

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

DOCKETED

LAVA FUNDING LLC,	:	January Term 2017	MAY 25 2017
	:		
Plaintiff,	:		
	:		
v.	:	No. 1640	R. POSTELL
714 N. 15 TH STREET, LLC, OLEG KOZIAR,	:		COMMERCE PROGRAM
	:		
And RIMMA KOZIAR,	:	Commerce Program	
	:		
Defendants.	:	Control Number 17022466	
	:		

ORDER

AND NOW, this 25th day of May 2017, upon consideration of Defendants' Oleg Koziar, Rimma Koziar and 714 No. 15th Street, LLC's Petition to Strike/Open Confessed Judgment and Respondent/Plaintiff's response in opposition, it hereby is **ORDERED** that the Petition is **Granted in part and Denied in part** as follows:

1. The Petition to Strike is **Granted in part** and the judgment is modified from \$1,134,889.60 to \$1,048,517.10. All other aspects of the Petition to Strike are **Denied**.
2. The Petition to Open as it pertains to Oleg Koziar and 714 No. 15th Street LLC is **Denied**.
3. The Petition to Open as it pertains to Rimma Koziar is **Granted** solely to determine if Rimma Koziar was a joint applicant of Note I and related documents as defined by the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 et. seq. and the Federal Reserve Board's Regulation B at 12 C.F.R. § 1691 et. seq. Rimma Koziar's Petition to Open as it pertains to Note II and related documents is **Denied**.

BY THE COURT,



RAMY L. DJERASSI, J.

Lava Funding, Llc Vs 71-ORDOP



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	:	
Defendants.	:	
	:	Control Number 17022466

OPINION

Presently before the court is defendants 714 No. 15th Street, LLC, Oleg Koziar and Rimma Koziar's ("Defendants") Petition to Strike/Open Confessed Judgment. For the reasons discussed below, the Petition to Strike/Open is granted in part and denied in part.

On February 28, 2014, plaintiff Lava Funding, LLC ("Lava") extended a commercial loan in the amount of \$750,000 to 714 N. 15th Street, LLC (hereinafter referred to as "Note I") for the purchase of a commercial property.¹ The terms of the loan required that \$330,000 be disbursed to defendants at settlement for the mortgaged property located at 714-716 North 15 Street and the remaining \$420,000 was to be disbursed to defendants based on the percentage of construction completed at the sole discretion of Lava. Note I contained a provision granting Lava the power to confess judgment. Note I was signed by Eugene Bukh and Oleg Koziar, members of 714 N. 15th Street, LLC and was personally guaranteed by Oleg Koziar and Rimma Koziar, husband and wife.² The personal guarantees also contained a provision granting Lava the power to confess judgment. Defendant 714 N. 15th Street, LLC defaulted on Note I on September 28, 2014 when it failed to pay an interest payment of \$8,125.00 and upon inspection

¹ Exhibit "A" to Defendants' Petition to Open.

² Exhibits "B" and "C" to Defendants Petition to Open.

of the property showed that the project had not achieved the level of completion of construction in relation to the amount of funds released.

On October 8, 2014, Lava and 714 N. 15th Street, LLC agreed to enter into a Forbearance and Mortgage Modification Agreement (“Forbearance Agreement”).³ Defendants requested an additional \$100,000 and the term of the loan was extended until May 28, 2015. The total funds due were \$850,000 plus deferred interest and extension fees for a total sum of \$940,125.00. This sum was acknowledged by defendant 714 N. 15th Street, LLC as the current principal balance of Note I. In accordance with the Forbearance Agreement, all the original loan documents and the agreements remained in full force and effect, except as modified by the Forbearance Agreement. The Forbearance Agreement contained a provision giving Lava the power to confess judgment. The Forbearance Agreement was signed by 714 N. 15th Street, LLC’s members, Eugene Bukh and Oleg Koziar, and the personal guarantors including Bukh, Oleg Koziar and Rimma Koziar.⁴

On May 20, 2016, Lava extended a commercial loan to Oleg Koziar and Rimma Koziar for \$210,300.00 (hereinafter referred to as Note II). Note II contained a provision granting Lava the power to confess judgment. Note II was executed by the Koziars and was personally guaranteed by 714 No. 15th Street, LLC. Oleg Koziar and Rimma Koziar signed as the members of 714 No. 15th Street, LLC. The personal guarantee also contained a provision to confess judgment.⁵

On September 12, 2016, the Koziars entered into a Forbearance and Modification Agreement (“Forbearance Agreement”) since they were unable to meet the maturity date under

³ Exhibit “D” to Defendants Petition to Open.

⁴ Id.

