

MEMORANDUM OPINION

Plaintiff Aable Property Management, Inc. (“Lender”), is a New Jersey corporation. Individual defendant Paul Robinson (“Robinson”) is a resident of Pennsylvania. Robinson holds the title of president of corporate defendant Advanced Nursing Staffing (“Borrower”), also a Pennsylvania company. On March 4, 2010, Robinson executed on behalf of Borrower a Loan Agreement and Security Agreement (the “Loan Agreement”).¹ Pursuant to the Loan Agreement, Lender agreed from time to time to advance funds to Borrower; in return, Borrower granted Lender certain security interests in its assets, including its accounts receivables.² The Loan Agreement contained a *cognovit* clause enabling Lender to confess judgment against Borrower upon the occurrence of a default.³

On October 7, 2016, Lender confessed judgment in the amount of \$72,880.85 against Borrower and Robinson. In its complaint, Lender avers that it confessed judgment against both defendants for their failure to remit payments due under the loan since April 8, 2016.⁴ In the complaint, Lender itemized the confessed amount as follows: \$42,410.42 in unpaid principal, \$23,999.91 in interest, and \$3,470.52 in attorney’s fees (calculated at 5% of principal plus interest).

On October 26, 2016, Borrower and Robinson filed this petition to strike or open the confessed judgment and for a stay of execution proceedings. On November 16, 2016, Lender filed its answer to the petition.

DISCUSSION

Preliminarily, the Court notes that—

¹ LOAN AGREEMENT AND SECURITY AGREEMENT, Exhibit A to the complaint-in-confession-of-judgment.

² *Id.*, ¶ 2.

³ *Id.*, ¶ 9.

⁴ Complaint-in-confession-of-judgment, ¶ 6.

[i]n adjudicating the petition to strike and/or open the confessed judgment, the trial court is charged with determining whether the petitioner presented sufficient evidence of a meritorious defense... A meritorious defense is one upon which relief could be afforded if proven at trial.⁵

I. Petition to Strike.

The standards for striking judgments by confession are well settled:

[i]t 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.⁶

A motion to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record.⁷

In the petition, Borrower and Robinson allege the existence of several defects which, if true, would require the judgment to be stricken in its entirety. The court shall address each of alleged defects. First, Borrower and Robinson assert that the judgment should be stricken because Lender failed to attach to the complaint-in-confession-of-judgment an affidavit of non-military service, as required under Rule 2951 of the Philadelphia County Court Rules. However, the court reviewed the docket entries dated October 7, 2016, and found that Lender had filed with the court a duly stamped affidavit of non-military service, together with the complaint-in-confession-of-judgment.⁸ For this reason, the first argument for striking the judgment is rejected.

⁵ Ferrick v. Bianchini, 69 A.3d 642, 647 (Pa. Super. 2103).

⁶ Dime Bank v. Andrews, 115 A.3d 358, 364 (Pa. 2015).

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

⁸ Docket entry of October 7, 2016.

Second, Borrower and Robinson assert that Lender's failure to attach any promissory notes to the record created another fatal defect requiring that the judgment be stricken in its entirety. Specifically, Borrower and Robinson indicate that the Loan Agreement contained the following language:

[a]ll loans and advances made by the Lender ... shall be evidenced by a demand promissory note ... executed by Borrower and shall contain such terms as Lender shall require.⁹

Borrower and Robinson conclude that the failure of Lender to attach any demand promissory notes to the complaint renders the record fatally flawed and requires this Court to strike the judgment. This argument is rejected.

In Pennsylvania, a complaint-in-confession-of-judgment shall contain "the original or photostatic copy or like reproduction of the instrument showing the defendant's signature..."¹⁰ In this case, Lender satisfied the requirements contained in the Pennsylvania Rules of Civil Procedure by attaching a photostatic copy of the Loan Agreement containing the signature of Borrower. For this reason, the failure to include any promissory notes to the record does not create a fatal flaw in the record, and cannot compel this court to strike the judgment.

Third, the petition to strike asserts that individual defendant Robinson was not a party to the Loan Agreement; therefore, the petition concludes that naming Robinson as a party-defendant created yet another fatal defect in the record which requires that the judgment be stricken.¹¹ As the court stated earlier, a complaint-in-confession-of-

⁹ LOAN AGREEMENT AND SECURITY AGREEMENT, Exhibit A to the complaint-in-confession-of-judgment, ¶ 1; petition to strike, ¶¶ 14–19.

¹⁰ Pa. R.C.P. 2952(2) (2016).

¹¹ Petition to strike, ¶¶ 20–22.

judgment “shall contain the original or photostatic copy or like reproduction of the instrument **showing the defendant’s signature.**”¹² Furthermore, “[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.**”¹³ In this case, the Court reviewed the Loan Agreement and found that individual defendant Paul Robinson executed that document only in his capacity as president of Borrower.¹⁴ Nowhere in the Loan Agreement did this Court find that Robinson had signed his name in a personal capacity or as a personal guarantor. For this reason, the petition to strike is granted as to individual defendant Robinson: the complaint-in-confession-of-judgment is stricken as to that defendant, and is otherwise denied as to Borrower.¹⁵

Fourth, the petition to strike asserts that Lender improperly confessed judgment under the laws of Pennsylvania. Specifically, Borrower notes that the Loan Agreement “required ... [the judgment] ... to be brought under the laws of New Jersey.”¹⁶ In support of this position, Borrower relies on the language of the Loan Agreement which states in pertinent part that—

[t]his Agreement, and the rights and obligations of the parties hereunder, shall be governed and construed in accordance with the laws of the State of New Jersey.¹⁷

¹² Pa. R.C.P. 2952(2) (2016) (emphasis added).

¹³ *L. B. Foster Co. v. Tri-W Const. Co.*, 186 A.2d 18, 20 (Pa. 1962) (emphasis added).

¹⁴ LOAN AGREEMENT AND SECURITY AGREEMENT, Exhibit A to the complaint-in-confession-of-judgment, p. 7.

¹⁵ The confessed judgment may not be stricken as to Borrower because Robinson, in his capacity as president, did sign the Loan Agreement on behalf of Borrower and bound Borrower to the obligations contained in the instrument.

¹⁶ Petition to strike, ¶¶ 23–27.

¹⁷ LOAN AGREEMENT AND SECURITY AGREEMENT, Exhibit A to the complaint-in-confession-of-judgment, ¶ 13, p. 7.

The petition to strike also relies on New Jersey Rule 4:45—1, which instructs that “[a] judgment by confession shall not be entered upon a warrant of attorney which is included in the body of a bond or other instrument for the payment of money.”¹⁸ Borrower concludes that the record is defective because “New Jersey law does not permit the filing of a warrant of attorney.”¹⁹ This argument is rejected because the language of the Loan Agreement clearly and unambiguously empowered Lender to confess judgment in Pennsylvania under the laws of our Commonwealth.

Before turning to the pertinent language of the Loan Agreement, the Court notes that—

[t]he task of interpreting [a] contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.²⁰

The Loan Agreement states as follows:

9. Default and Remedies.

After an Event of Default, Borrower empowers any Prothonotary, Clerk of Court or attorney of any Court of record in the United States or elsewhere to appear for Borrower in any and all actions which may be brought to enforce the obligations hereunder ... and to confess judgment against Borrower, in any competent court for the recovery of the obligations hereunder.... In said suit or said actions, Borrower empowers such Prothonotary, Clerk of Court or

¹⁸ Petition to strike, ¶¶ 23—27.

¹⁹ *Id.* ¶ 26.

²⁰ Madison Construction Co. v. Harleysville Ins. Co. 735 A.2d 100, 106 (Pa. Super. 1999).

attorney of any court of record in the United States or elsewhere to confess judgment against Borrower for all or any part of the obligations hereunder and all such costs, expenses and interest together with attorney's commission of 5% of the amount so confessed.²¹

The Loan Agreement further states:

13. Miscellaneous.

This Agreement, and the rights and obligations of the parties hereunder, shall be governed and construed in accordance with the laws of the State of New Jersey.²²

These contractual provisions leave no doubt: although New Jersey law governs the rights and obligations of the parties in this Loan Agreement, such parties carved-out a remedial exception which is triggered upon the occurrence of an event of default. Under this exception, Borrower empowered Lender to confess judgment **in any court of record**, and to recover the obligations owed by Borrower under the Loan Agreement. Here, the complaint-in-confession-of-judgment avers that Borrower defaulted by failing to remit any payments since April 8, 2016; therefore, upon the occurrence of this default, Lender was empowered to confess judgment in any court of record in the United States, and did confess judgment in this Court of Common Pleas.²³ Lender properly

²¹ LOAN AGREEMENT AND SECURITY AGREEMENT, Exhibit A to the complaint-in-confession-of-judgment, ¶ 9, p. 6.

²² *Id.*, ¶ 13, p. 7.

²³ Complaint-in-confession-of-judgment, ¶ 6. The Court also notes that Borrower's invocation of New Jersey Rule 4:45-1, insofar as it suggest that this Court should engage in a choice-of-law analysis, is of no consequence in this case. "The rules in Part IV [of the New Jersey Rules of Court], insofar as applicable, **govern the practice and procedure of civil actions** in the Superior Court, Law and Chancery Divisions, and the surrogate's courts and the Tax Court...." N.J. Rule 4:1 (2016) (emphasis added). However in Pennsylvania, an analysis based on choice of law applies only to conflicts of substantive law and not on conflicts of procedural law. *Wilson v. Transport Ins. Co., et al.* 889 A.2d 563, 567 (Pa. Super. 2005). In this case, the New Jersey Rule invoked by Borrower, Rule 4:45-1, is procedural and of no import to the instant action in confession of judgment.

confessed judgment under the laws of Pennsylvania, Borrower's argument is thus rejected, and the petition to strike confession of judgment is denied.

II. Petition to Open.

One who petitions to open a confessed judgment must act promptly and offer a meritorious defense.... If evidence is produced which in a jury trial would require the issues to be submitted to the jury the Court shall open judgment.²⁴

In the petition to open, Borrower asserts that Lender has claimed improper amounts in the judgment and that, upon information and belief, Borrower "repaid the entire amount of any loans ... or a significant amount" thereof.²⁵ This argument is easily rejected because in Pennsylvania, "the petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses."²⁶ In this case, Borrower has produced no evidence showing that the borrowed amounts were repaid in full or in any significant part. Borrower did not sustain its burden of proof and for this reason the argument based on repayment of the loan is rejected.

Second, Borrower challenges the confessed judgment on grounds that it did not voluntarily, knowingly or intelligently waive its due process rights when it executed the Loan Agreement containing the *cognovit* clause. This argument is also rejected. In Pennsylvania,

[t]here is ... no merit to [the] assertion [based on a] purported lack of knowledge and/or understanding of the warrant of attorney provisions in the ... agreement.... The failure to read a confession of judgment clause will not justify avoidance of it.²⁷

In addition--

²⁴ Ind'l Valley Bank v. Lawrence & Associates, 428 A.2d 156, 158 (Pa. Super. 1981).

²⁵ Petition to open, ¶¶ 31–38.

²⁶ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

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

even if [Borrower's] unconstitutionality defense [were] meritorious, the Petition does not present evidence in support of the defense, and the judgment cannot be opened on this ground.²⁸

For this reason, the court rejects the argument asserting that Borrower un-intelligently waived its due process rights.

Finally, Borrower challenges the confessed judgment on the grounds that the underlying Loan Agreement contains usurious terms. This argument is readily rejected because the Court has already determined that Borrower voluntarily, knowingly and intelligently entered into the Loan Agreement; therefore, Borrower understood and bound itself to all the terms contained in that instrument.

In conclusion, Borrower has failed to sustain its burden of proof in any of the defenses challenging the confessed judgment. For this reason, the petition to open judgment by confession is denied in its entirety.

BY THE COURT,



RAMY I. DJERASSI, J.

²⁸ Sovereign Bank v. Mintzer, No. 1501 July Term 2000, 2000 WL 33711039 (Pa. Com. Pl. Nov. 2000).