**[Cite as *Huntington Natl. Bank v. Lomaz,* 2010-Ohio-705.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**PORTAGE COUNTY, OHIO**

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| THE HUNTINGTON NATIONAL BANK, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NOS. 2008-P-0007 and 2008-P-0061** |
| - vs - | : | |
| LARRY D. LOMAZ, a.k.a. LARRY LOMAZ, et al., | : | |
| Defendants, | : | |
| (ANTHONY NAPOLET, et al., Appellants) | | |

Civil Appeal from the Portage County Court of Common Pleas, Case No. 01 CV 1007 and 2001 CV 1007.

Judgment: Affirmed.

*David C. Tryon* and *Rebecca K. Fischer*, Porter, Wright, Morris and Arthur, L.L.P., 1700 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115-1483 (For Plaintiff-Appellee).

*Deborah L. Smith*, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482-4270 (For Appellant, Napolet Bonding Company).

*Larry W. Zukerman*, Zukerman, Daiker & Lear Co., L.P.A., 3912 Prospect Avenue, Cleveland, OH 44115 (For Appellant, International Fidelity Insurance Co.).

COLLEEN MARY O'TOOLE, J.

**{¶1}** Anthony Napolet, Napolet Bonding Company, and International Fidelity Insurance Company appeal from the December 12, 2007 judgment entry of the Portage County Court of Common Pleas, granting The Huntington National Bank's motion to enforce a supersedeas bond. Napolet further appeals from the June 16, 2008 judgment entry of the Portage County Court of Common Pleas, denying his motion to vacate the December 12, 2007 judgment entry. We affirm.

**{¶2}** Pacific Financial Services of America, Inc. executed certain promissory notes for monies owed Huntington, the notes being secured by a mortgage on property located in Portage County, Ohio. Laurence D. Lomaz, who controlled Pacific, was guarantor of the notes. Pacific and Mr. Lomaz entering default, Huntington brought an action in the Cuyahoga County Court of Common Pleas on the notes. Judgment was granted in favor of Huntington in the spring of 2000; Huntington immediately filed the judgment as a lien in Portage County. Huntington thereafter filed a complaint in foreclosure, and moved for summary judgment, which was granted by the trial court in the spring of 2003.

**{¶3}** Eventually, Pacific and Mr. Lomaz appealed. In connection with the appeal, this court required that Pacific and Mr. Lomaz file a supersedeas bond, in the amount of $92,500. The bond was obtained from Napolet. $50,000 was obtained through a power of attorney issued by International Fidelity to Napolet, as its agent; the remainder was secured by property allegedly owned by Napolet. The bond was posted and approved at the end of October 2005.

**{¶4}** In the summer of 2006, this court dismissed the appeal by Pacific and Mr. Lomaz, finding we lacked jurisdiction due to Mr. Lomaz's failure to abide by the rules governing vexatious litigators. See, e.g., *The Huntington Natl. Bank v. Lomaz*, 11th Dist. No. 2005-P-0075, 2006-Ohio-3880, at ¶7-16.

**{¶5}** Huntington made demand on Napolet and International Fidelity regarding the supersedeas bond, evidently without result. The subject Portage County property was sold at sheriff's sale. May 3, 2007, Huntington moved the trial court to enforce the supersedeas bond. Pursuant to App.R. 7(B), Huntington requested the trial court's clerk serve Napolet and International Fidelity with the motion. Napolet and International Fidelity each maintain on appeal they were never served. However, they do admit receiving several notices of hearing the trial court issued on the matter.

**{¶6}** October 9, 2007, hearing on the motion to enforce the bond was held before the trial court. Mr. Napolet attended in person. He was further represented by counsel, who also represented International Fidelity. Argument was had; and, the trial court granted Napolet and International Fidelity leave to file a memorandum in opposition to Huntington's motion. The memorandum was duly filed October 23, 2007. In that memorandum, Napolet and International Fidelity raised two arguments against enforcement of the bond. First, they contended that, since this court failed to affirm the trial court's judgment in Case No. 2005-P-0075, there was no basis for enforcement of the supersedeas bond against them, pursuant to R.C. 2505.20. Second, they contended that since Huntington's recovery from the foreclosure and sale of the subject property exceeded the amount of the supersedeas bond, Huntington had suffered no

damages due to the appeal in Case No. 2005-P-0075, and was not entitled to the proceeds of the bond.