⁵ Exhibits “E” and “F” to Defendants Petition to Open.

the terms of Note II and sought additional funds for the project. The Koziars acknowledged that the amounts owed were \$285,500 with a new maturity date of October 20, 2016. The Forbearance Agreement contained a provision to confess judgment and was signed by the Koziars individually and as members of 714 No. 15th Street, LLC, the guarantor. ⁶

Defendants defaulted on the loans. On January 11, 2017, Lava filed the instant confession of judgment in the amount of \$1,134,889.60⁷ and defendants filed the instant petition to strike/open the confessed judgment. ⁸

DISCUSSION

A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record.⁹ A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. 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. Matters *dehors* the record filed by the party in whose favor the warrant is given will not be considered. If the record is self-sustaining, the judgment will not be stricken. ¹⁰

In the case *sub judice*, defendants argue that the judgment should be stricken because Lava “cherry picked” from the different warrants of attorney found in the various documents

⁶ Exhibit “F” to Defendants Petition to Open.

⁷ On January 12, 2017, Lava filed another confession of judgment in the Court of Common Pleas of Carbon County under the same documents utilized here. As of the writing of this opinion, the action is still pending with a hearing scheduled for August 10, 2017.

⁸ In addition to filing a petition to strike/open, defendants also filed a motion to stay execution. The motion was granted pending resolution of the petition to strike/open.

⁹ *Bethlehem Steel Corporation v. Tri State Industries, Inc.*, 290 Pa. Super. 461, 434 A.2d 1236 (1981).

¹⁰ *Franklin Interiors v. Wall of Fame Management Company, Inc.*, 510 Pa. 597, 511 A.2d 761 (1986).

evidencing the loans to confess judgment and maximize the judgment amount. Defendants also argue that the judgment should be stricken because the attorney's fees are not authorized by the warrants and are excessive, penalties are not authorized by the warrants and Lava failed to include an affidavit of Military Service.

Defendants are correct that the warrants of attorney in the documents involved are different in terms of what may be recovered if judgment is confessed. For instance, Note I and II and the Forbearance Agreements provide as follows:

“for the entire principal balance of this Note, all accrued interest and all other amounts due hereunder, together with costs of suit and an attorney's fee of the greater of 10% of such principal and interest of \$1,000 added as a reasonable attorney's fee.”¹¹

On the other hand, the guarantees provide:

“in favor of the Lender for the amount of the Obligations and reasonable attorneys' fees and costs, and for doing so, this Guaranty or a copy verified by affidavit shall be a sufficient warrant.”

While differences exist, they are not material. The warrants in Note I, II and the related Forbearance and Modification Agreements authorize the collection of attorney fees. The warrants allow “the greater of 10% of such principal and interest of \$1,000 added as a reasonable fee”. Here, the complaint in confession of judgment identifies the attorney fee as \$20, 150.00 for Note I and Note II, respectively. This amount is less than “the greater amount of 10% of the principal and interest” owed under the Notes. In fact, the requested fee is 3.5% of the loans. Additionally, the attorney fee request is reasonable as required by the guarantee agreements.¹²

¹¹ Exhibits “A”, “D”, “E” and “F” to Defendants Petition to Open.

¹² See *RAIT Partnership, LP v. E Pointe Properties, I, Ltd.*, 957 A.2d 1275 (Pa.Super.2008) (upholding attorney collection commission of 15% of balance, or \$450,000.00); *Dollar Bank, Federal Savings Bank v. Northwood Cheese Co., Inc.*, 637 A.2d 309 (Pa.Super.1994) (upholding attorney collection fee of 15% of balance), *appeal denied*, 653 A.2d 1231 (Pa.1994).

Based on the foregoing, the attorney fee requested is not excessive and the petition to strike is denied in this regard.¹³

Defendants also argue that the judgment should be stricken because an unauthorized “penalty” amount was added to the judgment. Upon review of the various documents, the court agrees. The complaint in confession of judgment does identify “penalty” as an item of damage. However, a review of Note I, Note II, the respective guarantees and Forbearance Agreements fail to authorize penalties. As such, the judgment will be modified to reflect the deduction of the unauthorized penalty amounts, \$59,872.50 and \$26,500.00, respectively. Based on the foregoing, the petition to strike is granted in part and the judgment is modified to \$1,048,517.10.

Defendants, in the alternative, also seek to open the judgment. A confessed judgment may be opened “if the petitioner (1) acts promptly, (2) alleges a meritorious defense, and (3) can produce sufficient evidence to require submission of the case to a jury.”¹⁴ A judgment of confession will be opened if “a petitioner seeking relief therefrom produces evidence which in a jury trial would require issues to be submitted to a jury.”¹⁵ The standard of sufficiency here is similar to the standard for a directed verdict, in that the facts must be viewed most favorably to the moving party, the evidence and proper inferences in support of the defense raised must be accept as true, and all adverse allegations we must reject.¹⁶

¹³ As it pertains to defendants’ claim that an affidavit of non-military service was missing and therefore the judgment should be stricken, the court finds that this contention is incorrect since an affidavit of non-military service was attached to the complaint in confession of judgment.

¹⁴ *Neduscin v. Caplan*, 121 A.3d 498, 506 (2015), appeal denied, 131 A.3d 492 (Pa. 2016).

¹⁵ *Id* quoting *Foerst v. Rotkis*, 244 Pa.Super. 447, 368 A.2d 805, 807–08 (1976).

¹⁶ *Id* citing *Greenwood v. Kadoich*, 239 Pa.Super. 372, 357 A.2d 604, 606 (1976).

