

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

TOTL, LLC	:	August Term, 2016
	:	
Plaintiff	:	Case No. 00003
	:	
v.	:	
	:	Commerce Program
	:	
ROWAN DEVELOPMENT, INC.	:	
and	:	
OGONTZ AVENUE REVITALIZATION CRP	:	16083804
	:	Control No. 1603804
Defendants	:	

ORDER

AND NOW, this 1st day of February, 2017, upon consideration of the petition to strike or open judgment by confession and for a stay of execution, the response in opposition, and the respective *memoranda* of law, it is **ORDERED** that the petition to strike is **GRANTED** and the confessed judgment is **STRICKEN**.

BY THE COURT,



RAMY I. DJERRASSI, J.

DOCKETED
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F. BROWN
DAY FORWARD

Totl Llc Vs Rowan Devel-ORDMM



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MEMORANDUM OPINION

The petition to strike judgment by confession requires this Court to determine whether a warrant-of-attorney provision, which entitles plaintiff to confess judgment for possession of real property, may be used by plaintiff to confess judgment for money. For the reasons explained below, the Court finds that the warrant-of-attorney for possession of real property does not entitle plaintiff to confess judgment for money.

BACKGROUND

Plaintiff TOTL, LLC (“Plaintiff”), is a Pennsylvania entity. Plaintiff is the ultimate successor of interest of Wachovia Bank, NA (“Wachovia”), a non-party in this action. Defendants Rowan Development, Inc. (“Rowan”), and Ogontz Avenue Revitalization Corporation (“Ogontz”) are entities based in Philadelphia Pennsylvania (collectively, “Defendants”).

On November 8, 2006, Wachovia and Ogontz entered into a “Loan Agreement.” Under the terms of the Loan Agreement, Wachovia granted to Ogontz a line of credit in the amount of \$800,000.00, and a “Term Loan” in the amount of \$781,000.00.¹ The Loan Agreement states in pertinent part that—

[t]he Term Loan will be evidenced by a Promissory Note ... executed and delivered by [Ogontz] to [Wachovia] simultaneously herewith in the principal amount of Seven Hundred Eighty One Thousand (\$781,000.00) Dollars, providing for such payment of principal, together with interest thereon at the rate(s) set forth therein, in such amounts, at such times and according to such further terms as set forth therein (the “Term Note”).²

¹ LOAN AGREEMENT, Exhibit A to the complaint.

² Id. ¶ 1.I.(2), at p. 3.

Finally, the Loan Agreement itself does not contain a warrant-of-attorney provision.³

Also on November 8, 2006, Rowan executed an “Open-End Mortgage and Security Agreement” in favor of Wachovia.⁴ The Open-End Mortgage and Security Agreement, which is found at Exhibit B to the complaint, states as follows in pertinent part:

WHEREAS, [Rowan] has executed and delivered to [Wachovia] its Guaranty Agreement bearing even date herewith ... under the terms of which [Rowan] has unconditionally guaranteed and provided surety to [Wachovia] for the obligation of Ogontz ... (the “Borrower”) with respect to (i) a ... \$781,000.00 term loan ... and (ii) \$800,000.00 ... revolving line of credit.... Now, Therefore ... [Rowan] DOES HEREBY MORTGAGE ... to [Wachovia], ITS SUCCESSORS AND ASSIGNS, all of [Rowan’s] right, title and interest now owned in ... The Real Estate [located at 6801—17 North 16th Street, Philadelphia, Pennsylvania]....⁵

In addition to this language, the Open-End Mortgage and Security Agreement empowers Wachovia or its successors to confess judgment against Rowan for possession of real property identified in the preceding paragraph.⁶ Specifically, the Open-End Mortgage and Security Agreement contains the following language:

³ An agreement purporting to confess judgment “**must contain a warrant of attorney provision authorizing confession by the plaintiff’s attorney.**” Crum v. F.L. Shaffer Co., 693 A.2d 984 (Pa. Super. 1997) (emphasis supplied).

⁴ OPEN-END MORTGAGE AND SECURITY AGREEMENT, Exhibit B to the complaint. In the complaint, at ¶ 6, Plaintiff identifies this document as a “First Written Mortgage Note (the ‘NOTE’).” However, the document in question specifically states that it is an “Open-End Mortgage and Security Agreement, dated November 8, 2006 (together with any amendments, modifications, extensions or renewals hereof ... the “**Mortgage**”) (emphasis supplied). Notwithstanding the misnomer, this Court readily concedes that the Mortgage-and-Surety Agreement is also a “note” because it contains a promise given by defendant Rowan at ¶ 2—A. See 13 Pa. C.S.A. § 3104(e) of the Pennsylvania Commercial Code (stating that “[a]n instrument is a note if it is a promise.”)

