

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

COMPLETE BUSINESS SOLUTIONS GROUP, INC.	:	November Term, 2016
	:	
<i>Plaintiff</i>	:	Case No. 03192
	:	
v.	:	Commerce Program
	:	
NG CONSULTING SERVICES, LLC,	:	
NEXGEN MEDICAL SOLUTIONS, LLC,	:	
NEXGEN PROPERTY SOLUTIONS, LLC	:	
and	:	
ANDRES GONZALES	:	Control No. 17012067.
	:	
<i>Defendants</i>	:	

ORDER

AND NOW, this 15th day of February, 2017, upon consideration of the petition to strike or open confession of judgment and for a stay of execution, the response in opposition, and the parties' respective *memoranda* of law, it is **ORDERED** that the petition to strike is **GRANTED** and **JUDGMENT BY CONFESSION IS STRICKEN**.

BY THE COURT,



RAMY I. DJERASSI, J.

Complete Business Solut-ORDRF



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R. POSTELL
COMMERCE PROGRAM

Memorandum Opinion

The petition to strike judgment by confession requires this Court to determine whether plaintiff's complaint-in-confession-of-judgment avers that defendants violated certain representations and warranties, as required under the *cognovit* clause within the parties' agreement. For the reason below, the Court finds that the complaint-in-confession-of-judgment fails to aver such violations; therefore, the petition to strike judgment by confession is granted and the judgment is stricken.

BACKGROUND

Plaintiff is Complete Business Solutions Group, Inc., a Philadelphia, Pennsylvania-based corporation (*hereinafter*, "Lender"). Corporate defendants are NG Consulting Services, LLC, Nexgen Medical Solutions, LLC and Nexgen Property Solutions, LLC, all of which are based in the State of Texas ("the Borrowers"). Individual defendant is Andres Gonzales ("Gonzales" or "Guarantor"). Whenever required, Borrowers and Gonzales/Guarantor will be collectively identified hereinafter as "Defendants."

On May 31, 2016, Lender and Borrowers entered into a "Factoring Agreement."¹ Individual defendant Gonzales personally guaranteed to Lender the "performance of all the representations, and warranties made by [Borrowers] in ... the Factoring Agreement...."²

¹ Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment.

² Guaranty, Exhibit A to the complaint-in-confession-of-judgment.

Pursuant to the terms of the Factoring Agreement, Lender loaned to Borrowers \$150,000.00; simultaneously, Borrowers agreed to repay Lender the amount of \$217,500.00 in “Specified Daily Amounts “ of \$1,686.05, over a period of 129 days.³ The loan document was drafted in the guise of a sale: it identified Borrowers as the “Seller/Merchant,” Lender as a “Purchaser,” and the transaction itself as a “Purchase and Sale of Future Receipts....”⁴ Pursuant to the loan, Lender was empowered to directly tap into the bank account of Borrowers and withdraw the Specified Daily Amounts until satisfaction of the entire obligation.⁵

The loan/Factoring Agreement contained certain provisions of relevance to the instant petition to strike the confessed judgment. The provisions specifically stated:

III. EVENTS OF DEFAULT AND REMEDIES.

* * *

3.2 Remedies.

* * *

IN THE EVENT OF VIOLATIONS OF THE REPRESENTATIONS AND WARRANTIES BY PURCHASER [sic], AND ONLY IN THAT EVENT, PURCHASER [sic] may also file a Complaint in Confession of Judgment pursuant to the Warrant of Attorney contained herein....

3.3 WARRANT OF ATTORNEY TO CONFESS JUDGMENT. UPON THE OCCURRENCE OF A VIOLATION OF THE REPRESENTATIONS AND WARRANTIES MADE HERETOFORE BY MERCHANT [BORROWER], MERCHANT AND GUARANTOR IRREVOCABLY AUTHORIZE AND EMPOWER ANY ATTORNEY OR ANY CLERK OF ANY COURT OR RECORD,

³ Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment, p. 1.

⁴ Id.

⁵ Id.

