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

WILMINGTON SAVINGS FUND SOCIETY, FSB	:	August Term, 2019
	:	Case No. 04431
Plaintiff	:	
	:	
v.	:	
	:	
ROBERT TRACY	:	Commerce Program
	:	
Defendant	:	Control No. 19103663

ORDER

AND NOW, this 23rd day of January, 2020, upon consideration of the defendants' petition to strike or open confession of judgment, the answer of plaintiff, the respective briefs, and defendant's reply brief, it is **ORDERED** that the petition to strike is **GRANTED** and the confession of judgment is **STRICKEN**.

BY THE COURT

RAMY I. DJERASSI, J.

Wilmington Savings Fund-ORDRF
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OPINION

Before the Court is a petition to strike or open confession of judgment filed by defendant. For the reasons below, the petition to strike is granted and the judgment entered by confession is stricken.

BACKGROUND

Plaintiff is the Wilmington Savings Fund Society, FSB ("Lender"). On June 19, 2013, Lender loaned funds to an entity named 826 Associates, LP ("Borrower"), as evidenced by a promissory note (the "Note"), in the amount of $2.5 million.[1] Under the terms of this Note, Borrower was required to remit to Lender monthly payments in a specified amount, a final balloon payment of the outstanding principal by July 1, 2018, and late charges in the event of a default committed by Borrower.[2] Additionally, and in consideration for the loan, Borrower granted to Lender a first-priority perfected lien by delivering to Lender a mortgage upon Borrower's real property (the "Mortgaged Property").[3]

Defendant is Mr. Robert Tracy ("Guarantor"), a resident of Philadelphia, Pennsylvania. On July 2, 2013, Guarantor, executed in favor a Lender an UNCONDITIONAL GUARANTY AND SURETY AGREEMENT (the "Guaranty").[4] The Guaranty contained a warrant-of-attorney empowering Lender to confess judgment against Guarantor upon a default committed by Borrower.[5]

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[1] Note, Exhibit A to the complaint.
[2] Id., ¶¶ 2, 6.
[3] Mortgage, Exhibit B to the complaint.
[4] Unconditional Guaranty and Surety Agreement, Exhibit C to the complaint.
[5] Id., ¶ 13.

Guarantor upon a default committed by Borrower.[5]

On July 3, 2018, Lender and Borrower entered into a "First Extension Agreement." Under the terms thereof, the maturity date of original Note was postponed from July 1, 2018 to October 1, 2018.[6] The First Extension Agreement became effective upon the satisfaction of a specific condition precedent, namely, upon payment by Borrower to Lender of a $2,000.00 administration fee.[7] Simultaneously, Lender and Borrower executed a document titled "Allonge" to the Note.[8] The Allonge specifically stated:

> Costs and Expenses. In accordance with the terms of the Modification Agreement, the Borrower shall reimburse ... [Lender] in the amount of $13,207.35, representing the ... [Lender's] out-of-pocket expenses, including preparation, and negotiation of this Allonge, the Extension Agreement and the related agreements.[9]

At about the same time the parties executed the First Extension Agreement and the Allonge, Guarantor executed a "First Reaffirmation of Guaranty." The First Reaffirmation of Guaranty stated:

> 3. Reaffirmation of Liability. The Guarantor hereby unconditionally ratifies, confirms and reaffirms without condition or reservation, that all terms and conditions of the Guaranty continue unimpaired and in full force and effect and secure all of the obligations of the Borrower under the Loan documents and the [First] Extension Agreement.[10]

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[5] Id., ¶ 13.
[6] First Extension Agreement, Exhibit D to the complaint, ¶ 5(a).
[7] Id., ¶ 4(b). This fee was included in the First Extension Agreement to cover the costs for "the negotiation of ... this First Extension [Agreement,] including without limitation ... [Lender's] legal fees and costs, and all other fees and expenses." Id.
[8] "An allonge is a slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." JP Morgan Chase Bank, N.A. v. Murray, 63 A.3d 1258, 1259 (Pa. Super. 2013) (quoting Black's Law Dictionary 76 (Deluxe 7th ed.)). In this case, the parties apparently employed the term "Allonge" not to describe a slip of paper attached to a negotiable instrument, but to identify a new writing modifying an existing document.
[9] Allonge, Exhibit E to the complaint, ¶ 6.
[10] FIRST REAFFIRMATION OF GUARANTY, Exhibit F to the complaint, ¶ 3.

