

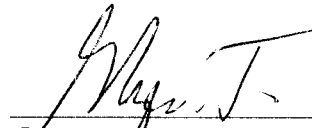
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

AGUSTIN TAVARES	:	April Term, 2016
	:	
<i>Plaintiff</i>	:	Case No. 00306
	:	
v.	:	Commerce Program
	:	
BALDEMIRO RODRIGUEZ	:	
	:	Control No. 16091143.
<i>Defendant</i>	:	
	:	

ORDER

AND NOW, this 13th day of October, 2016, upon consideration of the petition to strike or open confession of judgment and for a prompt hearing, the response in opposition, and the respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**. The **STAY OF EXECUTION PROCEEDINGS**, which this court issued by **ORDER** dated September 9, 2016, is **LIFTED**.

BY THE COURT,



GLAZER, J.

Tavares Vs Rodriguez-ORDRC



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R. POSTELL
COMMERCE PROGRAM

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MEMORANDUM OPINION

This action in confession-of-judgment arises out of a promissory note executed on May 10, 2012 by Lender (“Plaintiff”) and Borrower (“Defendant”). The promissory note states that in 2007, Defendant received from Plaintiff \$150,000.00 in cash, and agreed to repay the full amount to Plaintiff by August 10, 2012.¹ Pursuant to a related document titled Disclosure for Confession of Judgment (the “Disclosure”), Plaintiff is empowered to seize real property of Defendant in “full or partial payment” of Defendant’s outstanding obligations.²

On April 6, 2015, Plaintiff confessed judgment against Defendant for the full amount of the promissory note. On September 8, 2016, Defendant filed the instant petition to strike or open the confessed judgment and request for a prompt hearing. On October 3, 2016, this court issued an Order directing Plaintiff to file a response, and to address in its response all of the challenges contained in Defendant’s petition. Pending

¹ Promissory note, Exhibit A to the complaint-in-confession-of-judgment, p. 1.

² Disclosure for Confession of Judgment, p. 4, ¶ B, Exhibit A to the complaint-in-confession-of-judgment.

resolution of the petition, the Order also stayed execution proceedings, including a sheriff auction of real property owned by Defendant.³ Plaintiff did file a response to Defendant's petition, and the matter is now ripe for a decision.

In the emergency petition, Defendant lists a number of challenges aimed at striking or opening the confessed judgment. Rather than separately addressing the "striking challenges" and the "opening challenges," this court will address each argument in the same undifferentiated order as presented by Defendant.

The standards for striking and opening a confession of judgment are well—settled:

[a] motion to strike a judgment operates as a demurrer to the record and will only be granted if a fatal defect or irregularity appears on the face of the record or judgment. The defect which is a matter of record or which appears from the face of the judgment must be alleged in the application.⁴

It is a firmly established rule of construction in the case of warrants of attorney to confess judgments that the authority thus given must be clear, explicit and strictly construed, that if doubt exists it must be resolved against the party in whose favor the warrant is given, and that all proceedings thereunder must be within the strict letter of the warrant. If the authority to enter judgment by confession on a warrant of attorney is not strictly followed, the judgment will be stricken.⁵

Conversely—

if the truth of the factual averments contained in the complaint in confession of judgment and attached exhibits are disputed, then the remedy is by proceeding to open the judgment, not to strike it.⁶

³ "Execution proceedings shall be stayed during the period from the time the defendant files the hearing request form with the sheriff to the time the court makes the determination on the petition." Pa. R.C.P. 2973.3(d).

⁴ Manor Bldg. Corp. v. Manor Complex Associates, Ltd., 645 A.2d 843, 846 (Pa. Super. 1994).

⁵ Dime Bank v. Andrews, 115 A.3d 358, 364 (Pa. Super. 2015).

⁶ Neducsin v. Caplan, 121 A.3d 498, 504 (Pa. Super. 2015), appeal denied, 131 A.3d 492 (Pa. 2016).

One who petitions to open a confessed judgment must act promptly and offer a meritorious defense.⁷

In his first challenge to the confession of judgment, Defendant asserts that he “was never served.”⁸ This challenge is rejected and the judgment will not be stricken because the record shows un-rebutted evidence that Defendant was personally served in accordance with the Pennsylvania Rules of Civil Procedure.⁹

The second challenge asserts that the judgment should be stricken because the *cognovit* clause within the promissory note fails to include the signature of Defendant.

