

DOCKETED

JAN - 9 2019

R. POSTELL
COMMERCE PROGRAM

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

CEBV, LLC

Plaintiff

v.

ROBERT SCHWARTZ

Defendant

: October Term, 2018
: Case No. 04239
:
:
: Commerce Program
:
:
: Control No. 18120841

ORDER

AND NOW, this 3¹² day of January, 2019, upon consideration of the petition to strike confession of judgment, the response in opposition, and the parties' memoranda of law, it is **ORDERED** that the petition is **GRANTED** and the judgment entered by confession is **STRICKEN**.

BY THE COURT,



RAMY I. DJEKASSI, J.

Cebv, Llc Vs Schwartz-ORDRF



18100423900010

MEMORANDUM OPINION

The petition to strike confession of judgment requires this Court to resolve two issues: first, whether a document titled Forbearance Agreement modified certain prior underlying documents; and second, whether the Forbearance Agreement restated or properly republished the warrants-of-attorney contained in such prior underlying documents. For the reasons below, the Court finds that the Forbearance Agreement did modify the underlying prior documents but failed to restate or properly republish the warrants-of-attorney thereof.

BACKGROUND

Plaintiff CEBV, LLC (“Lender”), loaned funds to herein defendant Robert Schwartz (“Schwartz”), and to a non-party, Rosa Styles (“Styles”). In turn, Schwartz and Styles executed a promissory note in favor of Lender.¹ On the same day, May 8, 2018, certain other non-parties executed two additional promissory notes for the benefit of Lender.² Also on May 8, 2018, Schwartz executed a personal guaranty (the “Guaranty”), in favor of Lender.³ Under the terms of this Guaranty, Schwartz agreed to act as a guarantor and surety for the indebtedness of Styles and the other non-party obligors, all of whom remained bound under the terms of the afore-mentioned promissory notes.⁴ The three promissory notes and the Guaranty contain warrants-of-attorney.

On June 29, 2018, Schwartz and the other obligors executed a “Forbearance Agreement.” Under the terms of the Forbearance Agreement, Schwartz and the other

¹ The “Schwartz Promissory Note,” Exhibit A to the complaint-in-confession-of-judgment. The face amount of this note is \$2,941,274.00.

² The “Rodriguez Promissory Note” and the “Hogg Promissory Note,” Exhibits B, C to the complaint-in-confession-of-judgment. The respective promissory notes have face values of \$2,049,658.00 and \$10,078,808.00.

³ Guaranty, Exhibit D to the complaint-in-confession-of-judgment.

⁴ Id.,

obligors admitted that they had defaulted on their obligations under the three promissory notes and Guaranty, and confirmed that they were bound to repay the principal amount of \$15,069,740.00, plus accruing interest and legal fees.⁵ In addition, the Forbearance Agreement required Schwartz and the other obligors to meet specific obligations aside from those already contemplated under the promissory notes and Guaranty. For example, the Forbearance Agreement required Schwartz and the other obligors to pay a combined forbearance fee of \$1.5 million, and to remit a “good faith” deposit equal to 50% of the combined financial statements of all the entities owned by the obligors, to be determined in the course of a specified period.⁶ For its part, Lender agreed to refrain from asserting its rights against Schwartz and the other obligors until the expiration of the Forbearance Agreement.⁷ The Forbearance Agreement does not contain a warrant-of-attorney provision.

On October 31, 2018, Lender confessed judgment against individual defendant Schwartz. Lender’s complaint avers that Schwartz, as the guarantor of the non-party obligors, is responsible to Lender for their defaults.⁸ In addition, Lender’s complaint specifically states that—

[i]n accordance with the terms of the Promissory Note[s] and Guaranty, **as modified by the Forbearance Agreement** ... [Lender] hereby accelerates all the debt owed by Defendant [Schwartz] ... under the Promissory Note[s] and the Guaranty.⁹

⁵ Forbearance Agreement, Exhibit G to the complaint-in-confession-of-judgment, §§ 2, 4.

⁶ *Id.*, §§ 5.28, 5.29.

⁷ § 5.1.

⁸ Complaint-in-confession-of-judgment, ¶ 20.

⁹ *Id.*, ¶ 22 (emphasis supplied).

On December 6, 2018, Schwartz filed the instant petition to strike or open the confessed judgment; on December 27, 2018, Lender filed a response in opposition thereto.