⁵ OPEN-END MORTGAGE AND SECURITY AGREEMENT, Exhibit B to the complaint, pp. 1—2. Although this language mentions the existence of a Guaranty Agreement executed and delivered by Rowan on the same date as the Open-End Mortgage and Security Agreement, this Court could not find evidence of such a document anywhere in the record.

⁶ Id., “WITNESSETH” clause, p. 2, and ¶ 8—B, p.p. 17—18.

B. **Possession.** Mortgagee [Plaintiff] may enter upon and take possession of the Property....

FOR THE PURPOSE OF OBTAINING POSSESSION OF THE PROPERTY FOLLOWING ANY EVENT OF DEFAULT ... MORTGAGOR [ROWAN] IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEY OF ANY COURT OF RECORD IN THE COMMONWEALTH OF PENNSYLVANIA ... TO ... CONFESS JUDGMENT IN EJECTION AGAINST [ROWAN] ... FOR THE RECOVERY BY [PLAINTIFF] OF POSSESSION OF THE PROPERTY FOR WHICH THIS MORTGAGE (OR A COPY THEREOF VERIFIED BY AFFIDAVIT) SHALL BE SUFFICIENT WARRANT....⁷

On the same date as above, November 8, 2006, Rowan executed a document titled EXPLANATION AND WAIVER OF RIGHTS REGARDING CONFESSION OF JUDGMENT; ALSO on that day, defendant Ogontz executed a substantially similar document.⁸ Under the terms of these respective documents, Rowan and Ogontz authorized Wachovia and its successors “to enter a judgment against the ... [Rowan and Ogontz] ... after the occurrence of an Event of Default under the terms of the Guaranty Agreement....”⁹

During the period between December 19, 2013 and May 5, 2015, Wells Fargo Bank, successor of Wachovia, extended six separate “Forbearance Agreements” to Ogontz and Rowan.¹⁰ Each of these forbearance agreements contained warrant-of-attorney provisions. Unlike the Open-End Mortgage and Security Agreement whose warrant-of-attorney empowered Wachovia to solely obtain possession of certain mortgaged properties, the warrants contained in the forbearance agreements

⁷ Id.

⁸ EXPLANATION AND WAIVER OF RIGHTS REGARDING CONFESSION OF JUDGMENT—ROWAN DEVELOPMENT, INC. Exhibit I to the complaint; EXPLANATION AND WAIVER OF RIGHTS REGARDING CONFESSION OF JUDGMENT—TERM LOAN OGONTZ AVENUE REVITALIZATION CORPORATION, Exhibit J to the Complaint.

⁹ Exhibit I, 1—A; Exhibit J, 1—A.

¹⁰ Forbearance Agreements, Exhibits E 1—6 to the complaint.

empowered Wachovia and its successors to confess judgment against Ogontz and Rowan “**FOR SUCH SUMS AS THEY ... MAY BECOME DUE UNDER THE NOTE AND/OR THE GUARANTY.**”¹¹

On January 15, 2016, *herein* Plaintiff became the present successor-in-interest to the rights held by Wells Fargo Bank.¹² Subsequently, on February 2, 2016 Plaintiff forwarded to Rowan a NOTICE OF INTENT TO FORECLOSE MORTGAGE. This notice specifically states that “the Mortgage held by [Plaintiff] on ... [the] property located at 6801 N. 16th Street, Philadelphia, Pennsylvania ... IS IN SERIOUS DEFAULT ... [and] you may cure this default within thirty (30) days of the date of this letter....”¹³

On June 26, 2016, Rowan executed a *Memorandum* of Understanding “relating to the Mortgage of the property located at 6801 on 16th Street in the City and County of Philadelphia.”¹⁴ Under the terms of the *Memorandum* of Understanding, Rowan agreed to perform six (6) specific obligations for the benefit of Plaintiff.¹⁵ In addition the *Memorandum* of Understanding stated as follows:

2. TOTL OBLIGATIONS AND AGREEMENTS

- (i) TOTL [Plaintiff herein] will pause all legal proceedings during the time covered by this agreement.¹⁶

3. TERM

This Memorandum will terminate 120 calendar days from the date of May 18, 2016.¹⁷

¹¹ *Id.*

¹² See Exhibits C—1, 2 and D—1, 2 to the complaint.

