

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

RAIT PARTNERSHIP, L.P.,	:	JULY TERM 2008
Plaintiff,	:	
v.	:	No. 4448
	:	
JACK BOYAJIAN, BOYAJIAN ASSET	:	COMMERCE PROGRAM
TRUST, ARAXIE BOYADJIAN, and	:	
HELEN BOYADJIAN,	:	Control No: 096135
Defendants.	:	

ORDER

AND NOW, this 27th day of March, 2009, upon consideration of the Amended Petition to Strike and/or Open Confessed Judgment of Defendants Jack Boyajian, Boyajian Asset Trust, Araxie Boyadjian, and Helen Boyadjian, the response thereto, all matters of record and in accordance with the Opinion filed herewith, it hereby is **ORDERED** that the Petition to Strike Confession of Judgment is **GRANTED** and the judgment entered in favor of Plaintiff on August 5, 2008 is hereby **STRICKEN**.

BY THE COURT,

ARNOLD L. NEW, J.

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Defendants.	:	

OPINION

Defendants Jack Boyajian, Boyajian Asset Trust, Araxie Boyadjian, and Helen Boyadjian (collectively, “defendants”) have filed an Amended Petition to Strike and/or Open Confessed Judgment in response to plaintiff RAIT Partnership, L.P.’s (“RAIT”) Complaint in Confession of Judgment against them. For the reasons set forth in this Opinion, the Petition to Strike is granted and the judgment is stricken.

BACKGROUND

On or around September 15, 2006, RAIT entered into a Loan and Security Agreement with Highland 100 LLC (“Highland”) pursuant to which RAIT loaned \$1,000,000.00 to Highland. In accordance with the terms of the Loan and Security Agreement, Highland executed a Promissory Note (the “Note”) in favor of RAIT for the principal amount of \$1,000,000.00. In addition, the defendants executed a Guaranty Agreement in favor of RAIT, under which they agreed to guarantee payment of Highland’s loan.

Pursuant to the terms of the Note, Highland was to make payments, including interest, each month from November 1, 2006 to September 15, 2007. Highland had three options to extend the maturity date of the loan, each for six months, provided that it paid

RAIT an extension fee equal to one-half of one percent of the outstanding balance of the loan and it increased the amount on deposit in a debt service reserve.¹ Highland exercised its first option, which extended the maturity date of the loan to March 15, 2008. Highland then attempted to exercise its second option, but failed to meet the conditions precedent for doing so, namely the payment of the extension fee and increasing the debt service reserve.

As a result, the principal balance of the loan became due on March 15, 2008. Highland failed to make payment by then and thus defaulted under the Loan and Security Agreement and the Note. RAIT contends that defendants, as guarantors of the loan, have also failed to make payment and thus, are in default of their obligations under the Guaranty Agreement. Consequently, on July 30, 2008, RAIT filed a Complaint in Confession of Judgment against defendants in the amount of \$1,334,817.53 based upon the authority granted under the Confession of Judgment/Warrant of Attorney provision contained in the Guaranty Agreement.² Presently before the Court is defendants' Petition to Strike and/or Open Confessed Judgment. Defendants argue the confessed judgment should be stricken because the Court lacks personal jurisdiction over them.

DISCUSSION

A court must have personal jurisdiction over a party in order to enter a judgment against it.³ Indeed, action taken by a court without jurisdiction is a nullity.⁴ A trial court may exercise personal jurisdiction over a non-resident defendant if either general or

¹ Loan and Security Agreement, at ¶ 1(h).

² RAIT simultaneously filed a Complaint in Confession of Judgment against Highland in a separate action captioned *RAIT v. Highland*, July Term 2008, No. 4441.

³ *Bancorp Group, Inc. v. Pirgos, Inc.*, 744 A.2d 791, 792 (Pa. Super. 2000) (citations omitted).

