

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

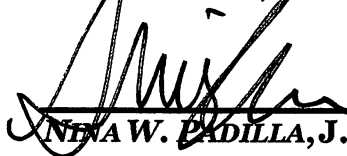
DLJ MORTGAGE CAPITAL, INC.	:	October Term, 2020
	:	Case No. 01083
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
COMMUNITY HOMES PHILADELPHIA, INC.	:	
	:	
<i>Defendant</i>	:	Control No. 20120975

ORDER

AND NOW, this 4th day of May, 2021, upon consideration of the petition to strike or open judgment by confession, the response in opposition, the parties' *memoranda-of-law*, and all papers of record, it is **ORDERED** as follows:

- I. The petition to Strike or open confession-of-judgment is **DENIED**
- II. The judgment amount as confessed by plaintiff is **MODIFIED** and **REDUCED** by \$10,838.64. The new judgment amount is \$193,068.50.

BY THE COURT,



NINA W. PADILLA, J.

OPINION

Before this Court is defendant's petition to strike or open confession-of-judgment. For the reasons below, the petition is denied, and the amount in confession-of-judgment is reduced.

BACKGROUND

On September 27, 2018, a Pennsylvania limited liability company, Commonwealth Homes Philadelphia, LLC (the "Debtor"), executed a balloon promissory note (the "Note"), with a maximum face value of \$420,156.00, in favor of an entity named TVC Finding II, LLC ("TVC").¹ The Note contained a warrant-of-attorney clause wherein Debtor acknowledged its indebtedness to TVC, and empowered TVC to confess judgment against Debtor if the latter failed to discharge certain obligations listed in the Note.² The warrant authorized TVC to claim as money damages—

**THE UNPAID BALANCE OF THE PRINCIPAL AMOUNT ... ALL INTEREST
ACCRUED AND UNPAID THEREON ... ALL OTHER AMOUNTS PAYABLE ...
TO [TVC] UNDER THE TERMS OF ... [THE] NOTE OR ANY OTHER
AGREEMENT ... GUARANTYING THE OBLIGATIONS EVIDENCE BY ... [THE]
NOTE, ... [PLUS] COSTS OF SUIT, AND ALL REASONABLE ATTORNEY'S
FEES....³**

On the same day, September 27, 2018, Debtor secured its obligations under the Note by executing a Commercial Mortgage for the benefit of TVC (the "Mortgage").⁴

At some time unknown, TVC executed a "Note Allonge," whereby TVC transferred its interest in the Note to herein plaintiff DJL Mortgage Capital, Inc. (hereinafter, the "Note Holder").⁵

¹ Note, Exhibit A to the Complaint, p. 1 (un-numbered). The Note bore a maturity date of October 19, 2019. *Id.*, at last paragraph of p. 1 (un-numbered).

² *Id.*, p. 4 (un-numbered).

³ *Id.*

⁴ Mortgage, Exhibit B to the Complaint.

⁵ Note Allonge, Exhibit C to the complaint.

On December 12, 2019, the Note Holder notified Debtor of its default under the Note, and advised that if payment of all the amounts due was not received within ten days, then the Note Holder would exercise its contractual right to confess judgment against Debtor.⁶

On October 15, 2020, the Note Holder entered judgment by confession against Debtor, in the amount of \$203,907.14, which includes the unpaid principal of \$178,096.92, interest of \$13,832.19, an unpaid late charge of 1,139.39, and unpaid fees of \$10,838.64.⁷ The complaint-in-confession-of-judgment avers that Debtor defaulted on its obligations under the Note by failing to make payment when due.⁸ The Note Holder attached to its complaint a sworn affidavit signed by one Cheryl Mallory (“Ms. Mallory”), assistant vice-president of an entity named Servis One, Inc., doing-business-as BSI Financial Services (“BSI”).⁹ In her affidavit, Ms. Mallory stated that BSI acts as a servicer to the Note Holder herein.¹⁰

On December 8, 2020, Debtor timely filed the instant petition to strike or open confession-of-judgment with an accompanying *memorandum* of law, and on December 18, 2020, the Note Holder filed a response in opposition to the petition, which is also accompanied by a *memorandum* of law.

