IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

COMMERCE BANK, N.A.,	:	DECEMBER, 2006
Plaintiff,	:	NO. 02577
v.	:	COMMERCE PROGRAM
PORTERRA, LLC, 1101 FRANKFORD, LLC, NUNZIO TERRA, and LAURA TERRA,	:	Control No. 011761
Defendants.	:	

ORDER

AND NOW, this 7th day of March, 2008, upon consideration of defendants' Petition to Strike Off, Or, Alternatively, To Open Judgment Entered By Confession, the responses thereto, the briefs in support and opposition, and all other matters of record, and after oral argument and a hearing held on January 4, 2008, and in accord with the Opinion issued simultaneously, it is hereby **ORDERED** that said Petition is **DENIED**.

BY THE COURT:

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ABRAMSON, HOWLAND W., J.

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Plaintiff,	:	NO. 02577
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Defendants.	:	

OPINION

Defendants Porterra, LLC ("Porterra"), Nunzio Terra, and Laura Terra have moved to open or strike the judgment confessed against them on December 20, 2006, by plaintiff Commerce Bank, N.A ("Commerce").[1] Their Petition is presently before the court, and, for the reasons set forth below, it must be denied.

Porterra is the borrower under a construction loan issued by Commerce in August, 2005, which is secured by property at 1039-55 Frankford Avenue in Philadelphia. As part of the loan transaction, Mr. and Mrs. Terra executed a personal guaranty of the loan to Porterra. Mr. Terra is a member of Porterra; Mrs. Terra is not. James Porter is the other member of Porterra.

In July, 2006, after Commerce had already distributed large portion of the loan monies to Porterra, Mr. Porter filed a lawsuit against Mr. Terra and Porterra (the "Porter Lawsuit"). He also filed a lis pendens against the property securing Commerce's construction loan. The Porter lawsuit is still active. On December 19, 2006, Commerce sent Porterra and Mr. and Mrs. Terra a "Notice of Event of Default" under the Construction Loan Agreement. In the Notice, Commerce

[1] The judgment confessed against defendant 1101 Frankford, LLC on December 20, 2006 was previously, properly, stricken by the court on February 27, 2007.

identified the Porter Lawsuit as an "Event of Default" under the Construction Loan Agreement because it constituted:

> The occurrence and continued existence of a material adverse change, in the reasonable determination of [Commerce], in the financial condition of [Porterra], or a material impairment, in the reasonable determination of [Commerce], in the value or priority of [Commerce's] security interests or mortgage liens in the [Property].[2]

The Notice of Default identified two other existing circumstances as "Events of Default," namely the filing of certain mechanic's liens against the property and the existence of a Joint Venture Agreement between Messrs. Porter and Terra, about which Commerce claimed ignorance.

On December 20, 2006, Commerce confessed judgment against Porterra and Mr. and Mrs. Terra based on the defaults under the construction loan. Porterra claims that the confessed judgment should be opened because Porterra has meritorious defenses to the events of default listed by Commerce in the Notice. However, the court previously granted summary judgment to Commerce on the basis that the filing of the Porter Lawsuit and the accompanying lis pendens constituted "Events of Default" under the Construction Loan Agreement.[3] Since the court has previously determined that Porterra has no valid defense with respect to this "Event of Default," the Petition to Open is denied.

Porterra also claims that the confessed judgment against it should be stricken because Commerce filed it too soon after the Notice of Event of Default. Porterra argues that it was entitled to notice and an opportunity to cure the Porter Lawsuit before Commerce could confess judgment against Porterra. However, the Construction Loan Agreement does not require any grace or cure period with respect to an "Event of Default" of that nature.

[2] Notice of Event of Default, p. 2.

[3] Commerce Bank, NA v. Porterra, LLC, February Term, 2007, No. 03257 (November 27, 2007, Abramson, J.).