⁴ *Id.*

specific jurisdiction is found.⁵ General jurisdiction is based upon a defendant's general activities within a forum as evidenced by continuous and systematic contacts within the state.⁶ Specific jurisdiction is narrower in scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action.⁷ For a court to exercise specific personal jurisdiction over a non-resident, "(1) the nonresident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice."⁸ Whether sufficient minimum contacts exist for the assertion of in personam jurisdiction is based on a finding that the "defendant's conduct and his connection with the forum State are such that he should reasonably anticipate being haled into court there."⁹ As the Pennsylvania Supreme Court articulated:

Critical to the analysis of whether a defendant should reasonably anticipate being haled into court in the forum state is the determination that the defendant purposefully directed his activities at residents of the forum and purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. Contacts with the forum that are "random," "fortuitous" or "attenuated" are not sufficient for the assertion of personal jurisdiction nor is unilateral activity in the forum by others who claim some relationship with the defendant.¹⁰

In evaluating an objection to personal jurisdiction, the objecting party initially bears the burden of proof.¹¹ However, "[o]nce the moving party supports its objections to

⁵ Gen. Motors Acceptance Corp. v. Keller, 737 A.2d 279, 281 (Pa. Super. 1999).

⁶ Fidelity Leasing Inc. v. Limestone County Bd. of Educ., 758 A.2d 1207, 1210 (Pa. Super. 2000).

⁷ Id.

⁸ Kubik v. Letteri, 614 A.2d 1110, 1114 (Pa. 1992), citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985).

⁹ Id., citing Burger King, 471 U.S. at 474.

¹⁰ Id., citing Burger King, 471 U.S. at 475.

¹¹ Barr v. Barr, 749 A.2d 992, 994 (Pa. Super. 2000); Grimes v. Wetzler, 749 A.2d 535, 538 (Pa. Super. 2000).

personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.”¹²

In support of their position that the Court lacks jurisdiction over them, defendants produced affidavits averring the following: they are residents of New Jersey; they have no contacts with Pennsylvania; they do not own property or conduct business in Pennsylvania; the Guaranty Agreement was not negotiated or executed in Pennsylvania, but was negotiated and executed in New York and/or New Jersey; and the property and business interests for which the loan was intended are located in New York. In response, RAIT advances various arguments in support of its position that this Court has personal jurisdiction over defendants, which will be discussed below. After careful review, the Court finds RAIT has failed to demonstrate sufficient facts to establish either general or specific jurisdiction over the defendants.

I. The Fact that Defendants Contracted With a Pennsylvania Entity is Not Sufficient to Establish Personal Jurisdiction Over Defendants.

RAIT first contends this Court has personal jurisdiction over defendants because defendants entered into the Guaranty Agreement with RAIT, an entity located in Pennsylvania, and induced a Pennsylvania entity to make a loan of \$1,000,000. RAIT argues since defendants contracted with a Pennsylvania entity, defendants should be subject to personal jurisdiction in Pennsylvania.

It is well-established that “the mere existence of a contract between an in-state party and an out-of-state party is not sufficient, by itself, to confer Pennsylvania courts with jurisdiction over the out-of-state party.”¹³ Rather, “negotiations prior to the contract, its contemplated future consequences, the terms of the contract and the parties’

¹² Barr, 749 A.2d at 994; see also Grimes, 749 A.2d at 538.

¹³ Insulations, Inc. v. Journeymen Welding & Fab, 700 A.2d 530, 531 (Pa. Super. 1997) (citations omitted).

actual course of dealing must be evaluated in determining whether the defendant purposefully availed itself of the privilege of conducting activities within the forum State.”¹⁴

Here, the mere fact defendants contracted with a Pennsylvania entity is not sufficient to establish personal jurisdiction over defendants. Defendants have averred the Guaranty Agreement was not negotiated or executed in Pennsylvania and the property and business interests for which the loan was intended are located in New York. RAIT has presented no contrary evidence to dispute these averments; in fact, RAIT has presented no evidence any activities surrounding the contract took place in Pennsylvania. As a result, RAIT’s argument fails.

II. The Choice of Law Provision Within the Guaranty Agreement is Not Determinative of Personal Jurisdiction.

Next, RAIT argues that since the Guaranty Agreement states that it is to be governed by Pennsylvania law, defendants should be subject to this Court’s jurisdiction. However, “a provision in an agreement that the laws of a particular forum are to govern disputes arising under the agreement is not the equivalent of a consent to personal jurisdiction.”¹⁵ Indeed, a choice of law provision in a contract “is not determinative of personal jurisdiction.”¹⁶ “[C]hoice-of-law analysis -- which focuses on all elements of a transaction, and not simply on the defendant’s conduct -- is distinct from minimum contacts jurisdictional analysis -- which focuses at the threshold solely on the defendant’s

¹⁴ Id.

¹⁵ Bancorp Group, Inc., 744 A.2d at 794.