**{¶7}** December 12, 2007, the trial court entered judgment in favor of Huntington, finding Mr. Napolet, his company, and International Fidelity jointly and severally liable for $50,000 of the supersedeas bond, and Mr. Napolet and his company liable for the additional $42,500 of the bond.

**{¶8}** January 10, 2008, Napolet and International Fidelity noticed appeal in Case No. 2008-P-0007. February 15, 2008, International Fidelity moved the trial court to vacate its December 12, 2007 judgment, pursuant to Civ.R. 60(B). On or about March 19, 2008, International Fidelity moved this court to remand the case to the trial court, for consideration of its motion to vacate. We granted the remand by a judgment entry filed on or about April 23, 2008. May 12, 2008, Napolet moved the trial court to vacate its December 12, 2007 judgment. By a judgment entry filed May 13, 2008, the trial court denied International Fidelity's motion to vacate. By a judgment entry filed June 16, 2008, the trial court denied Napolet's motion to vacate. July 7, 2008, Napolet noticed appeal from the trial court's June 16, 2008 judgment entry, that being Case No. 2008-P-0061. July 16, 2008, Napolet moved to consolidate the cases for purposes of briefing and oral argument, which motion this court granted August 15, 2008.

**{¶9}** We consider Napolet's assignments of error first. They are four in number:

**{¶10}** "[1.] THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THE SURETY ON THE SUPERSEDEAS BOND WHERE SAID BOND WAS

RENDERED NULL AND VOID BY THE FAILURE OF THE CONDITION PRECEDENT SET FORTH IN THE CONTRACT.

**{¶11}** "[2.] THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS WHERE APPELLANTS HAD NOT BEEN SERVED WITH A COPY OF THE MOTION TO ENFORCE SUPERSEDEAS BOND PURSUANT TO APP.R. 7.

**{¶12}** "[3.] THE TRIAL COURT ERRED IN SUMMARILY ENTERING JUDGMENT IN THE FULL AMOUNT OF THE POSTED SUPERSEDEAS BOND AND IN FAILING TO PROPERLY FIX THE AMOUNT OF DAMAGES OWED FOR PURPOSES OF ENFORCEMENT OF THE BOND.

**{¶13}** "[4.] THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B) WHERE THE CONDITIONS PRECEDENT OF THE BOND CONTRACT FAILED, RENDERING THE BOND INVALID AND THE JUDGMENT ON THE BOND THEREFORE INEQUITABLE AND INVALID."

**{¶14}** We commence our analysis with Napolet's initial three assignments of error.

**{¶15}** By his first assignment of error, Napolet contends that two conditions precedent for invoking liability under the supersedeas bond were not met. He contends these conditions precedent were: (1) that the judgment appealed would be a money judgment issuing from the Portage County Court of Common Pleas; and (2) that the judgment would be for monies owed both by Pacific, and Laurence Lomaz. Napolet argues that the judgment appealed was merely one for foreclosure, and that only Pacific, not Mr. Lomaz, was liable under the foreclosure. Napolet relies heavily on the

opinion of this court in *Lomas & Nettleton Co. v. Warren* (June 29, 1990), 11th Dist. No. 89-G-1519, 1990 Ohio App. LEXIS 2720. In that case, we held that liability for payment on a supersedeas bond was strictly controlled by the terms of the bond, and that the terms of the bond in question did not allow for collection since the party posting the bond had no judgment for damages pending against it.

**{¶16}** Napolet is correct in his contention that, "the law of contracts governs bonds, and the liability of the surety is determined upon the terms of the bond." *Lomas* at 8.