The Construction Loan Agreement lists seven "Events of Default," some of which grant Porterra a cure period and some of which do not. For instance, the following "Events of Default" contain cure provisions:

> (2) Failure of [Porterra] to perform or comply with any of the agreements, conditions, covenants, provisions or stipulations contained in the [Loan Agreement], and continuance of such failure uncured for twenty (20) days after written notice specifying such failure and requesting that it be cured is given by [Commerce] to [Porterra] or knowledge of [Porterra], whichever shall first occur
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> * * *
>
> (5) If any judgment, writ, warrant, lien or attachment or execution or similar process which calls for payment or presents liability either individually or in aggregate in excess of $25,000 shall be rendered, issued or levied against [Porterra] or its property and such process shall not be paid, waived, stayed, vacated, discharged, settled, satisfied or fully bonded within forty-five (45) days after its issuance or levy . . .[4]

However, the "Event of Default" definition under which the Porter Lawsuit falls does not set forth a cure period:

> (7) The occurrence and continued existence of a material adverse change, in the reasonable determination of [Commerce], in the financial condition of [Porterra], or a material impairment, in the reasonable determination of [Commerce], in the value or priority of [Commerce's] security interests or mortgage liens in the [Property].[5]

Upon the happening of a "material adverse change" or "material impairment," Commerce is entitled to accelerate the amounts due under the loan documents. Specifically, Commerce

> may, by notice to [Porterra], declare the Note, all interest thereon, and all other amounts payable under this Agreement to be forthwith due and payable, whereupon the Note, all such interest, and all such amounts shall become and be forthwith due and payable, without presentment, demand, protest, or further notice of any kind, all of which are hereby expressly waived by [Porterra].[6]

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[4] Construction Loan Agreement, p. 22, § 7.01.

[5] *Id.*, p. 23, § 7.01.

[6] *Id.*

In the Notice it sent to Porterra and Mr. and Mrs. Porter on December 19, 2006, Commerce properly notified them that it had "accelerated the Loan and is demanding immediate repayment of all obligations owed by [Porterra] under the Loan."[7] There is nothing in the above quoted notice-of-acceleration provisions that requires Commerce to give Porterra time to cure the Porter Lawsuit.[8] Likewise, there is nothing in the confession of judgment provisions of the Construction Loan Agreement that requires Commerce to give Porterra time to cure the Porter Lawsuit:

> FOLLOWING ANY DEFAULT OR EVENT OF DEFAULT HEREUNDER, SUBJECT TO APPLICABLE GRACE OR CURE PERIODS, BORROWER HEREBY IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEYS OF ANY COURT OF RECORD . . . TO CONFESS JUDGMENT OR A SERIES OF JUDGMENTS AGAINST BORROWER . . . [9]

Since the "material adverse change" and "material impairment" default provisions contain no grace or cure periods, Commerce was entitled to confess judgment immediately following the occurrence of the default, *i.e.*, the filing of the Porter Lawsuit, although it was also entitled to wait five months to do so, as it did. Therefore, Porterra's Petition to Strike the confessed judgment must be denied.

Leaving aside, for the moment, Mrs. Terra's argument that her guaranty was improperly obtained, Mr. and Mrs. Terra's Petition to Strike the judgment confessed against them based on improper notice of default must also be denied. The Confession of Judgment provisions of the Terras' Guaranty provides as follows:

> UPON THE OCCURRENCE OF AN EVENT OF DEFAULT HEREUNDER OR UNDER THE LOAN AGREEMENT, GUARANTOR DOES HEREBY

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[7] Notice of Event of Default, p. 3.

[8] At the time Commerce accelerated the loan, the Porter Lawsuit had been outstanding, and impairing Commerce's collateral, for 5 months. It is still outstanding, and impairing Commerce's collateral, 14 months after Commerce gave Porterra notice of acceleration. Apparently, Porterra and the Terras cannot cure it.

[9] Construction Loan Agreement, p. 27, § 8.22.

> IRREVOCABLY AUTHORIZE AND EMPOWER ANY ATTORNEY OR THE PROTHONOTARY . . . TO ENTER AND CONFESS JUDGMENT AGAINST [THE TERRAS] IN FAVOR OF [COMMERCE] . . .[10]

Since an "Event of Default" occurred under the Construction Loan Agreement, Commerce was entitled to confess judgment against the Terras under the Guaranty.

Finally, Mrs. Terra claims that the judgment confessed against her should be stricken because she was not properly made a guarantor of the construction loan. The court held oral argument and a hearing on this issue. Mr. and Mrs. Terra and a Commerce Vice President, who negotiated the loan with Mr. Terra, testified at the hearing.