In Pennsylvania—

[a] warrant of attorney to confess judgment must be self-sustaining and to be self-sustaining the warrant must be in writing and signed by the person to be bound by it. The requisite signature must bear a direct relation to the warrant of attorney and may not be implied.¹⁰

However—

a motion to strike may not be granted if the defect is one that can be remedied by an amendment of the record or other action.¹¹

In this case, Plaintiff cured the original error by attaching the missing signature page. For this reason, the second challenge to the confessed judgment is rejected and the judgment will not be stricken.

The third challenge asserts that the judgment should be opened because Defendant “never received any money ... for the claims made in confession of judgment.”¹² The law on opening judgments is well settled: “[t]he petitioning party

⁷ *Indus. Valley Bank & Trust Co. v. Lawrence Voluck Associates, Inc.*, 428 A.2d 156, 158 (Pa. Super. 1981).

⁸ Emergency petition to strike or open and request for a prompt hearing, ¶ 2.

⁹ Affidavit of server, Respondent’s answer to the Petition to strike or open and for hearing, Exhibit B. Pa. R.C.P. 400(d), 400.1(b).

¹⁰ *L. B. Foster Co. v. Tri-W Const. Co.*, 186 A.2d 18, 20 (Pa. 1962).

¹¹ *Atl. Nat. Trust, LLC v. Stivala Investments, Inc.*, 922 A.2d 919, 923 (Pa. Super. 2007).

¹² Emergency petition to strike or open and request for a prompt hearing, ¶ 5.

bears the burden of producing sufficient evidence to substantiate its alleged defenses.... The defenses raised must be valid ones.”¹³

In this case, Defendant has offered no evidence that he “never received” any money from Plaintiff. Most importantly, Defendant has failed to explain why he bound himself to a \$150,000.00 promissory note if he “never received” any money from Plaintiff. For this reason, the third challenge is rejected and the judgment will not be opened.

The fourth challenge asserts that the judgment should be stricken because Plaintiff failed “to plead that a default has occurred.”¹⁴ Under the Pennsylvania Rules of Civil Procedure—

if the judgment may be entered only after a default or the occurrence of a condition precedent, [the complaint-in-confession-of-judgment shall contain] an averment of the default or of the occurrence of the condition precedent.¹⁵

In this case, the promissory note specifically states that Defendant promised to repay Plaintiff “[i]n one installment of \$150,000.00 due on August 10, 2012.”¹⁶ In addition, a related document titled Disclosure for Confession of Judgment states that “after the occurrence of an event of default” Plaintiff “may enter judgment by confession against the undersigned [Defendant].”¹⁷ Finally, Plaintiff’s complaint, which was filed on April 6, 2015, asserts that “[a]n itemization of the amount now due is [the unpaid

¹³ *Haggerty v. Fetner*, 481 A.2d 641, 644 (Pa. Super. 1984).

¹⁴ Emergency petition to strike or open and request for a prompt hearing, ¶¶ 6—7. Petitioner improperly cites Pa. R.C.P. 2951(6). The court notes that such a provision does not exist under the current Rules of Civil Procedure; nevertheless, the court will disregard this typographical error and assume that Petitioner intended to rely on a different provision —namely, Pa. R.C.P. 2952(a)(6).

¹⁵ Pa. R.C.P. No. 2952(a)(6).

¹⁶ Promissory note, p. 1, Exhibit A to the complaint-in-confession-of-judgment.

¹⁷ Disclosure for Confession of Judgment, p. 4, Exhibit A to the complaint-in-confession-of-judgment.

balance of] \$150,000.00.”¹⁸ A comprehensive reading of these statements convinces this court that Plaintiff sufficiently averred an event of default; therefore, the fourth challenge is rejected and the judgment shall not be stricken.

