment on the amended and restated cognovit note. First, Universal argued that it incurred a $180,000 prepayment penalty because it had to satisfy the Nationwide mortgage rather than assume it as the sales agreement stipulated. According to Universal, this penalty should be charged to Euclid, which would result in Universal not

being in default on the amended and restated cognovit note when Euclid moved for judgment. The trial court did not give credence to this argument because Universal agreed to take over any payment obligation from the Nationwide mortgage when it signed the sales agreement. Universal next argued that real estate taxes were not prorated appropriately. This is their main argument on appeal. Universal claims to have received a credit for only half of the real estate taxes due on the property prior to the sale. This argument fails as explained below.

{¶ 14} "Defenses to cognovit judgment that other courts have found meritorious include, 'improper conduct in obtaining the debtor's signature on the note; deviation from proper procedures in confessing judgment on the note; and miscalculation of the amount remaining due on the note at the time of confession of judgment.'" *Ohio Carpenter's Pension Fund v. La Centre, L.L.C.*, Cuyahoga App. Nos. 86597 and 86789, 2006-Ohio-2214, ¶15, quoting *First Nat'l. Bank of Pandora v. Freed*, Hancock App. No. 5-03-36, 2004-Ohio-3554, ¶9, fn. 3. Therefore, if Euclid obtained a judgment above what it was entitled to under the terms of the cognovit note, or obtained a judgment when Universal was not in default on the note, Universal would have a valid defense.

a. Prepayment Penalty

{¶ 15} Universal claimed that it was unable to assume the mortgage as required in the sales agreement because the lender would not allow it to do so. This resulted in a $180,000 prepayment penalty when the sale was completed and the mortgage paid off. Universal argues that Euclid owes that amount, while Euclid argues that the penalty was incurred by Universal's election not to assume the mortgage as the sales agreement required.

{¶ 16} Article B, section 2 of the sales agreement states, "HARRIS shall assume the payment obligation of the principal and interest payment obligation owing to Nationwide Mortgage in the approximate amount of $2,700,000, and shall timely fund all payment obligations owing thereunder." A prepayment penalty is "[a] charge assessed against a borrower who elects to pay off a loan before it is due." Blacks Law Dictionary (8th ed. 2004). The prepayment penalty was a payment obligation arising under the mortgage incurred when the mortgage was satisfied, which Universal agreed to assume when Harris signed the sales agreement. The argument that Universal was not in default because it was incorrectly charged with the prepayment penalty is without merit. The trial court properly found that it was not a valid defense that would mandate relief from judgment.

{¶ 17} Although this was the gravamen of Universal's claim at the Civ.R. 60(B) hearing, its primary argument to this court is that the real estate taxes were incorrectly prorated, resulting in Universal not being in default when Euclid moved for judgment on the cognovit note.

b. Prorations of Real Estate Taxes

{¶ 18} Universal argues that real estate taxes were incorrectly prorated. It claims to have received a credit for only half the amount of the outstanding taxes. The real estate taxes for the premises generally are about $100,000 per year, divided into biannual payments of roughly $50,000. Universal claims that once this $50,000 is factored into the payments made, it was not in default when Euclid obtained judgment on the amended and restated cognovit note.

{¶ 19} Real estate taxes in Ohio become due one year after incurred. R.C. 323.01. Taxes become due on December 31 for the current tax year and are payable biannually. R.C. 323.12. This means that the taxes due in 2007 are for the 2006 tax year. Evidence adduced at the hearing for relief from judgment showed that Universal received a $51,712.15 credit for real estate taxes paid for January 1, 2006 through the date of sale on July 6, 2007. This was evidenced in the closing statement prepared by William Pappas and reviewed by Harris. William Pappas testified the other half-year was escrowed with the mortgage servicer, Capstone Realty Advisors ("Capstone").

According to this testimony and the closing statement, Universal received a full credit of $100,000 for all real estate taxes due prior to the sale of the building.

{¶ 20} Universal cites to the same closing statement, which only indicates a $51,712.15 credit, as evidence that it is owed another $50,000 in real estate taxes. Although Harris testified he received this roughly $50,000 credit for taxes, he did not refute the testimony of others that another $50,000 was escrowed with Capstone.

{¶ 21} Universal bears the burden of establishing a valid claim or defense. The unsupported allegations of Harris are not enough to meet this burden. Appellants must show sufficient operative facts to establish a valid defense. See *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 102-103, 316 N.E.2d 469.

{¶ 22} In *Luszczynski v. Walters*, Cuyahoga App. No. 84062, 2004-Ohio-4087, this court found that a defense that less was owed on the cognovit note than the amount of judgment sought was grounds for relief under Civ.R. 60(B). What distinguishes *Luszczynski* from the case before us is that operative facts in the *Luszczynski* record demonstrated that less was owed at the time the creditor moved for judgment. Here, Universal is only able to point to a closing statement between it and its lender, Madison Realty

Capital, L.P. Euclid is not a party to that transaction, and it has no bearing on the cognovit note at issue here.

{¶ 23} A Capstone representative, Tederick Bryan, testified at the Civ.R. 60(B) hearing. Universal had the opportunity to establish that no real estate taxes were escrowed with Capstone or that the escrowed taxes were not paid to the county treasurer. Universal did not ask Bryan any questions regarding taxes. "'The evidentiary materials must present "operative facts" and not mere general allegations to justify relief.'" *Hornyak v. Brooks* (1984), 16 Ohio App.3d 105, 106, 474 N.E.2d 676, quoting *E. Ohio Gas Co. v. Walker* (1978), 59 Ohio App.2d 216, 394 N.E.2d 348. Universal has not met its burden of establishing, through operative facts, that real estate taxes were incorrectly prorated.

IV. Conclusion

{¶ 24} There are no operative facts in the record to support appellants' claim. Universal has failed to show that it had a valid defense to the judgment on the amended and restated cognovit note. The trial court did not abuse its discretion in denying appellants' Civ.R. 60(B) motion.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY