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

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| **MELROSE CREDIT UNION** | : | August Term, 2017 |
| | : | Case No. 00616 |
| *Plaintiff* | : | |
| | : | |
| **v.** | : | Commerce Program |
| | : | |
| **DOUDA KOITA** | : | |
| and | : | |
| **F&C CAB CO.** | : | |
| | : | Control No. 17093050 |
| *Defendants* | : | |

**ORDER**

**AND NOW**, this 8th of January, 2019, upon consideration of the petition to strike or open confession of judgment and for a stay of execution, the response in opposition, and the petitioner's *memorandum* of law, it is **ORDERED** that the petition is **DENIED**. Plaintiff shall immediately submit to the court a calculation of the amounts of continuing interest, late charges, and **reasonable** attorney's fees.[1] The **STAY OF EXECUTION** is **LIFTED**.

**BY THE COURT,**

/s/ Glazer, J.

***GLAZER, J.***

Melrose Credit Union Vs-ORDRC

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[1] The warrant-of-attorney in the promissory note does not specify the percentage of attorney's fees recoverable by plaintiff.

## *MEMORANDUM* OPINION

On August 9, 2017, plaintiff, Melrose Credit Union ("Lender"), entered judgment by confession against individual defendant Douda Koita, and against an entity named F&C Cab Co. The judgment was entered upon a promissory note which the defendants had executed on December 12, 2012. The promissory note identified both defendants as borrowers (hereinafter, the "Borrowers"), and contained a *cognovit* clause empowering Lender to confess judgment against them.[2] In addition, the Borrowers executed a "Security Agreement" which granted to Lender an interest in certain collateral property, including a Taxi Cab Medallion, No. P—353.[3]

On September 25, 2017, Borrowers filed the instant petition to strike or open confession of judgment and for a stay of execution. The petition is denied.

### THE PETITION TO STRIKE

> A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record....
>
> A fatal defect on the face of the record denies the prothonotary the authority to enter judgment.... When deciding if there are fatal defects on the face of the record for the purposes of a petition to strike ... a court may only look at what was in the record when the judgment was entered.[4]

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[2] Promissory Note, Exhibit A to the complaint-in-confession-of-judgment, pp. 1, 6.
[3] Security Agreement dated December 6, 2012, Exhibit B to the complaint-in-confession-of-judgment.
[4] Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267–68 (Pa. Super. 2015).

Borrowers argue that the record is fatally flawed and the judgment should be stricken because the *cognovit* clause contains only the initials of individual Borrower Douda Koita. They argue that since the two Borrowers are separate parties, the *cognovit* clause should contain the initials of corporate Borrower (F&C Cab Co.), and the initials of individual Borrower (Douda Koita). This argument is rejected.

A review of the pertinent section of the promissory note reveals that a single line marks the place where "Borrower's and Other Obligor's initials" may be affixed.[5] In this case, individual Borrower Douda Koita affixed his/her initials once upon that single line. The court finds that the single set of initials "DK" suffices to bind to the *cognovit* clause not only Douda Koita as an individual Borrower" but also F&C Cab Co as the corporate Borrower. To find otherwise would imply that Douda Koita should have affixed his/her initials "DK" twice: once as the individual borrower and a second time as president or owner of F&C Cab Co. Although "Pennsylvania applies a ... strict standard to establish the validity of a cognovit clause,"[6] this court finds that the absence of an additional set of identical initials does not constitute a fatal flaw in the record, and cannot require striking this confession of judgment. The court finds that the absence of two sets of identical initials cannot constitute a fatal flaw in the record because only one individual, a defendant whose initials are "DK," was acting simultaneously as an individual Borrower, as the official representative F&C Cab. Co. Douda Koita properly affixed a single set of initials in the appropriate space, and for this reason the first challenge to the validity of the judgment is rejected.

The petition to strike also asserts that the judgment should be stricken as illegal

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[5] Promissory Note, Exhibit A to the complaint-in-confession-of-judgment, p. 5.
[6] Graystone Bank v. Grove Estates, LP., 58 A.3d 1277, 1282 (Pa. Super. 2012).

because Pennsylvania law specifically prohibits the waiver of rights involved herein.[7] In support of this conclusion, Borrowers and Guarantor cite Title 42 of the Pennsylvania Consolidated and Annotated Statutes which instructs as follows:

§8122. Waiver of exemption.

> Exemptions from attachment or execution granted by statute may not be waived by the debtor by express or implied contract before or after the commencement of the matter, the entry of judgment or otherwise.[8]

This argument is rejected. The argument is rejected because the statute cited by Borrowers and Guarantor establishes that the exemptions listed therein apply only when a creditor attempts to execute against a debtor upon money "to the value of $300" (with some exceptions), upon specific items of personal property such as wearing apparel, Bibles, school books, sewing machines and uniforms, or upon retirement, insurance and pension benefits, *etc.*[9] In this case, the Taxi-Cab medallion does not fit into any of the classes exempted from attachment and execution; therefore, the court finds no merit in the argument seeking to strike the judgment through the requirements contained in 42 Pa. C.S.A. § 8122.

The petition to strike asserts that the record is fatally flawed because the name of the witness to the promissory note is un-identified. This argument is rejected because the Pennsylvania Rules of Civil Procedure do not have such a requirement; merely, the Rules only require that the complaint-in-confession-of-judgment contain "the original or photostatic copy ... of the instrument showing the defendant's signature."[10]

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[7] Petition to strike, ¶ 40.
[8] 42 Pa. C.S.A. § 8122 (2018).
[9] Id., §§ 8123-8127.
[10] Pa. R.C.P. 2852(a)(2).

