

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

<p>CITIZENS BANK OF PENNSYLVANIA</p> <p style="text-align: center;"><i>Plaintiff</i></p> <p style="text-align: center;">v.</p> <p>G&A SOMERTON PHARMACY, LLC</p> <p style="text-align: center;"><i>Defendant</i></p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>July Term, 2017</p> <p>Case No. 03824</p> <p>Commerce Program</p> <p>Control No. 17092781</p>
---	--	--

ORDER

AND NOW, this 11th day of October, 2017, upon consideration of the petition to strike or open judgment by confession and for a stay of execution proceedings, the response in opposition, and the parties' respective *memoranda* of law, it is **ORDERED** that the petition to strike is **GRANTED** and the judgment entered by confession is **STRICKEN**.

BY THE COURT,

[Signature]

GLAZER, J.

Citizens Bank Of Pennsy-ORDRF



17070382400015

MEMORANDUM OPINION

Plaintiff is Citizens Bank of Pennsylvania (“Lender”). Defendant is G&A Somerton Pharmacy, LLC (“Borrower”), a business located in Philadelphia, Pennsylvania. On August 30, 2011, Borrower obtained from Lender a \$250,000.00 revolving-loan, as evinced by a “Revolving Demand Note.” The Revolving Demand Note contained a warrant-of-attorney provision which entitled Lender to confess judgment against Borrower upon the occurrence of an event of default.¹ The Revolving Demand Note also contained the following language:

[t]his Note is a revolving note and ... the **Borrower may, at its option, borrow, pay, prepay and re-borrow hereunder at any time prior to demand for payment...**²

On January 9, 2017, the same parties entered into a “Modification Agreement” whose language “ratified, acknowledged and confirmed” “all the terms ... provisions ... and conditions” of the Revolving Demand Note.³ The Modification Agreement converted the revolving loan into a “term loan,” as evidenced by the following language:

WHEREAS, the Borrower and the ... [Lender] have agreed to convert the Revolving Loan to a term loan and that as of the date of this Agreement **there shall be no further advances** respecting the Revolving Loan[,] and all amounts outstanding respecting the Revolving Loan shall be repaid in accordance with this Agreement.⁴

¹ REVOLVING DEMAND NOTE, Exhibit A to the complaint.

² Id., p. 1.

³ MODIFICATION AGREEMENT, Exhibit B to the complaint.

⁴ Id., 7th “Whereas” clause at p. 1.

On August 1, 2017, Lender entered judgment by confession against Borrower. On September 22, 2017, Borrower filed a petition to strike or open the confessed judgment and for a stay of execution proceedings. In the petition to strike the judgment, Borrower asserts that the Modification Agreement lacks a warrant-of-attorney provision; furthermore, Borrower asserts that the language, which in the Modification Agreement purports to ratify all the terms and conditions from the Revolving Demand Note, is “legally insufficient to create ... the power to confess judgment” because it fails “to restate or specifically incorporate a Warrant of Attorney.”⁵

DISCUSSION

Under Pennsylvania law,

[a] petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.

The original record that is subject to review in a motion to strike a confessed judgment consists of the complaint in confession of judgment and the attached exhibits.⁶

In addition, Pennsylvania courts “will not presume an intent of parties to a modified contract to perpetuate a warrant of attorney.”⁷ Pennsylvania courts will not presume such an intent because “[a] general reference in the body of an executed [modification contract] to terms and conditions outside the agreement is insufficient to bind [a party] ... to a warrant of attorney not contained in the body

⁵ Petition to strike, ¶ 22, *memorandum* of law in support of the petition to strike at I(a), p. 6.

⁶ *Neducsin v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015), *appeal denied*, 131 A.3d 492 (Pa. 2016).

⁷ *Scott v. 1523 Walnut Corp.*, 447 A.2d 951, 956 (Pa. Super. 1982).

[of that modification].”⁸ A signed modification to an existing contract confirms the parties’ intent “to be bound by the confession of judgment” provision contained in the original contract, where the modification “**specifically republish[es] the terms of the confession of judgment and clearly state[s] the parties’ intent that it continue in effect.**”⁹

In the response in opposition to the petition to strike, Lender argues that under Pennsylvania law, the failure to include a warrant-of-attorney in the instant Modification Agreement, or the failure to republish therein the warrant contained in the Revolving Demand Note, does not constitute a fatal flaw. According to Lender, the failure to include or republish a warrant-of-attorney is not a fatal flaw where the modification agreement, as in this case, merely extends the maturity date of a loan without conferring additional burdens or benefits upon the parties. In support of this argument, Lender relies on a case decided in 2012, Graystone Bank v. Grove Estates, LP.¹⁰ Reliance on Graystone is misplaced

In Graystone, a borrower, (“Grove Estates”), obtained a loan from lender, (the “Bank”). The loan was an “interest only obligation” which required the Grove Estates to repay interest on a monthly basis and the principal upon maturity of the term.¹¹ The loan was evidenced by a promissory note (the “Note”), which Grove Estates executed in favor of the Bank. The Note contained a warrant-of-attorney provision entitling the Bank to confess judgment against Grove Estates in the event of a default. Subsequently, the Bank and Grove Estates entered into a new

⁸ Frantz Tractor Co. v. Wyoming Valley Nursery, 120 A.2d 303, 305 (Pa. 1956).

