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

REPUBLIC FIRST BANK,	:	October Term 2012
Plaintiff,	:	
v.	:	No. 1135
MARKE EAST 14TH ST, LLC.,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 13010476

ORDER

AND NOW, this 3RD day of May, 2013, upon consideration of Defendant, Marke East 14th Street, LLC's Petition to Strike, or in the Alternative, to Open Confessed Judgment and for a Stay of Proceedings and Plaintiff's response in opposition, it hereby is **ORDERED** that the Petition is **Denied**.

BY THE COURT,

PATRICIA A. McINERNEY, J.

Republic First Bank Vs-ORDOP

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Defendant.	:	Commerce Program
	:	
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OPINION

This is a confession of judgment action filed by Plaintiff Republic First Bank (hereinafter "Bank") against Defendant Marke East 14th St. LLC (hereinafter "Marke"). Presently before the court is Marke's Petition to Strike and/or Open Judgment. For the reasons set forth below, the Petition to Strike and/or Open is Denied.

The Bank and the principal of Marke commenced a lending relationship in approximately 2006 when the Bank refinanced a large unrelated project for an entity in which the principal of Marke was involved. Marke alleges in the first half of 2009, the Bank approached its principal with the possibility of purchasing two loans the Bank had with entities owned or controlled by an individual named Yehuda Nelkenbaum (hereinafter "Nelkenbaum").

The first loan was to Nelkenbaum's entity known as Philmont Square, Inc. in which the Bank financed a commercial building located at 2381 Philmont Avenue in Lower Moreland, Pennsylvania consisting of an office and industrial flex space. The second loan was to Nelkenbaum's entity known as East Fourteen Garden, Inc. in which the Bank financed the acquisition of and construction of an apartment complex.

According to Marke, the Bank made false representations and failed to disclose material facts to its principal concerning the Nelkenbaum's loans to coerce him into buying the loans.

The false representations included inflating the value of the properties, providing false and incomplete due diligence which falsely depicted the status of the rents and rent collection, falsely representing the construction progress to the East Street property, and failing to disclose existing code violations.

Marke alleges the Bank assured the principal he was getting a great deal and continually sought to persuade him to purchase the Nelkenbaum Loans by informing him that others were interested in purchasing same. Additionally, the Bank allegedly enticed him by financing approximately 97% of the purchase price for the loan acquisition.

On June 30, 2009, Marke closed on the purchase of the loans. To acquire the East 14th Street loan, Marke, a single member limited liability company, was formed. To fund the acquisition of the East 14th Street, Marke borrowed the original principal amount of $6,756, 396 from the Bank. Marke executed a term note. The principal guaranteed and became the surety for the Marke obligations to the Bank under the East 14th Street Acquisition Loan. On December 6, 2009, Marke executed and delivered a First Allonge. In the Allonge, the Bank agreed to increase the face amount of the note to $6,886,396.00.

According to Marke, almost immediately after the closing and continuing thereafter, it became apparent that the Bank had made a series of false or misleading statements or otherwise concealed certain pertinent facts regarding the East Street property.

Despite the Bank's representations, Marke was able to stay current with the debt service obligation arising from the East street property by using the cash generated from the Philmont Street property to fund the debt service. This came to a halt when the Bank allegedly forced Marke to sell the Philmont street property against his will. In April 2012, the property was sold and the proceeds were used to pay the Bank the indebtedness on the Philmont Loans.

Subsequent to the sale of the Philmont property, Marke became unable to service the debt on the East 14th Street Acquisition Loan because it no longer had the cash cushion generated by the Philmont property and the East 14th Street Property had inadequate cash flow to service the indebtedness on its own.

