

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

PIDC LOCAL DEVELOPMENT CORPORATION

Plaintiff

v.

RAY—WHITAKER, INC.

Defendant

: October Term, 2016

: Case No. 01241

: Commerce Program

: Control No. 16125208

ORDER

AND NOW, this 23rd day of January, 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 parties' respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**.

BY THE COURT,


RAMY I. DJERASSI, J.

DOCKETED

JAN 24 2017

N. MONROE
CIVIL ADMINISTRATOR

Pidc Local Development C-ORDER



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MEMORANDUM OPINION

Plaintiff, PIDC Local Development Corporation (“Lender”), and defendant, Ray—Whitaker, Inc. (“Guarantor”), are companies based in Philadelphia, Pennsylvania.

On November 14, 2001, a non-party to this action, Blue Horizon (*hereinafter* “Borrower”), executed a promissory note (the “Note”), whereby Borrower promised to repay to Lender the amount of the loan, plus interest.¹ As a security to the loan, Borrower mortgaged its real property to Lender under the terms of an Open—End Mortgage and Security Agreement (the “Mortgage”).² Pursuant to this Mortgage—

[i]n the event of the failure of [Borrower] to pay the taxes ... charges, claims, assessments liens, or encumbrances ... [Lender] may, at its option ... pay any and all such items, together with penalties and interest.... All such sums so paid or advanced by [Lender] shall immediately ... be repaid by [Borrower] to [Lender] together with interest thereon ... and shall be added to the principal indebtedness secured by this Mortgage....³

Also on November 14, 2001, Guarantor executed a document titled Guaranty of Obligations—Suretyship (the “Guaranty”), whereby Guarantor agreed to guarantee the \$1 million loan disbursed by Lender to Borrower.⁴ The Guaranty contained a warrant-of-attorney provision which stated in pertinent part that—

[i]n case default shall be made under [the Note, Guarantor] empowers any attorney of any court of record ... to confess judgment ... against [Guarantor] ... for the unpaid balance of the principal debt, additional loans or advances ... or any mortgage or mortgages securing the same, together with interest thereon, costs of suit and an attorney’s commission for collection of five percent (5%) of the total indebtedness....⁵

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

² Open—End Mortgage and Security Agreement, Exhibit B to the Response in opposition of Lender to the petition to strike of Guarantor.

³ *Id.*, § 5.

⁴ Guaranty of Obligations—Suretyship, Exhibit A to the complaint-in-confession-of-judgment.

⁵ *Id.*, pp. 3–4 (un-numbered).

On October 11, 2016, Lender entered judgment by confession against Guarantor in the amount of \$2,686,000.00. This amount includes the entire unpaid principal of \$1,000,000.00, interest in the amount of \$1,545,000.00, taxes in the amount of \$91,000.00, and attorney's fees of \$50,000.00. According to the complaint, Lender confessed judgment against Guarantor because Borrower had defaulted on the promissory note executed in conjunction with the underlying loan.⁶

On December 14, 2016, Guarantor filed a petition to strike or open the confessed judgment and for a stay of execution.

PETITION TO STRIKE.

In Pennsylvania—

[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.⁷

In the petition, Guarantor asserts that the record has fatal flaws which, if true, would require this Court to strike the confessed judgment. The Court shall address individually the averments asserting the existence of fatal flaws in the record.

First, Guarantor avers that the record is flawed because the warrant-of-attorney within the Guaranty “is unsigned, appears in indistinguishable type, and [Guarantor’s] signature on page 4 bears no direct relation to the warrant.”⁸ In support of this position, Guarantor cites Egyptian Sands Real Estate, Inc. v. Polony, a 1972 Pennsylvania case decided by our Superior Court.⁹ Reliance on this case is improper. In Egyptian Sands,

⁶ Complaint, ¶¶ 3–8.

⁷ Fourtees Co. v. Sterling Equip. Corp., 242 Pa. Super. 199, 205, 363 A.2d 1229, 1232 (1976)

⁸ Petition to strike, ¶ 7.

⁹ Egyptian Sands Real Estate, Inc. v. Polony, 294 A.2d 799 (Pa. Super. 1972).