Here, defendants argue that the judgment should be opened on the proffered grounds that the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et. seq.* and the Federal Reserve Board's Regulation B at 12 C.F. R. § 202 were violated. The ECOA states that "it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction [,] on the basis of ... marital status[.]"¹⁷ Federal regulations implementing the ECOA provide as follows:

Signature of spouse or other person-(1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.¹⁸

"[T]he ECOA was enacted to ensure fairness in creditors' consideration of credit applications."

¹⁹ When determining whether a creditor has violated the ECOA by requiring a spousal signature, it is critical to determine whether the husband and wife were joint applicants on the loan. As noted above, lenders are permitted to require spousal signatures where the spouses are joint applicants.²⁰ A joint applicant is someone who applies contemporaneously with the applicant for shared or joint credit and not someone whose signature is required by the creditor as a condition for granting the credit requested.²¹

¹⁷ 15 U.S.C. § 1691(a)(1).

¹⁸ 12 C.F.R. 202.7(d)(1).

¹⁹ *Sw. Pennsylvania Reg'l Council, Inc. v. Gentile*, 776 A.2d 276, 281–82 (2001); *Freeman v. Koerner Ford of Scranton, Inc.*, 370 Pa.Super. 150, 536 A.2d 340, 341 (1987).

²⁰ 12 C.F.R. 202.7(d)(1); *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 699 (3rd Cir.1995), *cert. denied*, 515 U.S. 1184, 116 S.Ct. 32, 132 L.Ed.2d 914 (1995).

²¹ *Midlantic*, *supra* at 48 F.3d at 699, *citing*, Official Staff Interpretation to 12 C.F.R. § 202.7(d)(1); *see also*, *Riggs Nat'l Bank v. Webster*, 832 F.Supp. 147, 151 (D.Md.1993) (bank does not violate ECOA by requiring spouse's signature where she is a *de facto* joint applicant, as evidenced by the fact that the financial statement used to support the loan contained items owned jointly or wholly by the spouse); *Bank of America Nat'l Trust & Sav. Asso. v. Hotel Rittenhouse Associates*, 595 F.Supp. 800, 808 (E.D.Pa.1984) (bank does not violate ECOA when spouses offered to execute joint guarantee, and an individual guarantee was therefore never contemplated).

Here, a meritorious defense exists as it pertains to Rimma Koziar, the spouse of Oleg Koziar as it pertains to Note I and the related documents. While it is clear that Rimma Koziar is a joint applicant on Note II, it is not clear from the record, if she is a joint applicant on Note I. Rimma Koziar did not sign Note I as a member of 714 N. 15th Street, LLC. Rather, she only signed the personal guarantee for Note I in her individual capacity. This creates an issue of fact as to whether Rimma Koziar was a joint applicant for Note I. Based on the forgoing, the judgment is opened as to Rimma Koziar only as to Note I and its related documents.

As it pertains to the other defendants, the petition to open is denied. Petitioners failed to offer clear, direct, precise and believable evidence of a meritorious defense sufficient to raise a jury question. Petitioners argue that the confessed judgment should be opened because the amount of the judgment was not properly calculated and was filed in bad faith and retaliation against a non-party.²² Upon review of the record, the petition to open is denied. Petitioners did not present sufficient evidence of their alleged defenses to submit this question to a jury. With respect to Note I, petitioners fail to describe how the default amount under Note I is incorrect. While petitioner did attach some evidence to support their defense of improper calculation as to the debt owed on Note II, the evidence is not clear, direct, precise or believable.²³ Furthermore,

²² Petitioners also argue that the judgment should be opened because the penalty was excessive. This argument is moot since this argument was already considered and the judgment modified in the section addressing the petition to strike.

²³ Petitioners attached six checks as evidence of improper calculation. See Exhibit “J” to Defendants Petition to Open. However, the checks were issued before the Forbearance Modification Agreement was signed. The checks are not relevant since petitioners acknowledged the amount of the debt which is far greater than the sum of the six checks. Moreover, petitioner sought additional funds at the time the Forbearance and Modification Agreement was signed.

as it pertains to their defenses of retaliation and bad faith, petitioners failed to present any evidence.²⁴

CONCLUSION

For the foregoing reasons, the Petition to Strike is **Granted in part** and the judgment is modified from \$1,134,889.60 to \$1,048,517.10. All other aspects of the Petition to Strike are **Denied**. The Petition to Open as it pertains to Oleg Koziar and 714 No. 15th Street LLC is **Denied**. The Petition to Open as it pertains to Rimma Koziar and Note I is **Granted** solely to determine if she was a joint applicant of Note I and related documents under the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691 et. seq., and the Federal Reserve Board’s Regulation B at 12 C.F.R. § 1691 et. seq.

As it pertains to Note II, Rimma Koziar’s Petition to Open is **Denied**.

BY THE COURT,



RAMY I. DJERASSI, J.

May 25, 2017

²⁴ *Iron Worker’s S. & L. v. IWS, INC.*, 424 Pa. Super. 225, 622 A .2d 367, 370 (1993).