> 4. Ratification. The Extension Agreement, the Loan Documents and the Guaranty are hereby ratified and affirmed in all respects and without condition.[11]

On January 4, 2019, Lender and Borrower entered into a Second Extension Agreement (the "Second Extension Agreement"). Under the terms of the Second Extension Agreement, the maturity date of the Note was further postponed, from October 1, 2018 to April 1, 2019.[12] The Second Extension Agreement became effective upon the satisfaction of a specific condition precedent, namely, upon payment by Borrower to Lender of an $8,000.00 administration fee.[13] Simultaneously, Lender and Borrower executed a document titled "Second Allonge" to the Note. The Second Allonge specifically stated:

> Cost and Expenses. In accordance with the terms of the Second Extension Agreement, the Borrower shall reimburse ... [Lender] in the amount of $8,000.00, representing the ... [Lender's] out-of-pocket expenses, including counsel fees incurred by ... [Lender] in connection with the Loan Documents and development, preparation, and negotiation of the Second Allonge....[14]

At about the same time the parties executed the Second Extension and the Second Allonge, Guarantor executed a "Second Reaffirmation of Guaranty." The Second Reaffirmation of Guaranty tracked word-by-word the language of the First Reaffirmation of Guaranty, *supra*.[15]

Lender entered judgment by confession against Guarantor on August 27, 2019. The complaint-in-confession-of-judgment avers that Borrower failed to repay the

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[11] Id., ¶ 4.
[12] Second Extension Agreement, Exhibit G to the complaint, ¶ 5(a).
[13] Id., ¶ 4(c), 4(d).
[14] Second Allonge, Exhibit H to the complaint, ¶ 6.
[15] Second Reaffirmation of Guaranty, Exhibit I to the complaint, ¶¶ 3-4.

amounts due by the maturity date of the Note.[16] Guarantor filed the instant petition to strike or open the judgment on October 17, 2019; Lender filed its response in opposition to the petition on November 17, 2019; and Guarantor filed a reply to Lender's response in opposition, on December 9, 2019. The petition has been fully briefed and is ripe for a resolution.

DISCUSSION

"A petition to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record."[17] Moreover—

> a warrant of attorney to confess judgment must be self-sustaining.... [T]he warrant must be in writing and signed by the person to be bound by it; and the requisite signature must bear a direct relation to the warrant....[18]

Also—

> [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*.[19]

Finally, **"[a] warrant of attorney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference**."[20]

In the petition to strike the judgment, Guarantor asserts that the two Reaffirmations of Guarantees (the "Two Reaffirmations"), do not restate the warrant-of-attorney from the original Guaranty, nor do they specifically reference that provision.[21] Specifically, Guarantor states that when—

> an agreement is modified [as in this case,] the warrant-of-attorney in the original document is not presumed to carry

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[16] Complaint, ¶ 28.
[17] Vogt v. Liberty Mut. Fire Ins. Co., 900 A.2d 912, 915 (Pa. Super. 2006).
[18] Crum v. F.L. Shaffer Co., 693 A.2d 984, 988 (Pa. Super. 1997) (citing Shidemantle v. Dyer, 218 A.2d 810 (Pa. 1966).
[19] Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267 (Pa. Super. 2015).
[20] Crum v. F.L. Shaffer Co., 693 A.2d 984, 989 (Pa. Super. 1997) (emphasis supplied).
[21] Petition to strike, ¶ 21.

> over to the modified agreement, even when the prior terms are incorporated by reference.[22]

In support of this conclusion, Guarantor relies on a case decided by the Supreme Court of Pennsylvania, Solazo v. Boyle, 76 A.2d 179 (Pa. 1950).

In Solazo, the plaintiff ("Landlord"), leased a coal field to defendant ("Tenant"), under the terms of a written lease. At a later date, Landlord and Tenant entered into an oral contract whereby Tenant was permitted to mine a tract of land not comprised under the written lease. Subsequently, Landlord confessed judgment against Tenant for its failure to pay rent upon the section of the coal field controlled by the terms of the oral lease. Tenant filed a petition to strike the judgment and the trial court granted the petition to strike. Landlord appealed.

