

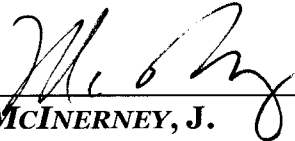
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

FIRST NIAGARA BANK, N.A.	:	May Term, 2016
	:	Case No. 03770
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
POTTSTOWN OASIS	:	
and	:	
D. JAY UMSTEAD and LEWIS WEIS	:	Control No. 17041756
	:	
<i>Defendants</i>	:	

ORDER

AND NOW, this 12th day of May, 2017, upon consideration of the petition to strike or open confession of judgment, the answer in opposition, and the respective briefs, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**.

BY THE COURT,



MCINERNEY, J.

DOCKETED
MAY 12 2017
R. POSTELL
COMMERCE PROGRAM

Niagara Bank, N.A. Vs P-ORDRC



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<i>Defendants</i>	:	

MEMORANDUM OPINION

Before the court is a petition to strike or open a confession of judgment. The Court finds that no fatal flaws appear on the record and no evidence has been offered in support of petitioner’s alleged defenses. For this reason, the petition to strike or open is denied in its entirety.

Background

Plaintiff is First Niagara Bank, N.A. (“Lender”), an entity with a place of business in Philadelphia, Pennsylvania. Defendant is Pottstown Oasis (“Borrower”), an entity based in Pottstown, Pennsylvania. Individual defendants are D. Jay Umstead (“Umstead”) and Lewis Weis (“Weis”).

On March 14, 2011, Lender and Borrower executed a document titled READY ACCESS REVOLVING LINE OF CREDIT NOTE AND SECURITY AGREEMENT WITH GUARANTY (the

“Note & Guaranty”), in the amount of \$30,000.00.¹ In his capacity as vice president of Borrower, Weis executed the Note portion of the afore-mentioned document.² In addition, individual defendants Weis and Umstead executed the Guaranty portion of the same document in their capacity as “Guarantors.”³

On May 31, 2016, Lender confessed judgment against Borrower and the two Guarantors. On April 14, 2017, Weis filed the instant petition to strike or open judgment by confession. On May 8, 2017, Lender filed its response in opposition. The petition and response have been fully briefed.

Discussion

PETITION TO STRIKE

Under Pennsylvania law—

[a] motion to strike a judgment will not be granted unless a **fatal** defect in the judgment appears on the face of the record. If the record is self-sustaining, the judgment will not be stricken.⁴

[I]f any defect disclosed by the record is one that can be remedied by an amendment of the record or other action, *nunc pro tunc*, the judgment should not be stricken off.⁵

In the petition, defendant Weis asserts that the record is fatally flawed because “nowhere in the Complaint does [Lender] aver that [Weis] executed a Guaranty of the Promissory Note.”⁶ This challenge to the confessed judgment is rejected because the record clearly shows that Weis executed the “Note” portion of the document in his

¹ READY ACCESS REVOLVING LINE OF CREDIT NOTE AND SECURITY AGREEMENT WITH GUARANTY, Exhibit A to the complaint-in-confession-of-judgment.

² *Id.*, first signature page.

³ *Id.*, second signature page.

⁴ *Fourtees Co. v. Sterling Equip. Corp.*, 363 A.2d 1229, 1232 (Pa. Super. 1976) (emphasis supplied).

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

⁶ Petition to strike, ¶ 7(a)–(d).

capacity as vice president of Borrower, and the “Guaranty” portion of the same document in his capacity as a personal guarantor.

Weis also asserts that the record is fatally flawed because the Guaranty portion of the document is not dated, and the “Guaranty of Payment’ fails to identify the Borrower or the specific obligation [which Weis was] ... allegedly agreeing to guarantee.”⁷ This argument is rejected because the operative document combines a promissory note and a guaranty, specifies the date of its execution, and contains language that clearly and unmistakably identifies Borrower in the first paragraph. In addition, Weis challenges the judgment on the grounds that in the operative document, the signatures of the parties were not witnessed. This argument is also rejected because under the Rules of Civil Procedure, Lender was required to merely include in its complaint “the original or photostatic copy of the instrument showing the defendant’s signature.”⁸ Simply stated, the Rules of Civil Procedure do not require that the signature of a defendant upon the operative instrument be witnessed.