Mrs. Terra argues that Regulation B promulgated under the Federal Consumer Credit Protection Equal Credit Opportunity Act ("ECOA") prohibits Commerce from requiring her to guaranty the construction loan to Porterra. Regulation B provides as follows:

> If, under [Commerce's] standards of creditworthiness, the personal liability of an additional party [in this case, Mr. Terra] is necessary to support the credit requested [by Porterra], [Commerce] may request [that Mr. Terra act as] a cosigner, guarantor, endorser, or similar party. . . .
>
> [Commerce] shall not impose requirements upon [Mr. Terra as guarantor] that [Commerce] is prohibited from imposing upon an applicant under this section. . . .
>
> [Commerce] shall not require the signature of [Mrs. Terra], other than [as] a joint applicant, on any credit instrument if [Mr. Terra] qualifies [as a guarantor] under [Commerce's] standards of creditworthiness for the amount and terms of the credit requested. [Commerce] shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.[11]

As evidenced by the court's difficulty in making the facts of this commercial transaction fit the provisions of Regulation B above, the court questions whether Regulation B is applicable to this

[10] Guaranty of Payment, p. 6, ¶ L.

[11] 12 C.F.R. § 202.7(d)(1),(5), and (6).

non-consumer loan transaction.[12] However, since the Pennsylvania Superior Court has applied Regulation B in a case involving a judgment confessed on a guaranty given by a husband and wife with respect to a corporate obligation, this court will do the same.[13]

In the Gentile case, the Superior Court held that

> When determining whether a creditor has violated the ECOA by requiring a spousal signature, it is critical to determine whether the husband and wife were joint applicants on the loan. . . . [L]enders are permitted to require spousal signatures where the spouses are joint applicants. . . . Similarly, lenders are generally permitted to require a spousal signature where (1) the guarantor signs as a party whose assets are necessary for the credit seeker to qualify as creditworthy, or (2) when a guarantor's signature is required to perfect a creditor's security interest in pledged assets which are jointly held.

In this case, the Commerce representative testified that Commerce required a guaranty from Mr. Terra of the Porterra construction loan because Porterra was a start-up company whose only assets were the real estate pledged as collateral for the loan on which the construction was to take place.[14] Commerce required a guarantor with liquid assets who could deal with cost overruns and other problems that might arise during the construction project.[15] In his application as potential guarantor, Mr. Terra submitted a list of what he claimed were his assets. After Commerce questioned him regarding those assets, it became clear that the cash was jointly held by him and Mrs. Terra.[16]

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[12] *See* Midlantic National Bank v. E.F. Hansen, 48 F.3d 693, 699 (3d. Cir. 1995)("The ECOA was enacted to protect consumers from discrimination by financial institutions.") It appears that the original intent of the statute was to prevent a bank from denying credit to a woman applicant without her husband's co-signature, which is not the situation presented in this case. *See* Integra Bank v. Freeman, 839 F. Supp. 326, 328 (D. Pa. 1993) ("The purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.").

[13] Southwestern Pennsylvania Regional Council, Inc. v. Gentile, 776 A.2d 276 (Pa. Super. 2001).

[14] Notes of Testimony, January 4, 2008, p. 74.

[15] *Id*., pp. 74-78.

[16] *Id*., pp. 78-82.

The Commerce representative testified that he asked Mr. Terra in April, 2005 for a list of assets solely owned by Mr. Terra, and, in response, Mr. Terra offered his wife as additional guarantor,[17] which would not be a violation of the ECOA. In contrast, Mr. and Mrs. Terra testified that Commerce suddenly demanded in August, 2005 that Mrs. Terra guaranty the loan to Porterra,[18] which could be a violation of Regulation B. However, Commerce produced a May 18, 2005 Commitment Letter from Commerce Bank, which was signed by both Mr. and Mrs. Terra on June 1, 2005, in which Mrs. Terra is listed as a guarantor of the loan. This document supports the Commerce representative's testimony and conflicts with the Terras' testimony regarding when and how Mrs. Terra agreed to become a guarantor of the loan.

Furthermore, its is clear that Mr. Terra, with his list of assets jointly held with his wife, did not satisfy Commerce's liquidity requirements for a sole guarantor of the Porterra construction loan. "A lender does not violate the ECOA where the spouses present themselves as joint applicants, or where the credit seeker is not individually creditworthy absent a spousal signature."[19] Even if Commerce demanded Mrs. Terra's signature as guarantor, it was entitled to do so because Mr. Terra was not individually creditworthy to serve as guarantor.

For all the foregoing reasons, Porterra's and Mr. and Mrs. Terra's Petition to Strike Off, Or Alternatively, To Open Judgment Entered By Confession is denied.

BY THE COURT:

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ABRAMSON, HOWLAND W., J.

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[17] Notes of Testimony, January 4, 2008, p. 59.

[18] *Id*., pp. 105, 114.

[19] Gentile, 776 A.2d at 283.