Affirming, the Pennsylvania Supreme Court noted that the confessed judgement was invalid because it had been impermissibly entered upon an oral contract. Then, the Supreme Court tackled the Landlord's alternative argument, namely—

> that the agreement to mine the ... [tract controlled under the oral agreement] was not an independent contract but merely a modification of the original written agreement[,] and since an oral modification of a written contract is permitted, the power to confess judgment must necessarily apply to that modification.[23]

The Supreme Court rejected this argument and stated: "[i]t is true that a written contract may be modified by *parole* but it does not follow that the warrant of attorney attaches to that modification."[24] Thus the Supreme Court held that—

> [o]n the contrary, an authority to confess judgment must be clear, explicit and strictly pursued.... A judgment by confession must be self-sustaining and cannot be entered where matters outside the record need be considered to

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[22] Id., ¶ 53.
[23] Solazo v. Boyle, 76 A.2d 179, 180 (Pa. 1950).
[24] Id.,

support it.[25]

This holding stands for two related propositions: first, a judgment entered by confession may stand only where the authority to enter such a judgment is clear and strictly followed; and second, a warrant-of-attorney from a prior agreement does not necessarily attach to a subsequent modification of that prior agreement.

With these principles in mind, the Court returns its attention to the case at hand to determine whether the warrant-of-attorney in the original Guaranty attaches to the two Reaffirmations of Guaranty executed in connection with the First and Second Extension Agreements.

In the response to the petition to strike, Lender asserts that "[t]he Reaffirmations explicitly ratified the [original] Guaranty in its entirety, without modification of alteration, and did so in connection with the extension of the maturity date of the Note."[26] In other words, Lender concludes that the warrant-of-attorney in the original guaranty were explicitly ratified in the Reaffirmations; therefore, the Guarantor remains bound thereunder. In support of this conclusion, Lender relies on Graystone Bank v. Grove Estates, LP.[27]

In Graystone a borrower ("Grove Estates"), obtained a loan from a lender (the "Bank"), as evidenced by a promissory note containing a warrant-of-attorney. Subsequently, Grove Estates and the Bank entered into a "Change-in-Terms Agreement" which extended the maturity date of the promissory note, but lacked a warrant-of-attorney to confess judgment. Grove Estates defaulted, the Bank confessed judgment, and Grove Estates filed a petition to strike. In the petition, Grove Estates argued that

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[25] Id.
[26] Response in opposition to the petition to strike, ¶ 53.
[27] Graystone Bank v. Grove Estates, LP, 58 A.3d 1277 (Pa. Super. 2012).

the absence of a warrant-of-attorney in the Change-in-Terms Agreement created a fatal flaw in the record –a flaw which nullified the confession of judgment altogether. The trial court disagreed with this argument and issued an order denying the petition to strike or open. Grove Estates appealed.

The Pennsylvania Superior Court agreed with the lower court's finding that the Change-in-Terms Agreement had created "nothing more than an extension of the original Promissory Note's maturity date, and not, as ... [Grove Estates] argued, a new, comprehensive agreement setting forth new burdens and benefits upon the parties."[28] The Superior Court also agreed that—

> 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.[29]

The Graystone decision also stands for two related propositions: first, when a modification agreement extends the maturity date of a note, but modifies nothing else, such a modification creates neither new burdens, nor new benefits; and second, when a modification agreement fails to create new burdens or benefits, a party remains bound to the obligations in the prior agreement, including the obligations contained in the original warrant-of-attorney.

With this additional set of principles in mind, the Court turns to the following issue: whether or not the First and Second Extension Agreements created new burdens and/or benefits upon the parties as to modify the original Note.[30]

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[28] Id. at 1280.