¹³ NOTICE OF INTENTION TO FORECLOSE MORTGAGE, Exhibit F to the complaint.

¹⁴ *MEMORANDUM OF UNDERSTANDING*, (introductory paragraph), Exhibit G to the complaint.

¹⁵ *Id.*, at § 1 (i—vi).

¹⁶ *Id.*, § 2.

¹⁷ *Id.*, § 3. A quick calculation shows that the 120 days pause, which commenced on May 18, 2016, expired on September 15, 2016.

This Memorandum shall be immediately voided if ROWAN filed for bankruptcy protection.

4. ADDITIONAL MATTERS

- (iii) ROWAN shall promptly, in good faith, as soon as practicable, supply all documents requested in this agreement.
- (iv) Upon termination of this agreement and or Rowan's failure to perform. TOTL shall immediately foreclose on this PROPERTY.¹⁸

On July 20, 2016, before the end of the 120-day period contemplated under the *Memorandum of Understanding*, Rowan received notice that it was in breach of the *Memorandum*.

On July 29, 2016, Plaintiff entered the instant complaint-in-confession-of-judgment against Rowan and Ogontz. In the complaint, Plaintiff asserts that Defendants are "in default under the Note and all forbearance agreements" for their failure to make payments "once the last forbearance expired on June 30, 2015 and thereafter."¹⁹ In addition, Plaintiff avers that—

[t]he note contains a warrant of attorney under which the defendants authorize ... any attorney or the prothonotary ... to appear on Plaintiff's behalf ... after the default under the Note ... and confess or enter judgment against the Defendants fir [sic] **the entire unpaid principal of the Note....**²⁰

Finally, the complaint seeks to recover the amount of \$534,007.56, representing

¹⁸ *Id.*, § 4.

¹⁹ Complaint, ¶ 14.

²⁰ *Id.*, ¶ 16 (emphasis supplied).

\$402,407.21 as principal, \$34,057.35 as interest, and \$97,543.00 as attorney's fees.²¹

On August 29, 2016, Defendants timely filed their petition to strike or open the confessed judgment and for a stay of execution. Upon the filing of this petition, the docket automatically indicated a response date of September 19, 2016 –the date by which Plaintiff was required to oppose the petition. Plaintiff did not file its response in opposition to the petition, and on September 21, 2016, the unopposed petition was assigned to the Honorable Judge Ramy I. Djerassi of the Commerce Program. On September 28, 2016, this Court issued an Order granting the petition to strike on grounds that the record was fatally defective. On September 30, 2016, the Court received a letter from Plaintiff's counsel. The letter indicated that Plaintiff had not filed a response in opposition to Defendant's petition because the Court had not yet issued a rule returnable day. After receipt of this letter, the Court chose to disregard Plaintiff's procedural error on the grounds that such error "[did] not affect the substantial rights of the parties."²² Consequently, the Court vacated its Order striking the judgment, and Ordered Plaintiff to file a response in opposition to the petition no later than by the end of October 19, 2016. Plaintiff did file its response within the new deadline, and the petition is now ripe for a decision.

DISCUSSION

In Pennsylvania—

[a] petition to strike a judgment operates as a demurrer to the record, and must be granted whenever some fatal defect appears on the face of the record.... When deciding if there are fatal defects on the face of the record for the purposes of a petition to strike a judgment, a court may only look at what

²¹ Id. ¶ 28.

²² Pa. R.C.P. 126.

was in the record when the judgment was entered.²³
In addition,

a warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law and equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword.... For that reason, the courts of this Commonwealth require that a warrant of attorney be explicit and strictly construed. **A warrant of attorney to confess judgment must be self-sustaining; the warrant must be in writing and signed by the person to be bound by it; and the requisite signature must bear a direct relation to the warrant and may not be implied....**²⁴

- I. The complaint fails to include the proper instruments purportedly showing Defendants' signature.

In the petition, Defendants assert that Plaintiff failed to attach to the complaint the "Term Note or Guaranty Agreement which purportedly contains the warrant of attorney upon which Plaintiff is proceeding."²⁵ Defendants conclude that such an absence creates a fatal flaw requiring the confessed judgment to be stricken. In the response in opposition, Plaintiff denies that the record is fatally flawed, and reiterates that the Note attached to the loan documents entitles Plaintiff to recover "**the entire unpaid principal of the Note and all other sums....**"²⁶ Plaintiff's argument is rejected.