Unable to service the debt on the East Street property, Marke attempted to work out an arrangement with Nelkenbaum that would provide for the conveyance of the East 104th Street Property to a Marke controlled entity so that Marke could sell the property and thereby satisfy or negotiate a termination of the Marke LLC's obligations under the Term Note and Marke's obligations under the Surety Agreement. Marke did not have the liquidity to consummate the transaction and the Bank agreed to lend Marke and the Marke LLC $250,000 to close on the conveyance of the East 14th Street property. Despite the promise to fund, the Bank failed to loan Marke the $250,000 to close.

After April 2012, the Borrower and Marke stopped making payments on the loan. On September 12, 2012, the Bank forwarded to Marke's counsel a Default Notice formally advising Marke of his defaults and declaring the loan due. On October 9, 2012, the Bank confessed judgment against the principal and Marke. [1] On January 4, 2013, Marke filed his Petition to Open/Strike.

DISCUSSION

I. The Petition to Strike the Confession of Judgment is denied since there are no fatal defects or irregularities on the face of the confessed judgment.

A Petition to Strike a judgment operates as a demurrer to the record and may only be granted when an apparent defect on the face of the record exists. In considering the merits of a

[1] The Bank also confessed judgment against the principal, Namik Marke in this Court on October 9, 2012 at case no. 121000665 based on the Surety Agreement. The principal has also filed a Petition to Strike/Open the Confessed Judgment.

petition to strike, the court is limited to reviewing the record as filed by the party in whose favor the warrant is given, the complaint and the documents which contain confession of judgment clauses.[2] A court's order that strikes the judgment annuls the original judgment and the parties are left as if no judgment had been entered.

In the case *sub judice*, Marke asserts six grounds for striking the confessed judgment. Specifically, Marke argues that the Bank's failure to restate the confession of judgment when it modified the Surety Agreement rendered the warrant of attorney invalid and void, the judgment is defective on its face because the Bank failed to properly aver a default or a condition precedent, the Bank failed to aver that the judgment was not being entered against a natural person in connection with a consumer credit transaction, the Bank failed to verify its pleading, the Bank failed to provide an itemized computation and the basis for seeking to recover certain components of its damages claimed and the Bank's calculation and attempt to recover attorney's fees is erroneous and otherwise inconsistent and irreconcilable with its loan documents. Said grounds however do not warrant striking the judgment.

Marke's averment that the confession of judgment should be stricken because the December 16, 2009 Allonge did not repeat the warrant of attorney does not merit striking the judgment. Although the Allonge did not reassert the confession of judgment provision, the lack of said clause in the letter is not a fatal defect. The Allonge narrowly modified the loan obligations and fully continued them. Indeed, Marke affirmed its duties under said agreement and therefore the warrant remains valid. [3]

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[2] *Resolution Trust Co. v. Copley Qu-Wayne Assocs.*, 546 Pa. 98, 105, 106, 683 A.2d 269, 273 (1996).

[3] *See, Graystone Bank v. Grove Estates, LP.*, 58 A.3d 1277 (Pa. Super. 2012)(the lack of a confession of judgment clause in the change in terms agreement was not a fatal defect that invalidated the confessed judgment.)

As for Marke's contention that the Bank failed to properly allege a default or a condition precedent as required by Pa. R. Civ. P. 2952(a)(6), a review of the complaint filed in confession of judgment reveals the Bank did in fact comply with said provision by identifying the defaults within the complaint.[4] Moreover, Marke's reliance upon a typographical error in one paragraph of the complaint wherein the Bank referred to "Security Agreement" instead of a "Surety Agreement" is not sufficient to strike the confession of judgment.

Marke also contends that the judgment should be stricken since the Bank only sent the notice of default to Marke's counsel and not to Marke himself as required by the documents. Although the documents do provide that notice is to be made to Marke and counsel, no facts exist to suggest that Marke was not made aware of the default notice. More importantly, the warrant of attorney provision does not require notice be provided to Marke before the Bank exercised its right under the warrant. As such the petition to strike in terms of improper notice is denied.