DISCUSSION

Preliminarily, the court notes that the parties have failed to direct any attention upon the choice-of-law provision in the Note; rather, they support their respective arguments by relying exclusively on the law of Pennsylvania. An examination of the

⁶ Letter via certified and regular mail, from Note Holder to Debtor, Exhibit D to the complaint.

⁷ Complaint, ¶ 19.

⁸ *Id.*, ¶ 18.

⁹ Affidavit of Default, attached to the complaint-in-confession-of-judgment.

¹⁰ *Id.* (emphasis supplied).

Note shows that it would be governed and construed “in accordance with the laws of the State of Maryland.”¹¹ The Court will quickly dispose of this matter, and will not engage in a choice-of-law analysis, because the parties have waived the issue by failing to bring it to the attention of this Court.¹²

I. The Petition to Strike Confession of Judgment.

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 deciding if there are fatal defects on the face of the record for the purposes of a petition to strike ... judgment, a court may only look at what was in the record when the judgment was entered.¹³

A. Debtor’s assertion that the Note Holder lacks capacity to sue.

The first challenge to the instant judgment asserts that the Note Holder, a foreign corporation, “may not conduct business or file suit” in Pennsylvania “without first obtaining a certificate of authority” from this Commonwealth, pursuant to 15 Pa. C.S.A. §§ 4121, 4122 and 4141.¹⁴ This challenge to the validity of the judgment is rejected. To explain why Debtor’s challenge is rejected, the court preliminarily notes that the statutory sections relied upon by Debtor, 15 Pa. C.S. §§ 4121, 4122 and 4141 have been repealed since July 2015.¹⁵

¹¹ Note, p. 4 (un-numbered).

¹² Although the Court could not find Pennsylvania law specifically addressing the failure by both parties to raise any issues related to choice-of-law, the courts in this Commonwealth may adopt the analysis of a federal court when that analysis appeals to their reasoning. Kleban v. Nat’l Union Fire Co. of Pittsburgh, 771 A.2d 39, 43 (Pa. Super. 2001). In this instance, the Court is persuaded by the reasoning in Neely v. Club Med., Inc., 63 F.3d 166, 180-181, No. 10 (3d Cir. 1995): (“where a party fails to bring to the Court’s attention the existence of a choice-of-law issue, that issue is waived”).

¹³ Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267–68 (Pa. Super. 2015).

¹⁴ Petition to strike, ¶ 8.

¹⁵ 15 Pa. C.S. §§ 4121, 4122 and 4141, Repealed by 2014, Oct. 22, P.L. 2640, No. 172 § 25, Effective July 2015.

Next, the Court notes that 15 Pa. C.S.A. § 403(a)(8), adopted in 2014, specifically states that certain activities undertaken by foreign corporations in Pennsylvania –for example, the filing of a law suit– do not fall within the ambit of “doing business” in our Commonwealth; consequently such corporations, including the Note Holder herein, do not need to obtain a certificate of authority for seeking to recover a debt through Courts of our Commonwealth. Specifically, 15 Pa. C.S.A. § 403(a)(8) states as follows:

General Rule.—Activities of a foreign filing association or foreign limited liability partnership that do not constitute doing business in this Commonwealth under this chapter shall include the following:

* * *

(8) Securing or collecting debts or enforcing mortgages or security interests in property securing the debts and holding, protecting or maintaining property so acquired.¹⁶

Moreover, the Comment and Source Notes to § 403(a)(8) provides a detailed explanation of the afore-quoted section:

1. Engaging in Litigation.

A foreign association is not “doing business” solely because it resorts to the courts of Pennsylvania to **recover an indebtedness, enforce an obligation**, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies.¹⁷

This statutory language and comment leave no doubt: a foreign association, which includes a corporation such as the Note Holder herein, is not required to register or obtain a certificate just because it seeks to collect a debt through the Courts of our Commonwealth.

¹⁶ 15 Pa. Stat. and C.S.A. § 403(a)(8).

