

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Antonio Sofo & Son Importing Co., Inc.

Court of Appeals No. L-11-1113

Appellee

Trial Court No. CI0201006129

v.

Grinders, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided: March 16, 2012

* * * * *

Charles D. Niehaus, Stephen D. Nitschke and Christopher E. Hohenberger,
for appellee.

Benjamin Z. Heywood and Michael J. Podolsky, for appellants.

* * * * *

SINGER, P.J.

{¶ 1} Appellants, Grinders, Inc., Constance Bellisari, and Michael Bellisari,
appeal the judgment of the Lucas County Court of Common Pleas denying their motion
to vacate a cognovit judgment. We affirm.

{¶ 2} The facts giving rise to this appeal are as follows. On August 30, 2010, appellee, Antonio Sofo & Son Importing Co., Inc., filed a “cognovit complaint” against appellants. The complaint alleged that appellants had signed and breached a cognovit note (“Note”), and prayed for relief in the amount \$132,552.46 for the principal and interest and \$2,000.00 for estimated reasonable court costs and attorney’s fees.

{¶ 3} An answer confessing judgment was filed on behalf of appellants through a warrant of attorney. On September 9, 2010, the trial court entered a “cognovit judgment entry” and granted appellee judgment against appellants. Appellee filed motions for examination of judgment debtor against all appellants on October 12, 2010, and they were ordered. On January 6, 2011, appellants filed motions to vacate orders for examination of judgment debtor, and also moved to vacate the cognovit judgment. On May 5, 2011, the trial court denied both motions.

{¶ 4} Appellants now appeal setting forth the following Assignments of Error:

I. The trial court erred when it applied Civ. R. 60(B) in denying appellants’ motion to vacate cognovit judgment and motion to vacate order for examination of judgment debtors because appellants’ motions were premised on the trial court’s lack of subject matter jurisdiction.

II. The trial court erred when it failed to grant appellants’ motion to vacate cognovit judgment and motion to vacate order for examination of judgment debtor, because the trial court lacked subject matter jurisdiction.

{¶ 5} In both assignments of error, appellants argue that the trial court lacked subject matter jurisdiction. For ease of discussion, we will address appellants' assignments of error out of order.

{¶ 6} The trial court in this case construed appellants' motion to vacate the cognovit judgment as a motion to vacate pursuant to Civ.R. 60(B). In order to prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate the following: (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. v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. A motion for relief from judgment will be overruled if these three elements are not satisfied. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 520 N.E.2d 564 (1988). However, in the case of a judgment on a cognovit note, only two of the three elements need to be satisfied. *Meyers v. McGuire*, 80 Ohio App.3d 644, 646, 610 N.E.2d 542 (9th Dist. 1992). “[R]elief 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.” *Id.*

{¶ 7} In their second assignment of error, appellants contend that the trial court lacked subject matter jurisdiction because appellants reside in Delaware County and have never conducted business in Lucas County.

{¶ 8} R.C. 2323.13(A) provides in relevant part:

Notwithstanding any agreement to the contrary, if the maker or any of several makers resides within the territorial jurisdiction of a municipal court * * * or signed the warrant of attorney authorizing confession of judgment in such territory, judgment on such warrant of attorney shall be confessed in a municipal court having jurisdiction in such territory, provided the court has jurisdiction over the subject matter; otherwise, judgment may be confessed in any court in the county where the maker or any of several makers resides or signed the warrant of attorney.

{¶ 9} Pursuant to the statute, the confession of judgment must be made within the jurisdiction of a court in which either any one of the makers resides or where the warrant of attorney was signed, in order for a trial court to have subject matter jurisdiction to enter judgment on a cognovit note. *Sunset Land Partnership v. Trowsdell*, 9th Dist. No. 20895, 2002-Ohio-4152, ¶ 9. In support of their argument, appellants cite their affidavits wherein they state that they all reside in Delaware County and that they never conducted business in Lucas County.

{¶ 10} However, paragraph 8 of the note states: “Governing Law. This Note is made at [sic] Toledo, Ohio and is being signed in Lucas County, Ohio and shall be construed under the laws of the State of Ohio.” The note also contains a “warrant of attorney” at paragraph 20.

{¶ 11} The trial court has jurisdiction to enter judgment on a cognovit note if the note was executed in the county where the court was located. *Brown-Graves Co. v. Caprice Homes, Inc.*, 9th Dist. No. 20689, 2002 WL 347322 (Mar. 6, 2002). Affidavits can be used to state where makers of the note reside as well as where that note was executed. *B & I Hotel Mgt., LLC v. Ditchman Holdings, L.L.P.*, 8th Dist. No. 84265, 2004-Ohio-6294.

{¶ 12} The cognovit note in this case expressly states that the execution of the note took place in Lucas County. Appellants in this case did not present any competent evidence to this court or the trial court to refute paragraph 8 of the cognovit note. Nor have they presented a meritorious defense. Accordingly, the court did not err in finding it had subject matter jurisdiction and in denying appellants' motion to vacate. Appellants' second assignment of error is found not well-taken.

{¶ 13} Appellant's first assignment of error assumes that the trial court lacked subject matter jurisdiction. Given our disposition of appellant's second assignment of error, appellant's first assignment of error is not well-taken.

{¶ 14} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24(A)(2).

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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