In Pennsylvania, a complaint-in-confession-of-judgment "shall contain ... the original or photostatic copy ... of the instrument showing defendant's signature."²⁷ In this case, Plaintiff clearly and unambiguously required in the Loan Agreement that Ogontz would execute and deliver ... [a Promissory Note] ... in the principal amount of

²³ Oswald v. WB Pub. Square Assocs., LLC, 80 A.3d 790, 793–94 (Pa. Super. 2013).

²⁴ Ferrick v. Bianchini, 69 A.3d 642, 651 (Pa. Super. 2013), (emphasis supplied).

²⁵ Petition to strike, ¶ 57.

²⁶ *Memorandum of law in support of Plaintiff's response to the petition to strike*, p. 4 (un-numbered, emphasis supplied).

²⁷ Pa. R.C.P. 2952(a)(2).

... \$781,000.00 ... providing for the payment of principal, together with interest....”²⁸

In addition, Plaintiff required in the Loan Agreement that Rowan execute and deliver to Plaintiff a “Guaranty Agreement,” whereby Rowan would guarantee the obligations of Ogontz.²⁹ Despite these requirements, Plaintiff has failed to attach the original or photostatic copy of the two instruments –namely, the Promissory Note and Guaranty Agreement– both of which purportedly contain warrant-of-attorney provisions empowering Plaintiff to confess judgment for money. Based on the foregoing, this Court finds that the complaint-in-confession-of-judgment does not satisfy the requirements of Pa. R.C.P. 2952(a)(2) because it fails to include an instrument signed by defendant and containing a warrant-of-attorney.³⁰

II. The Open-End Mortgage and Security Agreement cannot cure the fatal flaw caused by the absence of the original instruments.

Next, the Court addresses Plaintiff’s contention that the Open-End Mortgage and Security Agreement, characterized in the complaint as a “note,” “contains a warrant of attorney under which Defendants authorize” the entry of judgment “against Defendants [for] the entire unpaid principal ... and all other sums....”³¹ Before addressing whether the Open-End Mortgage and Security Agreement contains such a warrant, the Court finds it necessary to reiterate what it has already conceded, namely, that under the Pennsylvania Commercial Code, “[a]n instrument **is a note** if it is a promise.”)³² The Court has readily conceded this point because the Open-End

²⁸ Loan Agreement, Exhibit A to the complaint, ¶ 1.I.(2) at p. 3.

²⁹ *Id.*, ¶ 1.I.(4)(a) at p. 3.

³⁰ To execute a confession of judgment, an agreement “must contain a warrant of attorney provision authorizing confession by the plaintiff’s attorney.” *Crum v. F.L. Shaffer Co.*, 693 A.2d 984 (Pa. Super. 1997).

³¹ Complaint, ¶ 16.

³² 13 Pa. C.S.A. § 3104(e) (emphasis supplied). *See also* footnote 2, *supra*.

Mortgage and Security Agreement does contain promissory language whereby the mortgagor, Rowan, promised to perform certain obligations for the benefit of Plaintiff.³³ However, the Court rejects the contention that the Open-End Mortgage Agreement, though a note pursuant to the Commercial Code, contains a warrant of attorney authorizing Plaintiff to collect any money from Defendants. To determine whether or not the Plaintiff is entitled to collect money under this action, the Court will examine Plaintiff's pertinent averments in its complaint in lock-step with the warrant-of-attorney provision contained in the Open-End Mortgage and Security Agreement a/k/a the Note. At the onset of this examination, the Court notes that "[t]he task of interpreting a contract is generally a question of law to be decided by a court rather than a jury."³⁴ In addition, a court engaged in the interpretation of a contract must follow a fundamental rule of construction requiring that "words and phrases be given their plain and ordinary meaning when possible."³⁵

The complaint-in-confession-of-judgment states in pertinent part that—

6. [o]n or about November 8, 2006, Defendants ... executed ... the Note in the principal amount of \$781,000.00. A true and correct copy is attached hereto as Exhibit B and incorporated herein by reference in its entirety.

