

[Cite as *JP Morgan Chase, NA v. Bethel* , 2010-Ohio-2987.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JP MORGAN CHASE, NA

Plaintiff-Appellee

-vs-

STEPHEN R. BETHEL, ET AL.

Defendants-Appellants

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CA 0110

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 09CV0566

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

June 23, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

THOMAS R. MERRY
JEANINE LOEHR BIELBY
Barren & Merry Co., L.P.A.
110 Polaris Parkway, Suite 302
Westerville, Ohio 43082

GREGORY H. MELICK
MATTHEW T. ANDERSON
Luper Neidenthal & Logan
A Legal Professional Association
50 West Broad Street, Suite 1200
Columbus, Ohio 43215

Hoffman, J.

{¶1} Defendants-appellants Stephen R. Bethel and Mark A. Lankford appeal the August 5, 2009 judgment of the Licking County Court of Common Pleas finding in favor of Plaintiff-appellee JP Morgan Chase, NA.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 27, 2008, Appellants, along with their business partner Timothy Corral, executed a promissory note in the amount of \$600,000.00 as officers of CMH West, Inc. In conjunction, Appellants each executed their own limited personal guaranty in the amount of \$73,500. Appellants also signed assignments of deposit accounts as collateral for the loan. Appellants deposited \$73,500 each into separate deposit accounts.

{¶3} The liability provision of the guarantees states, in pertinent part:

{¶4} "MAXIMUM LIABILITY. The maximum liability of Guarantor under this Guaranty shall not exceed at any one time the sum of the principal amount of \$73,500, plus [interest, costs, expenses, and attorney's fees].

{¶5} ***

{¶6} "RIGHT OF SETOFF. Guarantor grants to Lender a security interest in, as well as a right of setoff against, and hereby assigns, conveys, delivers, pledges and transfers to Lender, as security for repayment of the Indebtedness, all Guarantor's right, title and interest in and to all Guarantor's accounts (whether checking, savings, or some other account) with Lender***Guarantor authorizes Lender***to collect, charge and/or setoff all sums owing on the Indebtedness against any and all such accounts****"

{¶17} The guarantees further provide, “Guarantor authorizes Lender*** to take and hold security for the payment of this Guaranty or the indebtedness***”

{¶18} Upon default of CMH West, Inc., Appellee Chase swept both Appellant’s deposits accounts, and continued its collection efforts with regard to Appellants as to the loan default of CMH, Inc.

{¶19} On March 24, 2009, Chase filed a “Complaint on Guarantys” in the Licking County Court of Common Pleas seeking cognovit judgments against each Appellant. The trial court entered confessed cognovit judgments as to the Appellants on the same day.

{¶10} On June 16, 2009, Appellants filed a motion to vacate the cognovit judgments pursuant to Ohio Civil Rule 60(B), setting forth an affirmative defense of payment. Via Judgment Entry of August 5, 2009, the trial court overruled the motion.

{¶11} Appellants now appeal, assigning as error:

{¶12} “I. THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN DENYING THE MOTION OF DEFENDANTS/APPELLANTS TO VACATE THE COGNOVIT JUDGMENTS ENTERED AGAINST THEM, WHILE OTHERWISE REQUIRING APPELLANTS TO PROVE THEIR CASE ON THE MERITS.

{¶13} “II. THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN DENYING THE MOTION OF DEFENDANTS/APPELLANTS TO VACATE THE COGNOVIT JUDGMENTS ENTERED AGAINST THEM IN HOLDING THAT THE DEPOSIT SAVINGS ACCOUNTS DID NOT SECURE DEFENDANTS/APPELLANTS LIMITED PERSONAL GUARANTEES ONLY.”

I & II

{¶14} Both assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶15} To prevail on a motion to vacate a judgment pursuant to Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense 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. *GTE Automatic Electric Company, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. Where timely relief is sought from a default judgment, and the movant has a meritorious defense, doubt should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. *Id.* at paragraph three of the syllabus. Our standard of review of a court's decision as to whether to grant a Civ. R. 60(B) motion is abuse of discretion. *Id.* at 148, 351 N.E.2d 113.

{¶16} Appellants maintain the application of the deposit accounts to CMH's indebtedness satisfied their liability under the guaranty agreements. Payment is a meritorious defense to a claim on a cognovit note. *Your Financial Community of Ohio Inc. v. Emerick* (1997), 123 Ohio App.3d 601.

{¶17} Upon review of the agreements herein, the limited personal guarantees provide a maximum personal liability of \$73,500 for each appellant. The appellants each deposited and assigned \$73,500 of their personal monies, the exact amount of their maximum liability under their personal guarantees. The Assignment(s) of Deposit

Accounts provide the savings deposit accounts secure the “indebtedness” of each appellant, which is further defined as the indebtedness evidenced by the Note or Related Documents. In turn, the term “Related Documents” is defined to include the guarantees. Therefore, we find the language of the documents conflicting and ambiguous.

{¶18} It is well established in Ohio conflicting provisions in a contract cannot be interpreted as a matter of law, and must be given to the fact finder, who must then rely on parol evidence. See *Fairmont Creamery Co. v. Ewing* (1932), 43 Ohio App.191.

{¶19} The August 5, 2009 Judgment Entry of the Licking County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

