

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

| | | |
|------------------------------------|---|----------------------|
| NOAH BANK | : | March Term, 2020 |
| | : | Case No. 00685 |
| <i>Plaintiff</i> | : | |
| | : | |
| v. | : | Commerce Program |
| | : | |
| HEMANI HOSPITALITY, LLC, | : | |
| KRYSTAL PENNSYLVANIA, LLC | : | |
| and HERMANI MANAGEMENT, LLC | : | |
| | : | |
| <i>Defendants</i> | : | Control No. 21010692 |

ORDER

AND NOW, this 18th day of May, 2021, upon consideration of the petition to strike or open judgment by confession, it is **ORDERED** that the petition is **DENIED**. The amount of judgment is modified and reduced, and the attorney's fees are recalculated to reflect the modified sums. The new judgment amount is as follows:

| | |
|-----------------------|----------------|
| Note A | |
| Principal | \$2,677,979.62 |
| Interest | \$186,885.53 |
| Late Charges | \$18,177.22 |
| Additional Costs | \$0.00 |
| Subtotal Note-A | \$2,873,042.37 |
| Note B | |
| Principal | \$630,918.61 |
| Interest | \$56,905.20 |
| Late Charges | \$4,284.07 |
| Additional Costs | \$0.00 |
| Subtotal Note-B | \$692,107.88 |
| A + B | \$3,565,150.25 |
| Attorney's Fees (10%) | \$356,515.00 |
| Costs of Suit | \$156.51 |
| Total | \$3,921,721.76 |

BY THE COURT,



NINA W. PADILLA, J.

OPINION

Plaintiff is Noah Bank (“Lender”), a lending institution. The defendants are three limited liability companies: Hemani Hospitality, LLC, Krystal Pennsylvania, LLC (the “Borrowers”), and Hermani Management, LLC (the “Guarantor”).

THE FIRST NOTE AND FIRST GUARANTY.

On October 24, 2014, Lender loaned \$3,025,000.00 to Borrowers, and Borrowers executed in favor of Lender a 26-year, U.S. Small Business Administration Note (the “First Note”), having a matching face value.¹ The First Note contains a *cognovit* clause empowering Lender to confess judgment against the Borrowers upon their breach and default thereof.² The *cognovit* clause states in pertinent part as follows:

Borrower ... empowers the prothonotary ... upon default ...
TO CONFESS AND ENTER JUDGMENT OR JUDGMENTS against the
Borrower or any of them ... for such sums as are due ... or
may become due under this Note and the other loan
documents, and/or ... to obtain possession of any Collateral
securing any of the obligations, with interest ... [and] with
reasonable legal fees and with costs of suit....³

The First Note was executed by two individuals on behalf of both Borrowers, including an individual named Mayur Khatwala (“Mayur Khatwala”), who held two simultaneous positions: one as the manager of Borrower Krystal Pennsylvania, LLC, and the other as the operating manager of Guarantor.

Also on October 24, 2014, Guarantor signed a document (the “First Guaranty”), guaranteeing all the payments owed by Borrowers to Lender under the First Note. The

¹ Note—A, Exhibit A to the complaint.

² *Id.*, p. 5 of 6.

³ *Id.*

First Guaranty contains a *cognovit* clause empowering Lender to confess judgment against the Guarantor upon a default committed by the Borrowers. This *cognovit* clause states in pertinent part as follows:

Guarantor empowers any attorney of any court of record, after the occurrence of any Event of Default ... to ... confess judgment ... against Guarantor in favor of Lender for the amount of the Obligations and any attorney's commission....⁴

Mayur Khatwala signed this Guaranty as the operating manager of Guarantor.⁵

THE SECOND NOTE AND SECOND GUARANTY.

On November 17, 2014, Lender loaned an additional amount of \$725,000.00 to Borrowers, and Borrowers executed in favor of Lender another 26-year, U.S. Small Business Administration Note (the "Second Note"), with a matching face value.⁶ The *cognovit* clause in the Second Note is identical in language to the *cognovit* clause in the First Note.⁷ The Second Note was executed on behalf of Borrowers by the same two individuals who executed the first, including Mayur Khatwala. As in the first loan-and-note transaction, Guarantor signed a "Second Guaranty" to assure payment of all the obligations of Borrower under the Second Note.⁸ The Second Guaranty also contains a *cognovit* clause with the same language as the *cognovit* clause in the first.⁹ Lastly, Mayur Khatwala executed the Second Guaranty on behalf of Guarantor.¹⁰

Lender confessed judgment against Borrowers and Guarantor on March 6, 2020. The complaint avers that Borrowers and Guarantor defaulted by failing repay the

⁴ First Guaranty, Exhibit B to the complaint, p. 4 of 5.

⁵ *Id.* at signature page, p. 5 of 5.

⁶ Second Note, Exhibit C to the complaint

⁷ *Id.*, p. 5 of 6.

⁸ Second Guaranty, Exhibit D to the complaint, p. 4 of 5.

⁹ *Id.*

¹⁰ Second Guaranty, Exhibit D to the complaint, at signature page, 5 of 5.

amounts owed as they became due.¹¹ Under the First Note and Second Note, Lender claims a combined sub-total of \$3,591,679.40, to which Lender adds 10% for counsel fees (\$359,167.94), and \$156.51 for costs of suit, for a total of \$3,951,003.85.

On January 8, 2021, Borrowers and Guarantor filed the instant petition to strike or open confession-of-judgment; Lender filed its response in opposition, and the filings have been briefed.