¹⁶ Commonwealth Capital Funding, Inc. v. Franklin Square Hospital, 620 A.2d 1154, 1159, n. 5 (Pa. Super. 1993).

purposeful connection to the forum...[S]uch a provision standing alone would be insufficient to confer jurisdiction....”¹⁷ Accordingly, RAIT’s argument fails.

III. Defendants Have Not Consented to Personal Jurisdiction in Pennsylvania in this Action.

RAIT asserts that since Highland expressly consented to jurisdiction in Pennsylvania in the Loan and Security Agreement and the Note and since defendant Jack Boyajian signed these agreements on behalf of Highland, Highland’s consent to jurisdiction should be imputed to Jack Boyajian.

Jurisdiction based upon consent is only appropriate “to the extent authorized by the consent.”¹⁸ In this case, RAIT confessed judgment on the *Guaranty Agreement*, not the Note. The Guaranty Agreement, to which defendants were parties to, did not contain a consent to personal jurisdiction provision. Thus, defendants did not contractually consent to personal jurisdiction in Pennsylvania.

Unlike the Guaranty Agreement, the Loan and Security Agreement and the Note *did* contain consent to Pennsylvania jurisdiction provisions. However, the only parties to the Loan and Security Agreement and the Note were RAIT and Highland; none of the defendants were parties to the Loan and Security Agreement or the Note. The consent to jurisdiction provisions contained in the Loan and Security Agreement and the Note plainly stated the “borrower,” identified as Highland within the agreements, submitted to personal jurisdiction in Pennsylvania.¹⁹ Further, the Loan and Security Agreement and the Note were signed by Jack Boyajian on behalf of Highland in his capacity as manager of Highland and not in his individual capacity. Thus, it is clear only Highland consented

¹⁷ *Id.*, citing *Burger King*, 471 U.S. at 481-82 (1985).

¹⁸ 42 Pa.C.S.A. § 5301(a)(1)(iii).

¹⁹ Loan and Security Agreement, at ¶ 21(b); Note, at ¶ 13(b).

to personal jurisdiction in Pennsylvania by virtue of the language contained within the agreements.

RAIT next argues that Araxie and Helen Boyadjian expressly agreed to be subject to jurisdiction in Pennsylvania pursuant to a consent to jurisdiction provision contained in a Mortgage and Security Agreement they entered into in conjunction with the Guaranty Agreement. However, the consent to jurisdiction provision in the Mortgage and Security Agreement specifically stated Araxie and Helen Boyadjian consented to jurisdiction in Pennsylvania in any suit “arising out of this Mortgage.”²⁰ Since the present suit does not arise out of the mortgage, but rather arises out of the Guaranty Agreement, Araxie and Helen Boyadjian have not consented to jurisdiction in this action.²¹

Lastly, RAIT argues that in addition to guaranteeing the loan in the present case, Jack Boyajian and Boyajian Asset Trust guaranteed a separate loan for \$3,800,000, in which they expressly consented to jurisdiction in Pennsylvania pursuant to a consent to jurisdiction provision contained within that guaranty agreement. However, the fact Jack Boyajian and Boyajian Asset Trust consented to personal jurisdiction in Pennsylvania in another guaranty agreement on a separate loan does not support the conclusion they consented to jurisdiction in Pennsylvania in suits based on the Guaranty Agreement at issue here. Indeed, the consent to jurisdiction provision in the guaranty agreement for the \$3,800,000 loan was expressly limited to suits “arising from, relating to or in connection with” the \$3,800,000 loan.²² Thus, Jack Boyajian and Boyajian Asset Trust’s consent to

²⁰ Mortgage and Security Agreement, at ¶ 39.

²¹ It is also noteworthy that the mortgaged property is located in New Jersey, not Pennsylvania.

²² Exhibit “B” to Response to Petition to Strike/Open (Guaranty of Non-Recourse Carveouts), at ¶ 14(b).

Pennsylvania jurisdiction in their guaranty for the \$3,800,000 loan did not confer personal jurisdiction over them in this action. Accordingly, RAIT's argument fails.²³

CONCLUSION

For the foregoing reasons, defendants' Petition to Strike Confession of Judgment is granted and the judgment is stricken.

BY THE COURT,

ARNOLD L. NEW, J.

²³ RAIT's final argument that Jack Boyajian should be subject to this Court's jurisdiction because he was sued in federal court in Pennsylvania in two actions unrelated to this litigation is without merit.