

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

FIFTH THIRD BANK,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-145
- vs -	:	<u>OPINION</u>
	:	11/29/2010
WOESTE BROTHERS PROPERTIES, LTD, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-09-3527

Alan J. Statman, 3700 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for plaintiff-appellee, Fifth Third Bank

Becker & Cade, Howard D. Cade III, 526-A Wards Corner Road, Loveland, Ohio 45140, for defendant-appellant, Lynn Weishaupt

Woeste Brothers Properties, P.O. Box 53895, Cincinnati, Ohio 45253, defendant

Daniel H. Woeste IV, 334 Palm Springs Drive, Fairfield, Ohio 45014, defendant

HENDRICKSON, J.

{¶1} Defendant-appellant, Lynn Weishaupt, appeals a decision of the Butler County Court of Common Pleas denying her motion for relief from a cognovit judgment entered in

favor of plaintiff-appellee, Fifth Third Bank. For the reasons outlined below, we reverse the decision of the trial court and remand.

{¶2} This matter arises out of a commercial collection proceeding involving the default by Woeste Brothers Properties, Ltd. on six cognovit notes issued by Fifth Third Bank.¹ On April 1, 2007, Weishaupt signed a "Continuing Guaranty Agreement," the terms of which provided that she personally guaranteed all obligations of Woeste Brothers.

{¶3} In September 2007, Fifth Third filed a complaint seeking to collect upon the cognovit notes. Pursuant to the statutory cognovit procedure outlined in R.C. 2323.13, Fifth Third also filed an answer and confession of judgment on Weishaupt's behalf. The trial court subsequently entered a judgment nearing \$500,000 in favor of Fifth Third.

{¶4} Pursuant to R.C. 2323.13, the clerk of courts attempted to serve Weishaupt with a summons and notice of the complaint, answer, and judgment in foreclosure by certified mail. Although sent to the address provided by Weishaupt in the guarantee agreement she had signed approximately six months earlier, the mailing was returned "not deliverable as addressed." Thereafter, the clerk sent the documents by ordinary mail to the same address.

{¶5} According to Weishaupt, she did not become aware of the proceedings against her until March 2010 when she received a notice of garnishment at her address in the state of Washington. Fifth Third does not dispute this assertion. In April 2010, Weishaupt filed a motion for relief from judgment. The trial court denied the motion in a decision rendered on May 28, 2010. Weishaupt timely appeals, raising one assignment of error.²

{¶6} Assignment of Error No. 1:

1. Although a defendant in the trial court, Woeste Brothers Properties, Ltd. is not a party to this appeal. Accordingly, we shall limit our discussion to facts which concern Weishaupt.

2. The same day Weishaupt filed her appeal, she filed a second motion for relief from judgment. The trial court denied the second motion in an August 2010 decision. Notably, Weishaupt did not appeal the denial of her second motion for relief. As a result, the present appeal is confined *solely* to the trial court's May 2010 decision denying Weishaupt's first motion for relief.

{¶7} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING WEISHAUP'T'S MOTION TO SET ASIDE JUDGMENT."

{¶8} Citing a case out of the Tenth Appellate District, Weishaupt argues that the failure of the trial court to serve her with notice of the \$500,000 judgment and related pleadings divested the court of any further jurisdiction in the matter. See *Klosterman v. Turnkey-Ohio, L.L.C.*, Franklin App. No. 08AP-774, 2009-Ohio-2508, ¶19 ("R.C. 2323.12 and 2323.13 govern a trial court's jurisdiction over cognovit notes. All of the requirements contained within these statutory provisions 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[.]"). Due to this procedural defect, Weishaupt maintains that she was entitled to relief from judgment under Civ.R. 60(B)(5).

{¶9} We review a trial court's decision granting or denying a party's motion for relief from judgment for an abuse of discretion. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} A cognovit note is an "ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." *D. H. Overmyer Co., Inc., of Ohio v. Frick Co.* (1972), 405 U.S. 174, 176, 92 S.Ct. 775. While legal, cognovit notes are generally disfavored because they deprive a debtor of notice and the opportunity to answer the complaint prior to the entry of judgment on the note. *Fifth Third Bank v. Schoessler's Supply Room, L.L.C.*, Warren App. No. CA2009-11-153, 2010-Ohio-4074, ¶11; *Gerold v. Bush*, Erie App. No. E-07-013, 2007-Ohio-5885, ¶13.