DISCUSSION¹⁰

In the petition to strike, Schwartz asserts that the warrant-of-attorney in the promissory notes and Guaranty ceased to be in force upon the parties' execution of the Forbearance Agreement. Schwartz argues that the Forbearance Agreement effectively modified the promissory notes and Guaranty, but failed to republish or properly ratify the warrants-of-attorney therein.¹¹ He concludes that the omission in the Forbearance Agreement of a properly republished or ratified warrant-of-attorney amounts to Lender's failure "to expressly and explicitly perpetuate" that provision.¹² In the response in opposition, Lender denies that the Forbearance Agreement modified the promissory notes and Guaranty. Specifically, Lender states that—

the entry into the Forbearance Agreement **did not ... modify ...** [Lender's] right under the Warrants of Attorney and Guaranty to confess judgment against ... [Schwartz].¹³

To determine whether the Forbearance Agreement modified Lender's rights under the warrants-of-attorney, this Court will analyze such a contract within the framework of two well-settled legal principles: first, "[t]he task of interpreting a contract

¹⁰ "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.... A fatal defect on the face of the record denies the prothonotary the authority to enter judgment.... When a prothonotary enters judgment without authority, that judgment is void *ab initio*.... 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." Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267–68 (Pa. Super. 2015).

¹¹ Petition to strike, ¶¶ 21-29.

¹² Id., ¶ 26.

¹³ Response in opposition to the petition to strike, ¶ 25. This response appears to contradict Lender's prior position as stated in ¶ 22 of the complaint-in-confession-of-judgment and footnote 9, supra.

is generally performed by a court rather than by a jury,” and second, “[a] contract can be modified with the assent of ... [the] contracting parties if the modification is supported by consideration.”¹⁴ In this case, the Court finds that the Forbearance Agreement does not merely reiterate the rights of Lender as fixed in the promissory notes and Guaranty; rather, it adds new rights in favor of Lender, as well as new burdens upon Schwartz and the other obligors, including the obligation of remitting in favor of Lender a combined forbearance fee of \$1.5 million, and a good faith deposit fee.¹⁵ Most importantly, the Court notes that these additional rights and burdens are supported by new consideration in the guise of additional fees –fees which Lender would have received in exchange for Lender’s promise to refrain from asserting its rights until expiration of the Forbearance Agreement. The addition of such rights, burdens, and consideration, convinces this Court that the Forbearance Agreement did modify the original promissory notes and Guaranty.

Next, the Court will analyze whether the warrants-of-attorney in the promissory notes and Guaranty were restated or properly republished in their modified form through the Forbearance Agreement. Under Pennsylvania law, “[a]mere general reference in a ... [modifying] document ... is insufficient to bind [a party] to the warrant of attorney clause set forth in [the original document].”¹⁶ In addition—

[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.¹⁷

¹⁴ Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999); Trombetta v. Raymond James Financial Services, Inc., 907 A.2d 550, 558 (Pa. Super. 2006).

¹⁵ Forbearance Agreement, Exhibit G to the complaint-in-confession-of-judgment, §§ 5.28, 5.29.

¹⁶ Scott v. 1523 Walnut Corp., 447 A.2d 951, 956–57 (Pa. Super. 1982).

¹⁷ L. B. Foster Co. v. Tri-W Const. Co., 186 A.2d 18, 20 (Pa. 1962).

Finally, a void judgment is a “mere blur on the record, and which it is the duty of the court of its own motion to strike off whenever its attention is called to it.”¹⁸

In this case, the Forbearance Agreement, which modified the promissory notes and Guaranty, states as follows:

[t]he obligors [including Schwartz] do hereby jointly and severally ratify, confirm and acknowledge that the statements contained in the Background of this [Forbearance] Agreement are true, correct and complete in all respects and that the Loan Documents [including the promissory notes and Guaranty] are valid, binding and in full force and effect as of the date hereof and fully enforceable against the Obligors [including Schwartz] and their assets....¹⁹

This language in the modifying document makes a mere general reference to the obligations of Schwartz as set forth in the warrants-of-attorney within the original promissory notes and Guaranty; therefore, this language is insufficient to bind him to the warrant of attorney clauses contained in the original promissory notes and Guaranty.²⁰ The signature affixed by Schwartz upon the Forbearance Agreement does not bear a direct relation to the warrants-of-attorney contained in the promissory notes and Guaranty; therefore, the judgment entered by confession is void and stricken.

BY THE COURT,



RAMY I. DJERASSI, J.

¹⁸ *M & P Mgmt., L.P. v. Williams*, 594 Pa. 489, 494, 937 A.2d 398, 401 (2007)

¹⁹ Forbearance Agreement, § 1.1, attached as Exhibit G to the complaint-in-confession-of-judgment.

²⁰ See, e.g. *Ferrick v. Bianchini*, 69 A.3d 642, 650-651 (Pa. Super. 2013) (finding that a warrant-of-attorney was properly republished in an amended contract because the amended contract specifically mentioned such a clause: “[t]he clause in question was ... **mentioned specifically** in the amendment.” (Emphasis supplied). For additional examples of additional mere general references to the promissory notes and Guaranty, see, Forbearance Agreement, §§ FF-TT, at Exhibit G to the complaint-in-confession-of-judgment.