¹⁷ Id. (emphasis supplied).

B. Debtor's assertion that the judgment lacks a proper verification.

In the petition to strike, Debtor asserts that under Rule 1024 of the Pennsylvania Rules of Civil Procedure, “every pleading containing a fact not of record in the action should be verified by a party to the action.”¹⁸ Debtor notes that Ms. Mallory, who signed the verification on behalf of the Note Holder, is not an employee thereof, nor a party to the action. Debtor concludes that the judgment should be stricken for this reason.¹⁹ This argument is rejected.

The pertinent portions of Pa. R.C.P. 1024 instruct that—

[e]very **pleading** containing an averment of fact not appearing on the record ... shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified.

The verification shall be made by one or more of the parties filing the pleadings **unless all the parties ... lack sufficient knowledge or information.... In such cases, the verification may be made by any person having sufficient knowledge or information and belief and set forth the source of the person's as to matters stated not upon his or her own knowledge and the reason why the verification is not made by a party.**²⁰

Preliminarily, the Court notes that Pa. R.C.P. 1024 applies to pleadings but not to petitions to strike or open confessions-of-judgment. Nevertheless, Pennsylvania Courts have routinely overlooked this distinction without a difference, and have applied the requirements of Pa. R.C.P. 1024 to petitions as well:

[i]t is true that the provisions of Rule 1024 are not directly applicable to petitions, because it explicitly addresses itself solely to pleadings, and a petition is not a pleading....

¹⁸ Petition to strike, ¶ 12 (emphasis supplied).

¹⁹ *Id.*, ¶¶ 13-17.

²⁰ Pa. R.C.P. 1024(a); Pa. R.C.P. 1024 (c) (emphasis supplied).

Nevertheless, we see no reason why practice regulating a matter as common and collateral to all proceedings as verification should not be uniform in all cases. This view has been universally urged by Pennsylvania legal writers and has been explicitly accepted by several lower courts.²¹

Next, upon a careful reading of Pa. R.C.P. 1024(c), the Court concludes that where the parties to the action lack sufficient knowledge or information of a fact not appearing on the record, then anyone having such knowledge or information may offer a verification in support of the factual averments, provided that such a person set forth the source of that information with an explanation as to why the verification is not made by a party.²²

Lastly, the Court turns to the verifications and affidavits signed by Ms. Mallory. In her verification, Ms. Mallory asserts that the statements made in the complaint-in-confession-of-judgment “are true and correct to the best of ... [her] knowledge, information and belief,” and she understands that any false statements therein “are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsifications to authorities.” Next, in the affidavit of default, Ms. Mallory discloses under oath that Debtor “is in default of its obligations under the terms of the instruments attached to the Complaint,” and “payment has not been made ... in accordance with the terms [of the instruments].”²³ Next, Ms. Mallory discloses under oath that she is the “Assistant Vice President of [BSI] **Servicer of [Note Holder] DLJ Mortgage Capital, Inc.**”²⁴ Based on the foregoing, the Court finds that although Ms.

²¹ Monroe Cont. Corp. v. Harrison Square, Inc., 405 A.2d 954, 957 (Pa. Super. 1979).

²² The interpretation of the Pennsylvania Rules of Civil Procedure presents a question of law which is the province of the Court, and the task thereunder requires the Court “is to ascertain and effectuate the intention of the Supreme Court.” Roth v. Ross, 85 A.3d 590, 592–93 (Pa. Super. 2014).

²³ Affidavit of Default attached to the Complaint.

²⁴ Affidavit of Cheryl Mallory, sworn and subscribed on October 6, 2020, attached to the complaint-in-confession-of-judgment.

Mallory is not a party hereto, she has sufficient knowledge or information regarding any default committed by Debtor under the terms of the Note and Mortgage: she has such knowledge or information by virtue of her position as an assistant vice-president of BSI, which is an entity tasked with the responsibility of monitoring and managing the loan-and-and-note transactions of plaintiff/Note Holder.²⁵ The Court finds that Ms. Mallory's verification meets the standards of Pa. R.C.P. 1024(c), and for these reasons, the petition to strike is denied.