Weis also asserts that the record is fatally flawed because the complaint is contradictory as to whether Borrower defaulted after making partial payments to satisfy its obligation, or by making no payments whatsoever.⁹ This argument is rejected because with respect to the amount confessed, Lender was only required to include in its complaint-in-confession-of-judgment “an itemized computation of the amounts then due.”¹⁰

⁷ *Id.*, ¶ 7(e)–(f).

⁸ PA. R.C.P. 2952(a)(2) (2017).

⁹ Petition to strike, ¶ 7(g)–(m).

¹⁰ PA. R.C.P. 2952(a)(7) (2017). The Court also notes that in the petition to open, Weis failed to provide any evidence to substantiate the veiled assertion that Borrower had purportedly made partial payments toward the Note, which evidence, if compelling, would require this court to open the judgment or to set-off its amount accordingly.

Weis also asserts that the record is fatally flawed because the affidavits submitted by Lender violate the Revised Uniform Law on Notarial Acts, 57 PA. C.S.A. § 301 *et seq.*¹¹ Specifically, Weis notes that the affidavits attached to the complaint were notarized by a New Jersey notary public; therefore, Weis concludes that the record is fatally flawed because the notarial acts “[could] only be performed by a Notary public commissioned by the Department of State of the Commonwealth of Pennsylvania.”¹² This argument is rejected. Pursuant to section 311 of the Revised Uniform Law on Notarial Acts—

(a) Effect.—A notarial act performed in another state has the same effect under the law of this Commonwealth as if performed by a notarial officer of this Commonwealth if the act performed in that state is performed by any of the following:

- (1) A notary public of that state.

(b) Prima facie evidence.—The signature and title of an individual performing a notarial act in another state are prima facie evidence that:

- (1) the signature is genuine; and
- (2) the individual holds the designated title.

(b) Conclusive determination.—The signature and title of a notarial officer described in subsection (a)(1) ... conclusively establish the authority of the notarial officer to perform the notarial act.¹³

The plain language of section 311 convinces this Court that the notarial acts contained in Lender’s affidavits have the same effect under the law of this Commonwealth as if performed by a notarial officer in Pennsylvania. Specifically, the

¹¹ Petition to strike, ¶¶ 8–11. The record shows that the verification of Lender’s representative was notarized in the State of New York; all the other notarial acts were executed by a notary public in the State of New Jersey.

¹² *Id.*, ¶ 10.

¹³ 57 Pa. S.C.A. § 311 (2017).

signature and title of the New Jersey-based public notaries conclusively establish their authority to perform the notarial acts contained in Lender's affidavits. For this reason, the last argument seeking to strike the confession of judgment is rejected, and the petition to strike is denied in its entirety.

PETITION TO OPEN

Under Pennsylvania law—

[a] petition to open is an appeal to the court's equitable powers and is addressed to the sound discretion of the court... However, the discretion exercised by the lower court must be guided by Rule 2959(e), Pa.R.C.P. which states in pertinent part: [i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury the Court shall open judgment. Thus the standard of sufficiency the court must employ is that of a directed verdict, viewing all evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense, while rejecting the adverse allegations of the party obtaining the judgment.¹⁴

In addition—

[t]he petitioning party [in an action in confession of judgment] bears the burden of producing sufficient evidence to substantiate its alleged defenses.... The defenses raised must be valid ones.¹⁵

In the petition, Weis asserts that the judgment should be opened because Lender's "[c]omplaint is confusing and misleading as to when the default occurred and when, and how much, payments were made toward the Promissory Note."¹⁶ This argument is quickly rejected for two reasons: first, the Court has already determined that Lender's complaint provides an adequate itemization of the amounts due as required under Pa. R.C.P. 2952(a)(7); and second, Weis has failed to offer any evidence

¹⁴ Indus. Valley Bank & Trust Co. v. Lawrence Voluck Assocs., Inc., 428 A.2d 156, 158 (Pa. Super. 1981).

