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

SOVEREIGN BANK,	:	July Term, 2000
Plaintiff	:	
	:	No. 1501
v.	:	
	:	Commerce Case Program
EDWARD MINTZER,	:	
Defendant	:	Control No. 091711

MEMORANDUM OPINION

Defendant Edward Mintzer ("Mintzer") has filed a petition to strike or open judgment ("Petition") in response to Plaintiff Sovereign Bank's complaint in confession of judgment ("Complaint") against him. For the reasons set forth in this Opinion, the Petition is denied.

BACKGROUND

On April 27, 1999, Sovereign Bank loaned the law firm of Mintzer, Zabicki, Powell & Mintzer, P.C. ("Firm") a total of $200,000 in accordance with the terms of two promissory notes ("Notes"). In connection with the Notes, Mintzer, the senior member of the Firm, executed a commercial guaranty ("Guaranty") guaranteeing the Firm's obligations under the Notes. The Notes and the Guaranty include confession of judgment provisions.

The Complaint alleges that the Firm defaulted on payments due under the Notes. Accordingly, Sovereign Bank confessed judgment against both the Firm and Mintzer on July 13, 2000 for a total of $191,255.42. In the Complaint, the total amount due was broken down into the outstanding principal balance, interest due and attorney's fees.

On September 28, 2000, Mintzer filed the Petition. In the Petition, Mintzer asserts that the amounts due are inadequately itemized, that the confession of judgment is unconstitutional and that Sovereign Bank acted in violation of the Equal Credit Opportunity Act ("ECOA").[1]

DISCUSSION

A petition to strike must be granted when there is an "apparent defect on the face of the record on which the judgment was entered." Germantown Savs. Bank v. Talacki, 441 Pa. Super. 513, 519, 657 A.2d 1285, 1288 (1995). When reviewing a petition to strike, a court may review only the record "as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses." Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 546 Pa. 98, 105, 683 A.2d 269, 273 (1996). If there are any ambiguities in the warrant authorizing the confession of judgment, they are to be "resolved against the party in whose favor the warrant is given." Manor Bldg. Corp. v. Manor Complex Assocs., Ltd., 435 Pa. Super. 246, 252, 645 A.2d 843, 846 (1994).

Similarly, a court is required to open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense and presents evidence that is sufficient to require submission of the issue to a jury. Crum v. F.L. Schaffer Co., 693 A.2d 984, 986 (Pa. Super. Ct. 1997) (citation omitted). A petition to open is treated as a motion by the petitioner for a directed verdict, with the court "viewing all the evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense while rejecting adverse allegations of the party obtaining the

[1] 15 U.S.C.A. §§ 1691-1691(f).

judgment." Dollar Bank v. Northwood Cheese Co., 431 Pa. Super. 541, 547, 637 A.2d 309, 311 (1994). Such evidence of a meritorious defense must be "clear, direct, precise and believable." Germantown Savs. Bank, 441 Pa. Super. at 520, 657 A.2d at 1289. In reaching its decision, a court may look beyond the confession of judgment documents to testimony, depositions, admissions and other evidence. Resolution Trust Corp., 546 Pa. at 106, 683 A.2d at 273 (1996).

Here, Mintzer has filed a combined petition to open/strike. It is unclear which grounds Mintzer believes warrant striking the judgment and which grounds he thinks warrant opening the judgment. However, a close examination reveals that the Petition neither presents evidence of a meritorious defense nor points out a defect in the Complaint. As a result, the Petition is denied.

I. Prompt Action

When determining if a petitioner has acted promptly, "[t]he crucial factor . . . is not the specific time which has elapsed but rather the reasonableness of the explanation given for the delay." First Seneca Bank & Trust Co. v. Laurel Mountain Dev. Corp., 506 Pa. 439, 443, 485 A.2d 1086, 1088 (1984) (citations omitted). See also Germantown Savs. Bank, 441 Pa. Super. at 522 n.5, 657 A.2d at 1290 n.5 (petition to open filed four months after confession of judgment was timely). Here, Mintzer received notice of the judgment and execution on July 27, and the Petition was filed on September 28, 2000. This two-month period is not unreasonably long, and Mintzer has acted in a sufficiently prompt manner.

Sovereign Bank argues that Rule 2959(a)(3)[2] requires that a petition to open be filed within thirty days after a defendant is served with notice. Because Mintzer was served with notice on July 27, 2000, Sovereign Bank asserts that his failure to file the Petition by August 26 renders it untimely and precludes its consideration.