**TO APPEAR FOR AND CONFESS JUDGMENT AGAINST
MERCHANT AND GUARANTOR FOR SUCH SUMS AS
ARE DUE AND/OR MAY BECOME DUE UNDER THIS
MERCHANT AGREEMENT OR ANY ACCOMPANYING
DOCUMENTS....⁶**

On October 12, 2016, Lender confessed judgment against Borrowers and Guarantor for their failure “to tender payments” to Lender “in accordance with the ... written obligations.”⁷ The amount confessed by Lender is \$171,532.45, which includes a principal of \$161,032.45, default and finance fees of \$500.00, and counsel fees of \$10,000.00.⁸

On January 17, 2017, Defendants filed a petition to strike or open the confession of judgment and for a stay of execution; on February 6, 2017, Lender filed its answer in opposition. The parties briefed their respective positions and the petition is now ripe for a resolution. The Court shall focus on the petition to strike the confessed judgment, and will not address the issues presented in the petition to open.

DISCUSSION

In Pennsylvania—

[a] petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record....

* * *

⁶ Id., pp. 3–4.

⁷ Complaint-in-confession-of-judgment, ¶ 11.

⁸ Id., ¶ 14.

An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.⁹

In the petition to strike, Defendants note that under the express language of the warrant-of-attorney within the Factoring Agreement, Lender may confess judgment only “upon the occurrence of a **violation of the representations and warranties** made ... by Merchant [i.e., Borrowers].¹⁰ Next, Defendants note that in the complaint-in-confession-of-judgment, Lender avers as follows:

[a]s a result of the Defendants’ failure to cure the default(s) on their obligations to ... [Lender]
Defendants are presently liable to ... [Lender]....¹¹

Based on the foregoing language, Defendants conclude that the confessed judgment must be stricken because—

the Complaint fails to allege a violation of representations and warranties ... [and therefore]
there are irregularities and fatal defects appearing on the face of the record.¹²

In the response in opposition, Lender asserts that “Defendants make much to do over a scriveners [*sic*] error which misstates the Factoring Agreement....”¹³ Lender also concedes that “[t]his is the only mistake” and concludes that such an error “poses no material difference to the [warrant-of-attorney] clause.”¹⁴ The Court rejects Lender’s argument.

⁹ Neducsin v. Caplan, 121 A.3d 498, 504 (Pa. Super. 2015), appeal denied, 131 A.3d 492 (Pa. 2016).

¹⁰ Petition to strike, ¶ 14 (emphasis supplied), (quoting the Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment, p. 3, ¶ 3.3).

¹¹ Id., ¶ 28 (emphasis supplied).

¹² Id., ¶ 37.

¹³ Response in opposition, ¶ 9.

¹⁴ Id.

In Pennsylvania—

[a] warrant of attorney [to confess judgment] constitutes a grant of authority by one contracting party to the other ... to enter that which results ordinarily only after a trial of the issue between the parties....¹⁵

In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses....¹⁶

Entry of a valid judgment by confession must be made in rigid adherence to the provisions of the warrant of attorney; otherwise, such judgment will be stricken.

A warrant to confess judgment ... will be strictly construed, with any ambiguities resolved against the party in whose favor the warrant is given.¹⁷

In this case, the warrant-of-attorney provision within the Factoring Agreement exclusively authorizes Lender to confess judgment against Defendants “upon the occurrence of a violation of the representations and warranties made ... by [Borrower].”¹⁸ Notwithstanding this clear requirement, the complaint-in-confession-of-judgment fails to aver that Defendants violated their representations and warranties; rather, the complaint avers that “[a]s a result of Defendants’ failure to cure the default(s) on their obligations to ... [Lender], Defendants are presently liable to Plaintiff....”¹⁹ After a careful reading of the complaint and the warrant-of-attorney clause within the Factoring Agreement,

¹⁵ TCPF Ltd. P’ship v. Skatell, 976 A.2d 571, 575 n. 5, (Pa. Super. 2009).

¹⁶ Hazer v. Zabala, 26 A.3d 1166, 1169 (Pa. Super. 2011).


¹⁷ Dime Bank v. Andrews, 115 A.3d 358, 371 (Pa. Super. 2015).

¹⁸ Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment, p. 3 at ¶ 3.3.

¹⁹ Complaint-in-confession-of-judgment, ¶ 13. To be clear, the complaint-in-confession-of-judgment is stricken because Lender failed to allege that Defendants violated any of the enumerated “REPRESENTATIONS, WARRANTIES AND COVENANTS” described in the Factoring Agreement at paragraph II.

this Court finds that the record is fatally flawed and rules that the petition to strike is granted and the confession-of-judgment is stricken.

BY THE COURT,



RAMY I. DJERASSI, J.