The petition to strike also asserts that the record is fatally flawed because the security agreement upon the collateral –the taxi-cab medallion– is not signed by Lender and is not conspicuously printed. This argument is likewise rejected because the security agreement is not the operative document upon which Lender confessed the judgment.

The petition to strike asserts that the record is fatally flawed because Lender is a federal credit union under conservatorship and that only the conservator has standing to confess the judgment. This argument is rejected because section 1786(h) of the United States Code instructs that a conservator "**may ...** take possession and control of the business and assets of any insured credit union."[11] The above-quoted language is merely permissive or discretionary: it does not strip Lender of its standing to collect from Borrowers and Guarantor, nor does it prevent the conservator to take immediate possession of any assets as may be received by Lender.

Finally, the petition to strike asserts that the record is fatally flawed because Borrowers not only lacked legal representation when the promissory note was signed, but also lacked the business sophistication to understand the implications of their corporate and personal actions. This argument is inappropriate for a petition strike because it does not point to a fatal flaw in the record; merely, it asserts that the Borrowers unknowingly and un-intelligently waived certain due process rights because they were not represented by an attorney when they executed the promissory note.[12] In other words, this is a defense potentially involving a factual dispute which "by definition cannot be raised or addressed in a petition to strike off a confession of

[11] 12 U.S.C.A. § 1786(h) (emphasis supplied).
[12] Petition to Strike or open confession-of-judgment, ¶ 52.

judgment."[13] As a matter of law, "if the truth of the factual averments contained in [the complaint in confession of judgment and attached exhibits] are disputed, then the remedy is by proceeding to open the judgment, not to strike it."[14] Notwithstanding the petitioners' analytical error, their argument is nevertheless rejected because "[t]here is ... no merit to [the] assertion that ... a [petitioner] lack[ed] knowledge and/or understanding of the warrant of attorney provisions in the note and guaranty agreement.... The failure to read a confession of judgment clause will not justify avoidance of it."[15]

THE PETITION TO OPEN

A petition to open a confessed judgment "may be granted 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."[16]

In the petition to open, Borrowers aver that Lender admits to having impaired the value of the collateral by practicing "unsound lending practices."[17] Borrowers

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[13] Neducsin v. Caplan, 121 A.3d 498, 504 (Pa. Super. 2015).
[14] Id.
[15] Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994). In support of their argument, Borrowers rely on a decision rendered by the United States Supreme Court in Overmyer Co., Inc. v. Frick Company, 405 U.S. 174 (U.S. 1972), a case emanating from the State of Ohio. Reliance on Overmyer is inappropriate because in that case, the U.S. Supreme Court explained that Overmyer had not been deprived of its due process rights since, throughout legal proceedings, it had been given an opportunity to show a "valid defense" against the judgment. Id., at 188. Similarly here, Borrowers have been given an opportunity to show a valid defense by presenting evidence that individual Borrower Douda Koita had been coerced into signing the operative papers without the benefit of counsel, or that the Borrowers lacked the business sophistication necessary to deal at arms-length in a $300,000.00 transaction. See, Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 194). (holding that "the petitioning party bears the burden of producing sufficient evidence to substantiate its defenses.") See also, Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994), (holding that due process means simply an opportunity to be heard ... [which] may be satisfied by ... a petition to open judgment [and/or] ... deposition to support the allegations in the petition.") In this case, Borrowers have not presented any evidence in support of the defense that they were coerced into a contract of adhesion, nor have they presented evidence to support their contention that they lacked sophistication to engage in a $300,000.00 transaction. For these reasons, this challenge to the confession of judgment is rejected.
[16] Hazer v. Zabala, 26 A.3d 1166, 1169 (Pa. Super. 2011).
[17] Petition to open, ¶¶ 66-67.

explain that Lender engaged in the unsound lending practices by initially causing an artificial and unreasonable rise in value of the collateral, only to cause that value to subsequently deflate and collapse.[18] In support of this averment, Borrowers have submitted into evidence a copy of a Consent Order issued pursuant to § 39 of the New York Banking Law.[19] However, this evidence merely shows that the New York Banking Authorities "identified significant supervisory concerns relating to the conduct of the Credit Union's business, including unsafe and unsound banking practices and apparent violations of laws and regulations...."[20] This evidence is insufficient because it does not constitute an admission by Lender that it had engaged in unsound lending practices which depressed the value of the specific taxi-cab medallion at issue herein. Borrowers' allegations are "merely conclusions of law ... not supported by any allegations of fact," and are rejected accordingly.[21]

Finally, the petition to open asserts that Borrowers relied on certain misrepresentations made by Lender and were fraudulently induced to execute the promissory note. Borrowers further aver that through such misrepresentations, Lender breached the implied covenant of good faith and fair dealing. These arguments are rejected because "[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses."[22] In this case, Borrowers and Guarantor have failed to meet their burden of producing such evidence, and for these reasons the petition to strike or open judgment entered by

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[18] Petition to open, ¶¶ 67-70.
[19] Id., Consent Order Issued Pursuant to Section 39 of the New York Banking Law, Exhibit 2 attached to the petition to open confession of judgment.
[20] Id., p. 3rd "Whereas Clause."
[21] City of Pittsburgh v. Allegheny Cty. Distributors, Inc., 488 A.2d 333, 334 (Pa. Super. 1985).
[22] Haggerty v. Fetner, 481 A.2d 641 (Pa. Super. 1984).

confession and for a stay of execution is denied in its entirety.

**BY THE COURT,**

**GLAZER, J.**