[29] Id., s

[30] Deciding whether the First and Second Extension Agreements creates new burdens and/or benefits requires this Court to interpret the pertinent contracts: "[t]he task of interpreting a contract is generally performed by a court... The goal of that tasks is ... to ascertain the intent of the parties as manifested by

As noted earlier, the First Extension Agreement became effective upon the satisfaction of a specific condition precedent which required Borrower to pay an additional administrative fee of $2,000.00.[31] In addition, the first Allonge to the Note, executed simultaneously with the First Extension Agreement, contained the following condition:

> Costs and Expenses. **In accordance with the terms of the Modification Agreement, the Borrower shall reimburse ... [Lender] in the amount of $13,207.35, representing the ... [Lender's] out-of-pocket expenses, including preparation, and negotiation of this Allonge, the Extension Agreement and the related agreements.**[32]

Moreover, the Second Extension Agreement contained another condition precedent which required Borrower to pay to Lender an additional $8,000.00 in administration fees. Finally, the Second Allonge to the Note, executed simultaneously with the Second Extension Agreement, also contained a new requirement:

> Cost and Expenses. In accordance with the terms of the Second Extension Agreement, the **Borrower shall reimburse ... [Lender] in the amount of $8,000.00, representing the ... [Lender's] out-of-pocket expenses, including counsel fees incurred by ... [Lender] in connection with the Loan Documents and development, preparation, and negotiation of the Second Allonge**....[33]

The above-quoted conditions precedent are clear and unambiguous: in exchange for the benefit of obtaining two separate extensions to the original maturity date, Guarantor accepted new financial burdens in the form of administrative fees and out-of-

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the language of the written instrument." Humberston v. Chevron, USA, Inc., 75 A.3d 504, 510 (Pa. Super. 2013).

[31] First Extension Agreement, Exhibit D to the complaint, ¶ 5(a).

[32] [First] Allonge, Exhibit E to the complaint, ¶ 6 (emphasis supplied).

[33] Second Allonge, Exhibit H to the complaint, ¶ 6 (emphasis supplied).

pocket payments, as required by Lender. [34] If this new fee were transacted as a separate fee, then an argument that a new burden is not created may be arguable. But here, the additional amounts become part of the bundle debt owed by the debtor; and this additional amount is unquestionably a new burden.[35]

Having determined that Guarantor received new benefits and new burdens through the First and Second Extension Agreements, this Court must finally tackle whether the two Reaffirmations of Guaranty, and their signatures, bear a direct relation to the warrant-of-attorney found in the original Guaranty. [36]

In a case, Ferrick v. Bianchini, the Pennsylvania Superior Court was asked to decide whether a lower court had erred in finding that a warrant-of-attorney in an existing agreement had been properly incorporated into a modification thereto.[37] In Ferrick, Mr. Bianchini ("Tenant"), entered into a 10 year lease with "Landlord." The lease contained a warrant-of-attorney. After a few days, Tenant, pursuant to an "Assignment of Lease," assigned his lease to a company of which he was a member: SAB LLC (hereinafter, the "Assignee"). Tenant personally guaranteed this assignment, and both the Assignment of Lease and Tenant's personal guaranty contained warrants of attorney. In the spring of 2010, the original lease and the subsequent Assignment of

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[34] "A modification [to a contract] does not displace a prior valid contract; rather, the new contract acts as a substitute for the original contract, but only to the extent that it alters it. Melat v. Melat, 602 A.2d 380, 385 (Pa. Super. 1992). "A contract ... may be modified by a subsequent agreement which is supported by legally sufficient consideration, or a substitute therefor, and meets the requirements for contract formation... Shedden v. Anadarko E. & P. Co., L.P., 136 A.3d 485, 490 (Pa. 2016). An agreement may be modified with the assent of both contracting parties if the modification is supported by consideration. Id., (citing Wilcox v. Regester, 207 A.2d 817, 821 (Pa. 1965).

[35] Another way of looking at this is to imagine a situation where a debtor's failure to pay the additional $8000 triggers a confession of judgment. Debtor's argument that he has paid the original loan would be of no avail because he hasn't repaid the additional amount.

[36] "The task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument." Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 510 (Pa. Super. 2013).

[37] Ferrick v. Bianchini, 69 A.3d 642, 646 (Pa. Super. 2013).

Lease were modified, and the amount of monthly payments therein was specifically reduced by $2,000.00. The modification agreement did not restate the existing warrants-of-attorney, but contained specific language which republished such warrants.