“Tenants” entered into a lease agreement for the use of commercial real estate. The lease agreement contained a two-sentence power-of-attorney provision which lay hidden in a document of approximately 7,000 words. Moreover, the provision was typed in the same size as most of the rest of the document, and Tenants –two immigrants with poor English-language skills– were not only dissuaded to seek their own legal representation, but were also kept ignorant of the existence of the warrant-of-attorney. After the Tenants defaulted on the agreement, “Landlord” entered judgment by confession; subsequently, Tenants petitioned to open the judgment on the grounds that when they signed the documents, “they were not completely aware of the legal consequences of the various covenants in the lease.”¹⁰ The Court of Common Pleas rejected this argument and Tenants appealed. Finding that the signatures of Tenants did not bear a direct relation to the warrant-of-attorney, the Pennsylvania Superior Court reversed the trial court’s decision and held that Pennsylvania law “requires a clearer manifestation of consent to sustain a warrant of attorney to confess judgment than it does to sustain a normal contract provision.”¹¹ Specifically, the Superior Court stated as follows:

[w]here a lease contains a warrant of attorney, the signature of the lessee must bear such direct relation to the provision authorizing the warrant as to leave no doubt that the lessee signed, conscious of the fact that he was thereby conferring upon the lessor a warrant to confess judgment against him for a breach of a covenant of the lease.... In short, a warrant of attorney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference.¹²

¹⁰ *Id.* 294 A.2d at 803.

¹¹ *Id.* at 804.

¹² *Id.*

In this case, the facts are clearly distinguishable, and Egyptian Sands is inapplicable. First, there is no averment in the instant petition that Guarantor lacked legal representation, or that Guarantor was dissuaded from obtaining representation prior to the execution of the Guaranty. Second, the warrant-of-attorney in this action, though typed in the same small characters as the rest of the text, is not eclipsed in a 7,000-word document, but is found on pages three and four of the four-page Guaranty, only a few inches away from the signature of Guarantor.¹³ For these reasons, the first argument seeking to strike the judgment is rejected.¹⁴

Second, Guarantor avers that the judgment is fatally flawed because the complaint “does not aver the occurrence of a required condition precedent,” in violation of Pa. R.C.P. 2952(a)(6).¹⁵ This argument is also rejected. The pertinent language found in the Pennsylvania Rules of Civil states that—

(a) [t]he complaint shall contain the following:

(6) if the judgment may be entered only after a default **or** the occurrence of a condition precedent, an averment of the default **or** of the occurrence of the condition precedent....¹⁶

This language leaves no doubt: under the Rules of Civil Procedure, the complaint-in-confession-of-judgment shall aver an event of default, **or** the occurrence of a condition precedent. In this case the complaint-in-confession-of-judgment does aver

¹³ The Court estimates that the Guaranty contains approximately 2,000 words. By way of comparison, the instant Order-and-Memorandum Opinion consists of fewer than 2,450 words contained predominantly in 9 pages of double-spaced text.

¹⁴ Guarantor also avers that the judgment should be opened on the grounds that the inconspicuous warrant-of-attorney provision in the Guaranty prevented Guarantor from knowingly, intelligently and voluntarily relinquishing its due process rights. Petition to open, ¶ 24. This defense is meritless because in Pennsylvania, “[t]he failure to read a confession of judgment clause will not justify avoidance of it.” Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994).

¹⁵ Petition to strike, ¶¶ 8–10.

¹⁶ Pa.R.C.P. No. 2952(a)(6) (emphasis added).

that Borrower, Blue Horizon, “is in **default** under the ... Note for failure to make payment in accordance with the terms of the ... Note.”¹⁷ The Court is satisfied that Lender properly averred an event of default in compliance with the requirement contained in Pa. R.C.P. 2952(a); for this reason, the second argument seeking to strike the judgment is rejected.

Third, Guarantor avers that the judgment is fatally flawed because the record is devoid of a 30-day notice of default which, under the terms of the Note, should have provided Borrower with an opportunity to cure.¹⁸ According to the petition, the lack of such a notice precludes Lender from confessing judgment against Guarantor.¹⁹ Notwithstanding Lender’s failure to attach the 30-day notice, this Court notes that Lender subsequently did amend the record by properly attaching such a document to its response in opposition to the petition to strike. In Pennsylvania—

[i]t has always been held that ... omissions in confessions of judgment may be corrected by amendment where the cause of action is not changed, where ends of justice require the allowance of such amendment, and where the substantive rights of defendant will not be prejudiced thereby.²⁰

In this case, the newly-attached document, dated August 17, 2004, informed Borrower of its delinquency, and clearly provided Borrower with a 30-day opportunity to cure. The Court is satisfied that Lender’s error in failing to attach the 30-day notice to the complaint was technical rather than prejudicial, and that Lender properly

¹⁷ Complaint, ¶ 5 (emphasis supplied).

¹⁸ Petition to strike, ¶¶ 10–15. The 30-day notice of default is required under the terms of the Note executed by Borrower, at page 3 of 4, (second full paragraph), Exhibit B to the complaint-in-confession-of-judgment.