Lastly, Marke's challenges to the calculation of attorney fees are without merit. The Bank's calculation of attorney fees is consistent with the loan agreement executed by Marke. The loan agreement permits the Bank to confess judgment against Marke for all sums due under the loan documents plus attorney commissions equal to five percent of the aggregate of such sums. As for Marke's claim of excessiveness, the Pennsylvania Courts have upheld awards of attorney fees of 15% of the total judgment amount.[5] Moreover, in accordance with the warrant of attorney, the loan agreement only permits the Bank to recover the actual amount of reasonable

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[4] Confession of Judgment Complaint §§ 13-16.

[5] *Rait Partnership, L.P. v. E Pointe Props. Inc.*, 957 A.2d 1275, 1279 (Pa. Super. 2008) (*citing Dollar Bank v. Northwood Cheese Co.*, 637 A.2d 309, 314 (Pa. Super. 1994)(attorney's fee provision of fifteen percent enforceable where it was specifically authorized by the warrant of attorney").

attorney fees charged or billed to the Bank. Attorney fees are only said to be 5% solely for the purpose of fixing a sum certain for which judgment can be entered by confession. Hence, Marke will only pay the actual and reasonable attorney fees. [6] Since the Bank filed a confession of judgment substantially in the form set forth in Pa. R. Civ. P. 2955 and 2962, the court finds that the Petition to Strike is denied.

II. The Petition to Open is denied since Marke failed to demonstrate the existence of a meritorious defense nor produced clear direct, precise and believable evidence of said defense.

In contrast to a Motion to Strike, a Petition to Open a confessed judgment looks beyond the confession of judgment documents and includes testimony, depositions, admissions, and other evidence. A petition to open is granted when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury.[7]

Marke has not set forth a meritorious defense to the confession of judgment. A meritorious defense is a defense that if proved at trial would justify relief.[8] A petitioner must go further than to just state they have a meritorious defense. Rather, the petitioner must demonstrate the existence of a meritorious defense by directing the court's attention to relevant facts which give rise to the defense.[9]

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[6] Marke also contends that the judgment should be stricken because the Bank failed to properly verify the complaint and improperly seeks to recover late charges and insurance premiums. A review of the complaint and the loan documents demonstrates there is no merit to Marke's contentions since the complaint is verified and the loan documents permit recovery of late charges and insurance premiums.

[7] *Germantown Sav. Bank v. Talacki*, 441 Pa. Super. 513, 520, 657 A.2d 1285, 1289 (Pa. Super. 1995).

[8] *Smith v. Morrell Beer Distribs. Inc.*, 29 A.3d 23, 26-28 (Pa. Super. 2011).

[9] *West Chester Plaza Assoc. v. Chester Engineers*, 319 Pa. Super. 196, 465 A.2d 1297, 1299-1300 (Pa. Super. 1983).

Once a petitioner sets forth a meritorious defense, the petitioner must also produce sufficient evidence of the defense to require the submission of the case to the jury.[10] Evidence of a meritorious defense must be clear, direct, precise and believable.[11] If such evidence is produced the court must open the judgment. In determining the sufficiency of the evidence for opening judgments, the standard of review is the same as in a petition for directed verdict, that is, the court must view all evidence in the light most favorable to the petitioner and accept all evidence and proper inferences supporting the defense, while rejecting adverse allegations of the party obtaining the judgment. [12]

In the case *sub judice*, Marke neither demonstrated the existence of a meritorious defense, nor produced clear, direct, precise or believable evidence sufficient to warrant the opening of the confessed judgment. Marke relies upon fraudulent inducement and economic duress as meritorious defenses. Specifically, Marke alleges as follows: (1) the Bank made false statements, concealed material information and coerced Marke into the transactions giving rise to the judgment; (2) the Bank caused the events that gave rise to Marke's inability to make loan payments and thereby is the sole cause of any default under the loan transactions; (3) the Bank reneged on a commitment to fund the costs of a transaction that would have resulted in its indebtedness being addressed and (4) Marke did not knowingly and voluntarily waive his rights.