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.... In other words, the petition to strike a confessed judgment must focus on any defects or irregularities appearing on the face of the record, as filed by the party in whose favor the warrant was given, which affect the validity of the judgment and entitle the petitioner to relief as a matter of law.... 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.¹²

In the petition to strike, Borrowers and Guarantor aver that the record is fatally flawed and the confession-of-judgment should be stricken because Lender served the original process improperly.¹³ Borrower and Guarantors specifically object to service made personally upon Mayur Khatwala at the latter's New Jersey residence.¹⁴ Borrower and Guarantor conclude that proper service should have been made upon Guarantor at its Trevoze, Pennsylvania address.¹⁵ This challenge to the validity of the judgment is rejected. The Pennsylvania Rules of Civil Procedure instruct that—

¹¹ Complaint, ¶ 10.

¹² *Neduccs v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015).

¹³ Petition to strike, ¶¶ 21, 45-58.

¹⁴ *Id.*, ¶¶ 6, 11, 12.

¹⁵ *Id.*, ¶ 57.

[s]ervice of original process upon a corporation or similar entity shall be made by handing a copy to any of the following persons[,] provided the person served is not a plaintiff in the action:

- (1) an executive officer partner or trustee of the corporation or similar entity, or
- (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
- (3) an agent authorized by the corporation of similar entity in writing to receive service of process for it.¹⁶

In this case, Mayur Khatwala is an executive officer of Guarantor –someone who held the power to contractually bind the Guarantor at all times relevant to this action. The Court is satisfied that service of original process adhered to Pa. R.C.P. 424, and this challenge to the validity of the judgment is rejected. The petition to strike is altogether denied.¹⁷

The Petition to Open.

A petition to open ... judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a ... judgment is within the sound discretion of the trial court....

[I]f a petition to open a judgment is to be successful, it must meet the following test:

- (1) the petition to open must be promptly filed;
- (2) the failure to appear or file a timely answer must be excused; and

¹⁶ Pa. R.C.P. 424—Corporations and Similar Entities.

¹⁷ Borrowers and Guarantor also assert that Lender improperly served its **complaint** to Mayur Khatwala, in New Jersey. (See, petition to strike, ¶ 21). This challenge to the validity of the judgment is likewise rejected: under the Pennsylvania Rules of Civil Procedure, a plaintiff-in-confession-of-judgment is not required to serve any defendants with a **complaint**; rather, the prothonotary “shall immediately give notice of the entry of ... a judgment entered by confession to the defendant by ordinary mail together with a copy of all documents filed....” Pa. R.C.P. 236 (emphasis supplied).

(3) the party seeking to open the judgment must show a meritorious defense...¹⁸

The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.¹⁹

In the petition to open judgment, Borrowers and Guarantor assert a number of defenses: they contend that Lender claims an improper judgment amount, they aver that the Covid-19 pandemic destroyed their ability to meet the financial obligations under the First Note-and-Second Note, and they assert that Lender has not only refused to engage in forbearance negotiations, but has also refused to accept offers for belated payments of any outstanding amounts.²⁰ In addition, they vaguely aver that Lender improperly confessed judgment rather than adhering to certain “Operating Procedures” –that is, procedures announced by the U.S. Small Business Administration to temporarily assist the business community in the aftermath of Covid-19.²¹ These defenses are rejected because Borrowers and Guarantor have failed to offer any evidence in support thereof. For example, Borrowers and Guarantors have not provided evidence tending to show that Lender was contractually obligated to engage in forbearance negotiations, or to accept belated payments after a default, nor any specific evidence demonstrating that Lender violated certain requirements promulgated by the U.S. Small Business Administration. Borrowers and Guarantors have not sustained their burden of proof, and for this reason, the petition to strike or open confession of judgment is denied in its entirety.

¹⁸ Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1270 (Pa. Super. 2015)

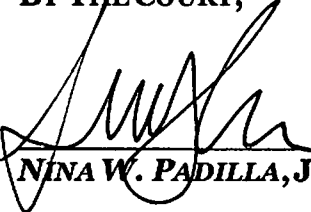
¹⁹ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

²⁰ Petition, ¶¶ 27, 31-35.

²¹ Id., ¶ 71.

However, the Court has noticed that neither the warrants in the First Note-and-Second Note, nor those in the First Guaranty-and-Second Guaranty, allow Lender to recover "Additional Costs." In fact, a careful review of the operative documents and warrants therein shows that Lender is entitled to recover only "such sums as are due ... with interest as above provided ... [and] reasonable legal ... with costs of suit, in addition to "Late Charges ... of up to 5.00% of the unpaid portion of the regularly scheduled payment."²² Conversely, this Court could not detect the presence in the record of any "Additional Costs," which costs Lender has claimed, under each Note, for a combined amount of \$16,529.15. This amount is removed, and the judgment amount is modified accordingly, as shown in the Order issued herewith.²³

BY THE COURT,



NINA W. PADILLA, J.

²² Warrants-of-attorney, First Note-and-Second Note, Exhibits A, C to the complaint. The claim for Late Charges is found at p. 3 of each Note (incorrectly numbered as p. 1), under the section titled "Subsidy Recoupment Fee."

²³ The Court notes that the documents in this action do allow the recovery of costs of suit. Thus, since some costs are authorized in the warrants-of-attorney, the Court will not strike the judgment altogether: "[i]f the judgment as entered is for items clearly within the judgment note, but excessive in amount, the court will modify the judgment and cause a proper judgment to be entered." Dollar Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994). Also, where an item "is ... not ... separate and apart from the substantive debt, its improper inclusion has not resulted in the nullification of the entire judgment." Colony Fed'l Savings & Loan v. Beaver, 361 A.2d 343, 346 (Pa. Super. 1976). However, "if the confessed judgment includes an item not authorized in the warrant, the judgment is void in its entirety and ... [shall] be stricken." PNC Bank v. Bolus, 655 A.2d 997, 1000 (Pa. Super. 1995).