The fifth challenge asserts that pursuant Pa. R.C.P. 2958.1, Plaintiff failed to serve a notice of execution to Defendant in a form substantially similar to the form provided under Rule 2964 of the Pennsylvania Rules of Civil Procedure.¹⁹ This argument is rejected because Exhibit B to Plaintiff’s response shows that notice was personally served upon Defendant on April 29, 2016, at 11:00 A.M., in a form substantially similar to Pa. R.C.P. 2964. For this reason, the judgment shall not be stricken.

The sixth challenge asserts that Plaintiff “never served” Defendant with a notice of service of sheriff sale, as required under Pa. R.C.P. 2958.2.²⁰ This challenge is rejected as meritless. The Pennsylvania Rules of Civil Procedure state as follows:

Written notice substantially in the form prescribed by Rule 2965 shall be served upon the defendant at least thirty days prior to the sheriff’s sale if the property to be levied upon consists solely of

(1) real property, or

(2) real property and personal property to be sold with the real property pursuant to Section 9604(a) of the Uniform Commercial Code.²¹

However, the Rules also instruct that—

Note:

¹⁸ Complaint-in-confession-of-judgment, ¶ 8.

¹⁹ Emergency petition to strike or open and request for a prompt hearing, ¶¶ 8—9. Defendant misidentified Pa. R.C.P. 2958.1 as 2956.1.

²⁰ Emergency petition to strike or open and request for a prompt hearing, ¶¶ 10—11.

²¹ Pa.R.C.P. No. 2958.2

The notice required by this rule must be served only when the plaintiff has not proceeded under Rule 2958.1 requiring at least [a] thirty days notice prior to the filing of the praecipe for writ of execution.²²

In this case, the record shows that Plaintiff has proceeded Under Rule 2958.1 of the Pennsylvania Rules of Civil Proceedings;²³ therefore, Plaintiff was not required to serve Defendant under Pa. R.C.P. 2958.2, and the confession of judgment shall not be stricken.

The seventh challenge asserts that Defendant has recently “had financial hardships and problems and has filed for bankruptcy....”²⁴ In Pennsylvania, “[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.... The defenses raised must be valid ones.”²⁵

In this instance, Defendant does not assert that the alleged bankruptcy proceedings removed this case from jurisdiction of this court, nor did he provide evidence of the existence of any bankruptcy proceedings. For this reason the seventh challenge is rejected and judgment shall not be opened.

The eighth and final challenge asserts that Defendant “only speaks and reads Spanish” and did not voluntarily, intelligently and knowingly submit to the English-typed *cognovit* clause.²⁶ The court rejects this argument because “[t]he failure to read a confession of judgment clause will not justify avoidance of it.”²⁷ For all of these reasons,

²² *Id.*, Note (emphasis supplied).

²³ NOTICE UNDER RULE 2958.1 OF JUDGMENT AND EXECUTION, attached to Plaintiff’s complaint-in-confession-of-judgment.

²⁴ Emergency petition to strike or open and request for a prompt hearing, ¶ 12.

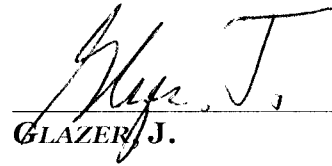
²⁵ *Haggerty v. Fetner*, 481 A.2d 641, 644 (Pa. Super. 1984).

²⁶ Emergency petition to strike or open and request for a prompt hearing, ¶ 14.

²⁷ *Dollar Bank v. Northwood Cheese Co.*, 637 A.2d 309, 313 (Pa. Super. 1994).

the petition to strike or open judgment by confession and for a prompt hearing is denied in its entirety, and the stay of execution is lifted.²⁸

BY THE COURT,



GLAZER, J.

²⁸ The Court also notes that Defendant untimely filed his emergency petition to strike or open and for a prompt hearing. In Pennsylvania, “timely filing of the petition to strike and/or open means within thirty days from a notice of execution.” Magee v. J.G. Wentworth & Co., Inc., 761 A.2d 159, 161 (Pa. Super. 2000). Courts may nevertheless disregard such untimeliness if the petitioner offers a reasonable explanation for the delay. Tony Palermo Const. v. Brown, 474 A.2d 635, 636 (Pa. Super. 1984). Defendant in this case has offered no explanation for his delay: for this additional reason, the petition is denied in its entirety.