The thirty-day filing requirement Sovereign Bank alludes to commences after service of an execution notice, not a judgment notice. Magee v. J.G. Wentworth & Co., __ A.2d __ (Pa. Super. Ct. 2000) (citing Thomas Assocs. v. GPI LTD., Inc., 711 A.2d 506 (Pa. Super. Ct. 1998)).[3] Here, the notice served on Mintzer purports to be a "Notice Under Rule 2958.1 of Judgment and Execution Thereon." However, Rule 2956.1(c)(2)(i) prohibits execution on a confessed judgment until at least thirty days after a defendant has been served with judgment notice in accordance with Rule 2958.1. As a result, Sovereign Bank was not entitled to execute on the judgment until after August 26, and its attempted execution on July 27 is invalid.

The docket in this matter does not reflect any execution on the judgment or notice of execution served on Mintzer after August 26. Without such execution or notice, the mandatory thirty-day filing period set forth in 2959(a)(3) did not commence, and the Court is not required to deny the Petition based a delay in filing.

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[2] Each Pennsylvania Rule of Civil Procedure is referred to individually as a "Rule."

[3] Magee is available on Westlaw at 2000 WL 1515426.

II. Meritorious Defense and Evidence

Mintzer has raised defenses based on inadequate itemization of the amount due, unconstitutionality of the confession against him and violations of the Equal Credit Opportunity Act. None of these warrants striking or opening the judgment.

A. Inadequate Itemization

Mintzer first claims that the Complaint does not provide a "detailed loan history" and therefore does not meet Rule 2952(a)(7)'s[4] itemization requirements. This Rule dictates that a confession of judgment complaint include "an itemized computation of the amount then due, based on matters outside the instrument if necessary, which may include interest and attorneys' fees authorized by the instrument." However, to comply with the Rule, "the plaintiff need only aver a default and allege the amounts due." Davis v. Woxall Hotel, Inc., 395 Pa. Super. 465, 469, 577 A.2d 636, 638 (1990).

Here, the Complaint separately lists the principal balance due, the interest due and attorneys' fees. The Complaint also specifies the rate at which interest continues to accrue. This is more than sufficient to comply with Rule 2952(a)(7), and Mintzer does not raise a meritorious defense based on inadequate itemization.

B. Constitutionality

Mintzer next asserts that the Rules outlining the procedure for entering judgment by confession do not provide notice and opportunity to be heard prior to confession of judgment. Consequently, Mintzer maintains, the confession of judgment Rules are unconstitutional.

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[4] Mintzer mistakenly refers to this Rule as "Rule 2952(f)."

In general, "Pennsylvania's practice in allowing the entry of judgments by confession is not unconstitutional." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1270 (3rd Cir. 1994) (citing FRG, Inc. v. Manley, 919 F.2d 850, 856-57 (3d Cir. 1990)). See also North Penn Consumer Discount Co. v. Shultz, 250 Pa. Super. 530, 533, 378 A.2d 1275, 1276 (1977) (noting with approval a federal court decision finding the Commonwealth's confession of judgment procedure constitutional). All that is required is that there be "a voluntary, knowing and intelligent waiver of the party's due process rights." Federman v. Pozsonyi, 365 Pa. Super. 324, 329, 529 A.2d 530, 533 (1987).[5]

Mintzer asserts that he did not knowingly, voluntarily and intelligently waive his rights to challenge the amount of the judgment, rendering the confession of judgment unconstitutional. However, he presents nothing to support this assertion,[6] and the primary case relied on is readily distinguished

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[5] It is also worth noting that a failure to read a confession of judgment clause will not justify avoidance of it, especially where the clause is clear, conspicuous and part of a commercial transaction. Dollar Bank, 431 Pa. Super. at 550, 637 A.2d at 313 (citations omitted).

[6] The section of the Petition discussing unconstitutionality barely makes reference to the facts of this case. See Petition at ¶ 12 ("Mintzer has a meritorious defense based upon the fact that the Entry of Judgment by confession violates the Pennsylvania and United States Constitutions because it deprives the Defendant of a valuable interest in his property without due process or equal protection under the law"). Mintzer's Memorandum is equally unenlightening:

> Edward Mintzer was under the impression that the loan balance was being reduced. It would be unconstitutional to permit a judgment to be entered against Edward Mintzer without his knowingly, voluntarily and intelligently waiving her [sic] rights to challenge the amount of the judgment.
>
> . . . [The] strict construction [of a warrant of attorney] would require a Court to open a judgment which is based upon information that Edward Mintzer had no knowledge. Confession of judgment would be unconstitutional as it applies to Edward Mintzer."