**{¶17}** The terms of the judgment being appealed, for which Napolet posted the supersedeas bond, were available to Napolet at the time the bond was created. Further, of course, Napolet prepared the bond. It is well established that a technically defective bond is enforceable against a surety, if the party on whose behalf the bond was delivered received the benefits of the bond – as Pacific did, in this case. See, e.g., *Richard L. Bowen & Assoc., Inc. v. 1200 W. Ninth Street L.P.* (1995), 107 Ohio App.3d 750, 754-755.

**{¶18}** Further, these arguments concerning the failures of alleged conditions precedent could, and should, have been presented to the trial court. They were not. "It is well-established that a litigant's failure to raise an issue with the trial court waives the litigant's right to raise that issue on appeal." *Arrich v. Moody*, 11th Dist. No. 2004-T-0100, 2005-Ohio-6152, at ¶26. By the same token, if the bond was insufficient to meet the purpose for which this court ordered it, this was Napolet's fault, as well. To allow him to raise any such insufficiency as a bar to Huntington's recovery under the bond would violate the principle that a surety is bound by a defective bond if the party for

whom it is issued receives benefit of the bond. *Bowen*, supra, at 754-755. It would also violate the invited error doctrine. Cf. *Lester v. Leuck* (1943), 142 Ohio St. 91, at paragraph one of the syllabus.

**{¶19}** Napolet's first assignment of error lacks merit.

**{¶20}** By his second assignment of error, Napolet argues he was deprived due process of law and an opportunity to be heard. This claim is premised on the alleged failure of the trial court's clerk to serve Napolet with Huntington's motion to enforce the bond, as well as one of the three notices of hearing regarding the bond.

**{¶21}** Mr. Napolet was at the October 9, 2007 hearing on the motion to enforce the bond, represented by counsel. Counsel was allowed to argue; and, the trial court allowed him fourteen days to file a memorandum opposing Huntington's motion. It is difficult to see how any failure by the clerk to serve the motion prejudiced Napolet. Napolet's counsel did not mention such failure of service, and did not argue it to the trial court. As this issue could and should have been raised to the trial court at the time of the hearing on the motion, and was not, it is waived on appeal. *Arrich* at ¶26.

**{¶22}** Napolet's second assignment of error lacks merit.

**{¶23}** By his third assignment of error, Napolet contends that the trial court failed to properly ascertain damages actually owed to Huntington due to the appeal, as is required when determining damages under a supersedeas bond. Cf. *Bowen* at 753.

**{¶24}** We respectfully disagree. The trial court held hearing on the motion to enforce the bond: Huntington had, throughout the proceedings, presented considerable evidence of damages relating to the delay attendant upon the appeal. Napolet could have attacked this evidence at the hearing, or in his memorandum opposing the motion

submitted thereafter. He did not. As such, the issue is waived for purposes of this appeal. *Arrich* at ¶26.

**{¶25}** Napolet's third assignment of error lacks merit.

**{¶26}** By his fourth assignment of error, Mr. Napolet contends the trial court erred in denying his Civ.R. 60(B) motion. As support, he reiterates the arguments he made under his first assignment of error: (1) that the bond he posted only applied to money judgments issuing from the trial court, not to foreclosures; and (2) that it only applied to money judgments against both Pacific and Laurence Lomaz. He contends he could not know that neither of these alleged conditions precedent allegedly had been unfulfilled by the judgment appealed until after the trial court issued its December 12, 2007 judgment enforcing the bond. He postulates he is entitled to relief under Civ.R. 60(B)(3), due to Huntington's alleged concealment of the fact it had no money judgment against Mr. Lomaz. He further contends it is inequitable, pursuant to Civ.R. 60(B)(4), that the trial court's judgment have prospective application.

**{¶27}** We review a trial court's decision to grant or deny a Civ.R. 60(B) motion for abuse of discretion. *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, at ¶24. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

**{¶28}** Civ.R. 60(B) provides, in pertinent part:

**{¶29}** "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. ***"

**{¶30}** "Civ.R. 60(B) is an equitable remedy that is intended to afford relief in the interest of justice. To prevail on a motion pursuant to Civ.R. 60(B), the movant must demonstrate: '(***) (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 Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146 ***, at paragraph two of the syllabus. These requirements are conjunctive; not disjunctive. Id. at 151." *Ludlow*, supra, at ¶23. (Parallel citation omitted.)