¹⁵ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

¹⁶ Petition to open, ¶ 17.

to substantiate his defense based on a veiled assertion that Borrower had made partial payments toward the Note.¹⁷

Weis also asserts a number of affirmative defenses typically contemplated under Rule 1030 of the Pennsylvania Rules of Civil Procedure, including the affirmative defense based on the applicable statute of limitations, as well as laches, accord and satisfaction, equitable estoppel, unclean hands, etc.¹⁸ These challenges to the confession of judgment are rejected because Weis has not produced any “evidence to substantiate its alleged [affirmative] defenses” and has failed to meet his burden of proof.¹⁹

Weis also asserts a defense based on his alleged un-knowing, un-intelligent, and involuntary waiver of due process rights.²⁰ This argument is also rejected under well-established Pennsylvania law which provides that—

[t]here is ... no merit to [the] assertion [based upon defendant's] ... purported lack of knowledge and/or understanding of the warrant of attorney provisions in the note and guaranty agreement.... The failure to read a confession of judgment clause will not justify avoidance of it.... This is particularly true where the confession of judgment clause is clear and conspicuous and part of a commercial transaction.²¹

In this case, Weis avers a number of reasons why he allegedly relinquished his due process rights un-knowingly, un-intelligently, and involuntarily; nevertheless, Weis

¹⁷ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

¹⁸ Id. ¶ 25.

¹⁹ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984). With respect to the defense based on the statute of limitations, the Court notes the language of Pa. R.C.P. 2952(a)(9) which states: “[t]he complaint [in confession of judgment] shall contain ... an application for a court order granting leave to enter judgment after notice,” **“if the instrument is more than twenty years old, or if the original or photostatic copy or like reproduction of the instrument showing the defendant’s signature is not attached to the complaint.”** (Emphasis supplied). In this case, the operative instrument bearing defendant’s signature is attached to the complaint, and is not yet twenty years old. For this reason, the defense based on the statute of limitations is meritless.

²⁰ Petition to open, ¶ 21.

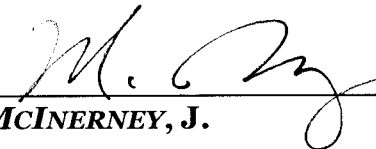
²¹ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994).

has not overcome his burden of providing evidence tending to show that he was coerced into signing the operative document, or that he was denied an opportunity to avail himself of counsel when he negotiated the loan and signed the Note & Guaranty.

Finally, Weis asserts a defense based on fraud-in-the-inducement. This defense is likewise rejected because Weis has not provided an affidavit or presented any evidence to support the defense that, but for certain fraudulent misrepresentations made by Lender, he would not have executed the Note & Guaranty.²²

Based on the foregoing, the petition to open is also denied in its entirety.

BY THE COURT,



MCINERNEY, J.

²² In Pennsylvania, “[t]he parol evidence rule states that, absent fraud, accident, or mistake, parol evidence of a prior or contemporaneous oral agreement is not admissible to alter, vary, modify, or contradict terms of a contract which has been reduced to an **integrated written instrument.**” Kehr Packages, Inc. v. Fidelity Bank, N.A., The York Grp., Inc. v. Yorktowne Caskets, Inc., 924 A.2d 1234, 1247 (Pa. Super. 2007) (emphasis supplied). In addition, “[a]n integration clause which states that a writing is meant to represent the parties’ entire agreement is ... a clear sign that the writing is meant to be just that and thereby expresses all of the parties’ negotiations, conversations, and agreements made prior to its execution. Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436 (Pa. 2004). Although Weis would be precluded from offering parol evidence to vary or contradict a fully integrated instrument, he would not be so precluded in this case because the Note & Guaranty does not have an integration clause and does not fall under the parol evidence rule. Nevertheless, Weis has not offered any evidence that he was fraudulently induced to sign the Note & Guaranty, and has thus failed to meet his “burden of producing sufficient evidence to substantiate [his] alleged defense.” Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984). For this final reason, the petition to open is denied in its entirety.