16. The note [a/k/a/ the Open-End Mortgage and Security Agreement] contains a warrant of attorney under which the Defendants authorize and empower any attorney or the prothonotary or the clerk of any court in the Commonwealth of Pennsylvania to appear on Plaintiff's behalf at anytime after the default under the note or Loan Documents and confess or enter judgment against the Defendants fir [sic] **the entire unpaid principal of the Note and all other**

³³ Open-End Mortgage and Security Agreement, ¶ 2—A, at p. 5, Exhibit B to the complaint.

³⁴ *O'Boyle v. J.C.A. Corp.*, 538 A.2d 915, 917 (Pa. Super. 1988).

³⁵ *Toombs NJ Inc. v. The Aetna Cas. & Sur. Co.*, 591 A.2d 304, 307 (Pa. Super. 1991).

sums paid by the plaintiff to or on behalf of the Defendants pursuant to the terms of the Note or the Loan Documents, and all interest accrued on those amounts, together with the costs of suit and reasonable attorney's fees, together with interest on any judgment....³⁶

Next, a careful reading of the Note, a/k/a the Open-End Mortgage and Security Agreement, discloses the following language:

- B. **Possession.** Mortgagee [Plaintiff] may enter upon and take possession of the Property ... with or without legal action, lease the Property, collect therefrom all rentals and, after deducting all costs of collection ... apply the net rentals to any one or more of the following items in such manner ... as [Plaintiff] may elect....

FOR THE PURPOSE OF OBTAINING POSSESSION OF THE PROPERTY FOLLOWING ANY EVENT OF DEFAULT ... MORTGAGOR [ROWAN] IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEY OF ANY COURT OF RECORD IN THE COMMONWEALTH OF PENNSYLVANIA ... TO ... CONFESS JUDGMENT IN EJECTION AGAINST [ROWAN] ... FOR THE RECOVERY BY [PLAINTIFF] OF POSSESSION OF THE PROPERTY FOR WHICH THIS MORTGAGE (OR A COPY THEREOF VERIFIED BY AFFIDAVIT) SHALL BE SUFFICIENT WARRANT....³⁷


The plain and ordinary meaning of this language leaves the Court with no doubt: pursuant to the warrant-of-attorney in the Open-End Mortgage and Security Agreement, defendant Rowan empowered Plaintiff to confess judgment only for possession of real property. Nowhere in this warrant-of-attorney could the Court find language empowering Plaintiff to additionally collect “the entire unpaid principal of the Note and all other sums ... **pursuant to the terms of the Note or the Loan**

³⁶ Complaint-in-confession-of-judgment, ¶¶ 6, 16 (emphasis supplied).

³⁷ Open-End Mortgage and Security Agreement (a/k/a Note), Exhibit B to the complaint-in-confession-of-judgment, ¶ 8—B, p. 17.

Documents ... together with the costs of suit and reasonable attorney’s fees, together with interest on any judgment.”³⁸ In this case, Rowan’s signature at the bottom of the Open-End Mortgage and Security Agreement bears a direct relation to the warrant of attorney only for the purpose of empowering Plaintiff to recover possession of real property. Stated another way, the warrant-of-attorney contained in the Open-End Mortgage and Security Agreement is not self-sustaining because Plaintiff attempts to characterize that provision as a warrant for recovery of money, notwithstanding the absence of any language in support of such an effort. Plaintiff’s attempt to characterize a warrant for possession into a warrant for recovery of money creates a fatal flaw in the record: for this reason the petition to strike is granted and the confession of judgment is stricken in its entirety.³⁹

BY THE COURT,



RAMY I. DJERASSI, J.

³⁸ Complaint-in-confession-of-judgment, ¶ 16 (emphasis supplied).

³⁹ The Note, a/k/a the Open-End Mortgage and Security Agreement, contains at ¶ 8—A, p. 17, an acceleration provision empowering Plaintiff to “declare the entire amount of the Liabilities immediately due and payable....” See Exhibit B to the complaint. However, this provision does not contemplate the entry of judgment by confession, and may not be considered a warrant-of-attorney provision.

Finally, it is no help to Plaintiff that each of the six Forbearance Agreements specifically empowers Plaintiff to confess judgment for money against the Defendants. It is no help because the six Forbearance Agreements specifically reference that the moneys may be collected as they become “due under the [Promissory] Note or the Guaranty Agreement.” Unfortunately, the absence of the referenced Promissory Note and Guaranty Agreement violates Pa. R.C.P. 2952 (a)(2), and for this reason the record remains fatally flawed.