⁹ Ferrick v. Bianchini, 69 A.3d 642, 652 (Pa. Super. 2013) (emphasis supplied).

¹⁰ Graystone bank v. Grove Estates, LP, 58 A.3d 1277 (Pa. Super. 2012) *aff’d* 81 A.3d 880 (Pa. 2013).

¹¹ Id., at 1280.

agreement titled “Change-in-Terms Agreement.”¹² The Change-in-Terms Agreement merely postponed the maturity date of the existing loan without setting any new burdens or benefits upon the parties. Unlike the original Note, however, the Change-in-Terms Agreement lacked a warrant-of-attorney provision, and did not purport to incorporate the prior warrant into the new document.

After an event of default occurred, the Bank entered judgment by confession against Grove Estates, and Grove Estates filed a petition to strike or open the judgment. In the petition, Grove Estates argued that the Change-in-Terms Agreement constituted a modified contract requiring either a new warrant-of-attorney, or at least a proper republication of the original warrant from the prior Note.¹³ Specifically, Grove Estates argued that due to the lack of a new warrant-of-attorney, the signature of Grove Estates in the Change-of-Terms Agreement bore no direct relation to the old warrant contained in the original Note. Grove Estates concluded that the lack of a warrant-of-attorney created a fatal flaw in the record, and the fatal flaw required the confessed judgment to be stricken. The trial court disagreed with Grove Estates and denied the petition to strike. Grove Estates appealed.

Affirming on appeal, the Pennsylvania Superior Court rejected the argument advanced by Grove Estates. The Superior Court rejected the argument because the Change-in-Terms Agreement had created “nothing more than an extension of the original Promissory Note’s maturity date, and not, as ... [Grove

¹² Id.

¹³ Id.

Estates] argued, a new, comprehensive agreement setting new burdens and benefits upon the parties.”¹⁴ The Superior Court further noted that—

[a]s such, the Change-in-Terms Agreement was distinguishable from a lease renewal, which must contain its own warrant-of-attorney under our jurisprudence given its status as a novation expressing all rights and responsibilities between the parties.... In contrast, the Change-in-Terms Agreement changed only the maturity date and, given the limits of its scope, did not purport to relieve ... [Grove Estates] from the remaining conditions set forth in the original ... Note. The [trial] court, therefore, found no defect or irregularity with the absence of a warrant-of-attorney ... [in] the Change-of-Terms Agreement. ¹⁵

The facts in this case are different: whereas the parties in Graystone amended their original agreement to merely extend the maturity date of the term-loan without creating new burdens or benefits, the parties in the instant case amended their original agreement by turning a revolving loan into a materially different term loan. As a result of this amendment, Borrower lost its power “to ... **re-borrow**” new funds, and submitted instead to a new burden mandating that “**there ... be no further advances respecting the Revolving Loan.**”¹⁶ In conclusion, the material modification required either a new warrant-of-attorney, or the proper re-publication of the existing warrant from the original Revolving Demand Note. The absence of a new or re-published warrant compels the court to find that the signature of Borrower upon the Modification Agreement lacks any direct relation to the warrant-of-attorney contained in the Revolving Demand

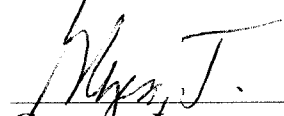
¹⁴ Id.

¹⁵ Id.

¹⁶ REVOLVING DEMAND NOTE, Exhibit A to the complaint, p. 1; MODIFICATION AGREEMENT, 7th “Whereas” clause at p. 1 (emphasis supplied).

Note. For this reason, the petition to strike is granted and the judgment entered by confession is stricken.¹⁷

BY THE COURT,



GLAZER, J.

¹⁷ The court takes notice that the petition to strike or open confession of judgment and for a stay of execution was filed beyond the time allowed under Rule 2959(a)(3) of the Pennsylvania Rules of Civil Procedure. However—

a void judgment ... cannot become valid through the lapse of time.... Void judgments are to be treated in the same way that they were treated at common law, i.e., at any time that a void judgment is brought to the attention of the court, it must be stricken. M & P Mgmt., L.P. v. Williams, 937 A.2d 398, 401-02 (Pa. 2007).

In this case, the judgment entered by Lender is void because the signature of Borrower on the Modification Agreement bears no direct relation to the warrant-of-attorney contained in the original document.