As it pertains to the defense of fraudulent inducement, even if the Bank made fraudulent misrepresentations to Marke concerning the profitability of the loans, the value of the property and the condition of the property, Marke ratified the loan agreements by performing under the loan documents for approximately two years after the alleged inducement occurred. Marke

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[10] *Hazer v. Zabala*, 26 A.2d 3d 1166, 1169, see also Pa. R. Civ. P. 2959 (e).

[11] *Germantown Savings Bank v. T*alachi, 441 Pa. Super. 513, 657 A.2d 1285, 1289 (Pa. Super. 1995).

[12] *Stahl Oil Co. v. Helse*l, 860 A.2d 508, 512 (Pa. Super. 2004).

admits it discovered the alleged fraud immediately after the loan closed and admits it was able to service the debt with the Philmont Street property. Based on the foregoing, the court finds fraudulent inducement does not constitute a meritorious defense.

Similarly, the defense of economic duress suffers the same fate. Duress has been defined as that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness. Where persons deal with each other on equal terms and at arm's length, there is a presumption that the person alleging duress possesses ordinary firmness. Moreover, in the absence of threats of actual bodily harm there can be no duress where the contracting party is free to consult with counsel.[13]

Business compulsion is a species of duress. "The important elements in the applicability of the doctrine of economic duress or business compulsion are that (1) there exists such pressure of circumstances which compels the injured party to involuntarily or against his will execute an agreement which results in economic loss, and (2) the injured party does not have an *immediate* remedy." [14] Business compulsion is not established merely by proof that consent was secured by the pressure of financial circumstances. There must be more than a mere threat which might possibly result in injury at some future time, such as a threat of injury to credit in the indefinite future. It must be such a threat that, in conjunction with other circumstances and business

[13] *Carrier v. William Penn Broadcasting Company,* 426 Pa. 427, 431, 233 A.2d 519, 521 (1967), quoting from *Smith v. Lenchner,* 204 Pa.Super. 500, 504, 205 A.2d 626, 628 (1964).

[14] *Litten v. Jonathan Logan, Inc.,* 220 Pa.Super. 274, 282, 286 A.2d 913, 917 (1971) (emphasis in original).

necessity, the party so coerced fears a loss of business unless he does so enter into the contract as demanded. [15]

Marke fails to satisfy all of the requirements for a showing of economic duress. In particular, he fails to show that the Bank placed him in the position that prevented his exercise of free will. The record shows that Marke was represented by counsel during the transactions at issue and is a sophisticated business man who had prior arms length dealings with the Bank.

Moreover, Marke failed to produce any clear, direct, precise and believable evidence for the court to take into consideration in deciding this petition. Marke attaches no documentation, such as the due diligence provided to Marke by the Bank which allegedly induced him into agreeing to purchase the loans or coerced him into purchasing the loan or selling the Philmont property. Moreover, Marke failed to attach any affidavits to support his allegations within the petition choosing to solely rely upon conclusory statements.[16]

CONCLUSION

Based on the foregoing, the Petition to Strike and/or Open is Denied.

BY THE COURT,

PATRICIA A. McINERNEY, J.

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[15] *National Auto Brokers Corporation v. Aleeda Development Corporation,* 243 Pa.Super. 101, 109-110, 364 A.2d 470, 474 (1976), *allocatur denied.*

[16] The court does not find convincing Marke's contention that it did not voluntarily waive its legal rights and that the Bank did not provide it with any separate disclosures regarding the confession of judgment provision. Considering the font and capitalization of said provision as compared to the other provisions within the loan agreement, it is more than clear that Marke agreed to the confession of judgment provision. Additionally provision 24 of the Term Note specifically states that Marke was represented by counsel of their choice and voluntarily agreed to the imposition of a confessed judgment when appropriate.