**{¶31}** We respectfully remain unpersuaded by Napolet's arguments. We think it was incumbent upon Napolet, as drafter of the bond in question, to understand the basic nature of the judgment being appealed, for which the bond acted as a

supersedeas. A minimum of inquiry would have alerted him to these alleged problems, if, indeed, they existed.

**{¶32}** Napolet's fourth assignment of error lacks merit.

**{¶33}** International Fidelity assigns two errors:

**{¶34}** "[1.] The trial court erred to the prejudice of the Defendant-Appellant by enforcing a criminal bail bond as a civil supersedeas bond and granting a judgment against International Fidelity Insurance Company.

**{¶35}** "[2.] The trial court erred to the prejudice of the Defendant-Appellant by failing to provide International Fidelity Insurance Company with notice and the opportunity to be heard, in violation of its rights to due process."

**{¶36}** We deal with International Fidelity's assignments of error in reverse order.

**{¶37}** By its second assignment of error, International Fidelity contends it was deprived of due process and an opportunity to be heard. In support of this contention, it argues that the trial court's clerk failed to serve it with Huntington's motion to enforce the bond (though admitting it received notice of the hearing). Consequently, International Fidelity argues it could not prepare for the hearing on the bond. International Fidelity, like Napolet, also argues the trial court failed to conduct the hearing so as to determine Huntington's actual losses occasioned by the appeal, and merely entered judgment on the face amount of the bond.

**{¶38}** We respectfully find these arguments have been waived. International Fidelity was represented by counsel at the hearing on enforcement of the bond; counsel was allowed to argue, and to present a memorandum in opposition to the motion to enforce. All of the deficiencies in procedure alleged by International Fidelity were

evident at the time of hearing, and should have been raised to the trial court. Cf. *Arrich* at ¶26.

**{¶39}** International Fidelity's second assignment of error lacks merit.

**{¶40}** By its first assignment of error, International Fidelity notes that the power of attorney used by Napolet in this matter to bind International Fidelity was only valid for issuing criminal bail bonds. International Fidelity notes that this is evident on the face of the power of attorney, and argues that Napolet exceeded any actual or apparent authority he possessed as International Fidelity's agent in using the power of attorney to post a civil supersedeas bond. Recognizing that its counsel failed to raise this issue before the trial court, and thus waived it for appeal, International Fidelity further argues that its trial counsel – who also represented Napolet in the trial court – was ineffective, and that we must review this issue for plain error.

**{¶41}** We respectfully disagree. Again, a technically defective bond is effective against a surety when the party on whose behalf it was issued received the bond's benefit. *Bowen*, supra, at 754-755. Further, that the power of attorney given by International Fidelity to Napolet was limited to issuing criminal bail bonds was evident at the time of hearing in the trial court, and had to be raised then. The doctrine of ineffective assistance of counsel is limited to criminal proceedings. Regarding the doctrine of civil plain error, the Supreme Court of Ohio has held:

**{¶42}** "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the

legitimacy of the underlying judicial process itself. ***" *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, at the syllabus. (Citations omitted.)

**{¶43}** The fact that Napolet may have exceeded his authority as International Fidelity's agent in posting the bond at issue simply does not rise to the level of civil plain error, in that requiring International Fidelity to honor the bond, at present, when it could have challenged its obligation previously, does not undermine the legitimacy of the judicial process. Indeed, it would be far more worrisome if Huntington, which has patiently awaited its judgment, could not collect due to failure by the sureties to post a technically correct bond.

**{¶44}** International Fidelity's first assignment of error lacks merit.

**{¶45}** The assignments of error being without merit, the judgment of the Portage County Court of Common Pleas is affirmed.

**{¶46}** It is the further order of this court that appellants are assessed costs herein taxed.

**{¶47}** The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.