Notwithstanding the modification, Tenant fell into arrears on his monthly payments, and Landlord confessed judgment against him. Tenant filed a petition to strike or open the confessed judgment, Landlord filed a response, and the trial court held a hearing on the matter. At the close of the hearing, the trial court denied the petition to strike or open, and Tenant appealed.[38]

According to Tenant, the trial court had erred when it held that the warrants-of-attorney from the original documents had been properly incorporated into the modification.[39] Instead, Tenant contended that to be effective, the original warrants-of-attorney had to be restated, not merely incorporated, in the modification agreement. The Pennsylvania Superior addressed this argument by analyzing the language purporting to incorporate the existing warrants into the modification agreement. The pertinent language in the modification agreement stated that the existing confession of judgment provisions—

> are hereby **republished** and both Tenant and Assignee agree to be bound thereby in accordance with the terms thereof.[40]

The Pennsylvania Superior Court explained that—

> **[w]hile the amendment ... does not restate the cognovit clause in its entirety, it does much more than generally incorporate the terms of the original lease. The amendment herein states that the confession of judgment provisions contained in both the ... Lease Agreement and the Assignment of Lease**

[38] Id., at 646-647.
[39] Id., 650.
[40] Id., at 650-651 (emphasis supplied).

> **... are hereby republished and both Tenants agree to be bound thereby in accordance with the terms thereof.**[41]

The Pennsylvania Superior Court thus concluded that the Tenant had executed a modification "which ... specifically republished the terms of the confession of judgment and clearly stated the parties' intent that it continue in effect"; in addition, the Court explained that "[t]his ... [was] not a case where the warrant [of attorney] was foisted upon anyone by implication or general and non-specific reference."[42]

Ferrick stands for the proposition that when an existing contract containing a warrant-of-attorney is subsequently modified, the warrant remains effective even if it is not restated in its entirety, so long as it is republished by specific incorporation and not by implication or by general and non-specific reference.

Lastly, the Court turns its attention to the language of the two Reaffirmations of Guaranty, wherein Guarantor purported to reaffirm the original warrants-of-attorney. The two Reaffirmations stated as follows:

> The **Guaranty** is ... **incorporated herein** by reference thereto **as if fully** set forth in this Reaffirmation.[43]

> The **Guarantor** hereby unconditionally **ratifies**, confirms and reaffirms without condition or reservation, that **all** the **terms and conditions of the Guaranty** continue unimpaired and in full force and effect and secure all of the obligations of the Borrower under the Loan Documents and the Extension Agreement[s].[44]

> The Extension Agreement, the Loan Documents and the **Guaranty** are hereby ratified and affirmed in **all** respects and without condition.[45]

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[41] Id., at 652 (emphasis supplied).
[42] Id., at 653.
[43] Reaffirmations of Guaranty, Exhibits F, I to the complaint, at ¶ 1 (emphasis supplied).
[44] Id., Exhibits F, I to the complaint, at ¶ 3(emphasis supplied).
[45] Id., Exhibits F, I to the complaint, at ¶ 4(emphasis supplied).

In this case, the above-quoted language purports to ratify the warrant-of-attorney from the original Guaranty; however, it fails not only to restate the warrant in its entirety, but it also fails to at least republish it by specific incorporation. Rather than restating the warrant or incorporating it by specific reference into the modified agreement, the above-quoted language attempts to ratify the original warrant by employing general and non-specific language –by using the all-encompassing but general terms "all" and "fully" in an effort to incorporate the original warrant-of-attorney into the two Reaffirmations. This drafting is insufficient to bind the Guarantor to the original warrant because the language of reaffirmation fails to specifically refer to the confession of judgment provisions from the original Guaranty; as a result, the signatures of Guarantor in the subsequently-executed Reaffirmations of Guaranty have no direct relation to the original warrant. For this reason, the petition to strike is granted and the judgment entered by confession is stricken.

In conclusion, professionals in the lending industry may see a decision such as this as legal nit-picking. What must be borne in mind is that Pennsylvania is one of a handful of jurisdictions that still employ confession of judgment to enforce debt repayment without a hearing. This is why courts stringently guard the notice provisions of confession of judgment procedure and why language matters in subsequent modifying agreements. General terms purporting to "fully" and "completely" "incorporate" promises and warnings made elsewhere are subject to misunderstanding and confusion especially by laymen. The consequences of a debtor signing a document without specifically knowing how it could be enforced may be severe, and with added attorneys' fees and interest costs. For this reason, courts enforce a warrant of attorney for confession of judgment when notice is specific and unmistakable. If not, a review is

appropriate to make sure debts are lawfully repaid.

BY THE COURT

RAMY I. DJERASSI, J.