II. The petition to open confession-of-judgment.

The law on opening judgments by confession is well-settled:

[a] judgment by confession will be opened if the petitioner acts promptly, alleges a meritorious defense, and presents sufficient evidence in support of the defense [as] to require the submission of the issues to a jury.... A meritorious defense is one upon which relief could be afforded if proven at trial.²⁶

The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.²⁷

In the petition, Debtor asserts that the judgment should be opened because the complaint fails to identify the amount of funds actually disbursed to Debtor under the Note, and fails to explain how Debtor's repayments were applied toward the balance.²⁸ These defenses are rejected.

The Pennsylvania Rules of Civil Procedure instruct that a complaint-in-confession-of-judgment "shall contain"—

²⁵ "[A] loan servicer typically processes ... loan payments, responds to borrower inquiries, keeps track of principal and interest paid, manages ... [one's] escrow account ... [if any]. <https://www.consumerfinance.gov/ask-cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/>."

²⁶ *Ferrick v. Bianchini*, 69 A.3d 642, 647 (Pa. Super. 2013).

²⁷ *Haggerty v. Fetner*, 481 A.2d 641, 644 (Pa. Super. 1984).

²⁸ Petition to open, ¶¶ 23, 25-26.

[a]n itemized computation of the amount then due, based on matters outside the instrument, if necessary, which may include interest and attorney's fees authorized by the instrument.²⁹

[T]he itemization contemplated by ... [Pa. R.C.P. 2952(a)(7)] permits the listing of the principle [*sic*] amount due under a commercial lease agreement in one lump sum.³⁰

In this case, well-settled procedural rules and case law permitted the Note Debtor to lump the amount of unpaid principal in one lump-sum; conversely, they did not require the Note Holder to identify Debtor's re-payments, nor to explain how such re-payments, if any, had been applied toward the balance of the Note. Debtor's attempt to open the judgment is un-supported by any evidence that could substantiate its defenses, and for this reason the petition to open judgment is likewise denied.

Nevertheless, Debtor indicates that the Note Holder seeks to recover \$10,836.64 in unpaid fees, and avers that the warrant-of-attorney does not authorize their recovery.³¹ In response to this defense, the Note Holder states that the unpaid fees in this matter "were assessed under the Mortgage on real property which serves as collateral for the loan" that Debtor obtained from TVC.³² In support of this rebuttal, the Note Holder purports to have attached a breakdown of the assessed fees, under Exhibit A to its response. The Court, however, could not find any evidence of the existence of Exhibit A in the record, nor any document showing a breakdown of the assessed, unpaid fees. Thus, once Debtor pointed to the absence of a specific reference to the recovery of unpaid fees, the burden of proof shifted to the Note Holder to show that the recovery of

²⁹ Pa. R.C.P. 2952(a)(7).

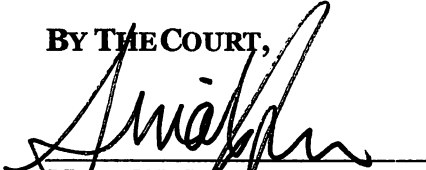
³⁰ Davis v. Woxall Hotel, Inc., 577 A.2d 636, 638 (Pa. Super. 1990).

³¹ Petition to open, ¶¶ 24, 26-27; *Memorandum-of-law* in support of the petition to open judgment, at § III.A.3., at p. 7.

³² Response to the petition to open, ¶ 27.

unpaid fees was authorized. However, with no effective rebuttal to Debtor's defense in this matter, the Court has no choice but to modify and reduce the judgment amount by the amount of unpaid fees as claimed by the Note Holder.³³ Otherwise, the petition to strike or open confession-of-judgment is denied.

BY THE COURT,



NINA W. PADILLA, J.

³³ Where a judgment debtor presents evidence in support of its defense, the burden of proof shift to the judgment holder. Ritchey v. Mars, 324 A.2d 513, 516 (Pa. Super. 1974).