¹⁹ *Id.*, ¶ 12. A review of the complaint-in-confession-of-judgment and attached documents shows that Lender did not attach a copy of a 30-day notice of default. However, this failure is inconsequential because as discussed *infra*, Lender lawfully amended the record by subsequently attaching the 30-day notice.

²⁰ Atl. Nat. Trust, LLC v. Stivala Investments, Inc., 922 A.2d 919, 923 (Pa. Super. 2007).

amended the record by attaching the missing document. As a result of this amendment, there is no fatal flaw in the record and Guarantor's third argument seeking to strike the confessed judgment is rejected.

Fourth, Guarantor avers that the judgment is fatally flawed because the complaint claims \$91,000.00 "as amounts due for "Taxes Advanced," where the record is devoid of any document authorizing [Lender] to collect those amounts...."²¹

Guarantor further contends that it is not obligated under the Guaranty to pay such "Taxes Advanced."²² This argument is easily rejected because the record includes two documents –respectively, the Mortgage and Guaranty– both of which authorize Lender to collect the amount challenged by Guarantor. Specifically, the Mortgage states that Lender—

may ... from time to time ... **advance** ... sums as [Lender] in its sole discretion may deem necessary to protect the security of [the Mortgage and that such sums] ... shall immediately be ... repaid by [Borrower] to [Lender]....²³

Furthermore, the Guaranty executed by Guarantor empowered Lender to "confess judgment ... against the [Guarantor] for the unpaid balance of the principal debt, additional loans or **advances** ... together with interest thereon, costs of suit and an attorney's commission ... of five percent."²⁴ Based on the foregoing language contained in the Mortgage and Guaranty, the Court finds that upon Borrower's default, Guarantor became liable for "Taxes Advanced" as claimed by Lender. For this reason, the fourth

²¹ Petition to strike, ¶ 17.

²² *Id.*, ¶ 18.

²³ Open—End Mortgage and Security Agreement, Exhibit B to the response in opposition of Lender to the petition to strike of Guarantor, § 5. As noted earlier, Lender did not originally attach the Mortgage to the record; instead, Lender amended the record by subsequently attaching the Mortgage to its response in opposition to the petition to strike.

²⁴ Guaranty, Exhibit A to the complaint-in-confession-of-judgment, p. 3 of 4 (un-numbered).

argument seeking to strike the judgment is rejected.

Fifth, Guarantor argues that the record is fatally flawed because the amount of attorney's commission, in this case \$50,000.00, is "clearly excessive and patently unreasonable."²⁵ This argument is quickly rejected because the Guaranty specifically empowered Lender to collect attorney's fees of five percent "of the total indebtedness."²⁶ A quick computation shows that in this case, attorney fees of \$50,000.00 represent five percent of the unpaid amount of the loan's principal. The amount claimed as attorney's commission is not excessive or unreasonable, and for this reason the petition to strike is denied in its entirety.²⁷

PETITION TO OPEN

In Pennsylvania—

[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.²⁸

²⁵ Petition to strike, ¶ 19.

²⁶ Guaranty, Exhibit A to the complaint-in-confession-of-judgment, p. 3 of 4 (un-numbered).

²⁷ "[A]ttorney's fees in the amount of fifteen percent [are allowed in Pennsylvania where such fees are] ... specifically authorized by the warrant of attorney. Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 431 Pa. Super. 541, 552, 637 A.2d 309, 314 (1994)

²⁸ Indus. Valley Bank & Trust Co. v. Lawrence Voluck Assocs., Inc., 428 A.2d 156, 158 (Pa. Super. 1981.)

²⁸ Petition to strike, ¶ 19.

²⁸ Guaranty, Exhibit A to the complaint-in-confession-of-judgment, p. 3 of 4 (un-numbered).

²⁸ "[A]ttorney's fees in the amount of fifteen percent [are allowed in Pennsylvania where such fees are] ... specifically authorized by the warrant of attorney. Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994).

²⁸ Indus. Valley Bank & Trust Co. v. Lawrence Voluck Assocs., Inc., 428 A.2d 156, 158 (Pa. Super. 1981).

In the petition to open the confessed judgment, Guarantor advances the same arguments asserted in the petition to strike. All such defenses in the petition to open are rejected because in Pennsylvania, “[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.”²⁹ In this case, Guarantor has not produced any evidence to substantiate its defenses, and for this reason the petition to open is denied in its entirety.

BY THE COURT,



RAMY I. DJERASSI, J.

²⁹ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).