Mintzer's Memorandum at II.B. In addition, there is no affidavit attached to the Petition.

from the instant case. See Connecticut v. Doehr, 501 U.S. 1 (1991) (statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional). Accordingly, even if Mintzer's unconstitutionality defense is meritorious, the Petition does not present evidence in support of the defense, and the judgment cannot be opened on this ground.

C. Equal Credit Opportunity Act

Last, Mintzer claims that Sovereign Bank's actions violate Section 1691 of the ECOA because the Firm "met all of the requirements of creditworthiness of [Sovereign Bank], however [Sovereign Bank] still required the signature of Edward Mintzer." Mintzer's Memorandum at II.C. The ECOA states, in part, that:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction:
>
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
>
> (2) because all or part of the applicant's income derives from any public assistance program; or
>
> (3) because the applicant has in good faith exercised any right under this chapter.

15 U.S.C.A. § 1691.

Courts have noted that "the main purpose of ECOA is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age." Kimberton Chase Realty Corp. v. Main Line Bank, No. Civ. A. 97-2767, 1997 WL 698487, at *3 (E.D. Pa. 1997) (citation omitted). See also Newton v. United Cos. Fin. Corp., 24 F. Supp. 2d 444, 462 (E.D. Pa. 1998) (noting the "anti-discriminatory purposes of [the] ECOA").[7] This makes

[7] This goal also appears in the public law adopting the ECOA and the regulations promulgated under the ECOA. See Pub. L. No. 93-495, § 502, 88 Stat. 1500 ("the purpose of [the ECOA is] to

Mintzer's use of this statute confusing, at best.[8] Mintzer's failure to provide any evidence to support allegations of ECOA violations further undermines his claims of a meritorious defense. As a result, the assertion that Sovereign Bank violated the ECOA does not support granting the Petition.[9]

III. Disposition

Rule 2959(b) requires a court to issue a rule to show cause "[i]f the petition [to open] states prima facie grounds for relief." As discussed supra, the Petition does not state prima facie grounds for relief. As a result, there is no need to issue a rule to show cause.

CONCLUSION

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require that financial Institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status"); 12 C.F.R. § 202.1(b) (the purpose of the ECOA regulations is to ensure access to credit regardless of race, color, religion, national origin, sex, marital status, age, income derived from a public assistance program, or good faith exercise of any right under the Consumer Credit Protection Act).

[8] In addition, the cases cited by Mintzer bear little resemblance to the instant case. See In re DiPietro, 135 Bankr. 773 (Bankr. E.D. Pa. 1992) (lender did not violate the ECOA by requiring signature of applicant's wife on promissory note); Ford City Bank v. Goldman, 424 N.E.2d 761 (Ill. Ct. App. 1981) (affirmative defense based on lender forcing loan applicant's wife to cosign promissory note was valid).

[9] Mintzer may be attempting to invoke 12 C.F.R. § 202.7(d)(1), which states that "a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." However, as pointed out by the Massachusetts Supreme Judicial Court, cases involving 12 C.F.R. § 202.7(d)(1) "uniformly deal with situations in which a creditor has required that an applicant's spouse sign a loan agreement," and there are "no reported cases involving [an] 'other person.'" See BayBank v. Bornhofft, 694 N.E.2d 854, 858 n.6 (Mass. 1998) (citing Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28 (3rd Cir. 1995); Integra Bank v. Freeman, 839 F. Supp. 326 (E.D. Pa. 1993); Marine Am. State Bank of Bloomington, Ill. v. Lincoln, 433 N.W.2d 709 (Iowa 1988)).

Mintzer has not presented sufficient evidence of a meritorious defense or prima facie grounds for relief. Consequently, the Petition is denied.

BY THE COURT:

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JOHN W. HERRON, J.

Date: November 15, 2000

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ORDER

AND NOW, this 15th day of November, 2000, upon consideration of Defendant Edward Mintzer's Petition to Strike or Open Judgment by Confession and Plaintiff Sovereign Bank's response thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Petition is DENIED.

BY THE COURT:

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JOHN W. HERRON, J.