{¶11} Due to the harsh results of the cognovit procedure, Ohio courts have employed

a modified scrutiny of Civ.R. 60(B) motions when the relief sought is from cognovit judgments. *Producers Credit Corp. v. Voge*, Preble App. No. CA2002-06-009, 2003-Ohio-1067, ¶30; *Gerold* at ¶15. Typically, a movant seeking relief under Civ.R. 60(B) must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) that the motion is made within a reasonable time, and, where the grounds for 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.

{¶12} Where a party seeks relief from a cognovit judgment, however, the second requirement of the *GTE Automatic* test is eliminated. *Lykins Oil Co. v. Pritchard*, 169 Ohio App.3d 194, 2006-Ohio-5262, ¶11. That is, a movant seeking relief from a cognovit judgment need not establish that she is entitled to relief under one of the grounds enumerated in Civ.R. 60(B)(1) through (5). *Voge* at ¶30. Rather, the movant need only demonstrate that a meritorious defense exists and that the motion was timely made in order to warrant relief. *Id.*

{¶13} As the facts of the present matter indicate, the trial court's May 28, 2010 decision denied Weishaupt's motion for relief from a cognovit judgment. In reviewing the trial court's decision, it is clear that the court neglected to apply the modified Civ.R. 60(B) test outlined above. Rather, the court improperly analyzed Weishaupt's motion for relief by considering all three factors of the *GTE Automatic* test. *Cf. Gerold* at ¶18. Unfortunately, this defect in the court's analysis was so pervasive that it dictated the outcome of the case.

{¶14} First, the trial court addressed whether Weishaupt presented a meritorious defense. After conducting its analysis, the court concluded that Weishaupt sufficiently alleged operative facts to allow the court to decipher that she adequately presented a meritorious defense. Fifth Third did not file a cross-appeal to dispute this finding, therefore

the trial court's resolution of this question is not at issue and is final.

{¶15} Next, the trial court considered whether Weishaupt established that she was entitled to relief under one of the grounds stated in Civ.R. 60(B). As stated, a movant does not bear the burden of proving this prong where the relief sought is from a cognovit judgment. *Voge* at ¶30. The trial court improperly considered this prong of the *GTE Automatic* test. The court rejected Weishaupt's argument that she was entitled to relief under Civ.R. 60(B)(5), determining instead that she was entitled to relief under Civ.R. 60(B)(3).

{¶16} The trial court's improper determination directly influenced its examination of the third factor, timeliness. Ordinarily, motions for relief which are based upon Civ.R. 60(B)(1), (2) or (3) must be filed within one year of the judgment, order, or proceeding. *GTE Automatic*, 47 Ohio St.2d at 151. Because the trial court concluded that Weishaupt was entitled to relief under Civ.R. 60(B)(3), it reasoned that her motion had to be filed within one year of the September 2007 cognovit judgment. In actuality, the motion was filed over two and a half years after the judgment. Accordingly, the court found Weishaupt's motion was late. While the court determined that Weishaupt had satisfied the first two prongs of the *GTE Automatic* test, it denied her relief from the cognovit judgment solely on the basis of the untimeliness of her motion.

{¶17} We believe the trial court's error in applying the wrong Civ.R. 60(B) test was unreasonable and unconscionable, and rises to the level of an abuse of discretion. *Blakemore*, 5 Ohio St.3d at 219. Because we are limited to this standard of review, we cannot pass judgment on whether Weishaupt was entitled to relief from the September 2007 cognovit judgment under the modified two-prong Civ.R. 60(B) test.

{¶18} On remand, the trial court must analyze the case by applying the modified Civ.R. 60(B) test. To reiterate, the modified test considers only whether the movant presented a meritorious defense and whether the motion was filed within a reasonable time.

Gerold, 2007-Ohio-5885 at ¶18; *Voge*, 2003-Ohio-1067 at ¶30. The trial court's finding that Weishaupt presented a meritorious defense is not in dispute. Accordingly, on remand, the trial court need only address the timeliness of Weishaupt's motion for relief.

{¶19} For the foregoing reasons, the May 28, 2010 judgment of the trial court is reversed and this matter is remanded for further proceedings according to law and consistent with this opinion.

{¶20} Reversed and remanded.

BRESSLER, P.J., and RINGLAND, J., concur.

[Cite as *Fifth Third Bank v. Woeste Bros. Properties, Ltd.*, 2010-Ohio-5807.]