

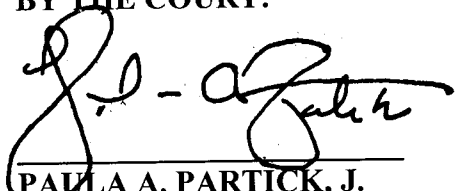
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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

ING PROPERTIES, LLC,	:	December Term 2022	
	:		
Plaintiff,	:		DOCKETED
	:		
v.	:	No. 1606	APR 27 2023
	:		
LYM DEVELOPMENT LLC,	:		R. POSTELL
	:		COMMERCE PROGRAM
Defendant.	:	Commerce Program	
	:		
	:	Control Number 23012507	

ORDER

AND NOW, this 27th day of April 2023, upon consideration of Defendant LYM Development LLC's Petition to Open and/or Strike the Judgment by Confession and Plaintiff ING Properties, LLC's Response in Opposition, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED and DECREED** that Defendant LYM Development LLC's Petition to Open and/or Strike the Judgment by Confession is **DENIED**.

BY THE COURT:

PAULA A. PARTICK, J.

221201606-Ing Properties Llc Vs Lym Development Llc



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

ING PROPERTIES, LLC,	:	December Term 2022
	:	
Plaintiff,	:	
	:	
v.	:	No. 1606
	:	
LYM DEVELOPMENT LLC,	:	
	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 23012507

OPINION

Presently before the Court is Defendant LYM Development LLC’s Petition to Open and/or Strike the Judgment by Confession. For the reasons discussed below, the Petition to Open and/or Strike the Judgment by Confession is denied.

BACKGROUND

Plaintiff ING Properties LLC (“Plaintiff”) is a limited liability company with a principal place of business in Arlington, Virginia. Defendant LYM Development LLC (“Defendant”) is a Pennsylvania limited liability company with a registered agent in Allentown, Pennsylvania.

On November 29, 2021, Defendant executed a promissory note in the amount of \$2,550,000.00 with fixed interest of \$382,500.00 for a term of six (6) months, with interest thereafter at an annual rate of 30%.¹ The Note required that the entire principal balance and the

¹ Complaint in Confession of Judgment ¶ 3; Exhibit “A” to the Complaint in Confession of Judgment -Promissory Note dated November 29, 2021.

fixed interest be due May 28, 2022.² The Note was secured by a Mortgage for the properties located at 901, 903, 905, 907,909 and 911 Emily Street, Philadelphia, PA. ³

The Note defined a default as a failure to make payment when due. In the event of a default, the Note provided for a one-time late charge of two percent (2%) on any outstanding principal balance due. Additionally, the Note included a confession of judgment provision which state as follows:

CONFESSION OF JUDGMENT. BORROWER HEREBY IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEY OR PROTHONOTARY OR CLERK OF ANY COURT IN THE COMMONWEALTH OF PENNSYLVANIA, OR ELSEWHERE, TO APPEAR AT ANY TIME FOR BORROWER AFTER THE AMOUNTS HEREUNDER BECOME DUE AND WITH OR WITHOUT COMPLAINT FILED, CONFESS OR ENTER JUDGMENT AGAINST BORROWER FOR THE ENTIRE PRINIPAL BALANCE OF THIS NOTE AND ALL ACCRUED INTEREST, LATE CHARGES AND ANY AND ALL AMOUNTS EXPENDED OR ADVANCED BY LENDER RELATING TO ANY COLLATERAL SECURING THE INDEBTEDNESS, TOGETHER WITH COSTS OF SUIT AND AN ATTORNEY'S COMMISSION OF TEN PERCENT (10%) OF THE UNPAID PRINICIPAL BALANCE AND ACCRUED INTEREST FOR COLLECTION, BUT IN ANY EVENT NOT LESS THAN FIVE HUNDRED DOLLARS (\$500) ON WHICH JUDGMENT OR JUDGMENTS ONE OR MORE EXECUTIONS MAY ISSUE IMMEDIATELY....⁴

Defendant failed to make its payment of principal and interest upon maturity of the Note on May 28, 2022. Plaintiff sent notice demanding payment; the final notice was sent on December 12, 2022. Plaintiff did not cure the default. On December 16, 2022, Plaintiff filed a Complaint in Confession of Judgment in the amount of \$2,588,956.32 (Principal \$1,962,991.13, Interest \$

² Complaint in Confession of Judgment ¶ 3; Exhibit "A" to the Complaint in Confession of Judgment -Promissory Note dated November 29, 2021.

³ Id. at ¶ 4.

⁴ Id. at Exhibit "A" pg. 5.

576,705.37⁵, Late Charges \$39,259.82 and Attorney Fees \$10,000.00). On January 16, 2023, Defendant filed a Petition to Open and/or Strike the Complaint in Confession of Judgment.⁶ On February 2, 2023, Plaintiff filed a response to the Petition. This matter is now ripe for disposition.⁷

DISCUSSION

Opening and striking a judgment are different remedies subject to different standards. A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record and may be granted only for a fatal defect or irregularity appearing on the face of the record.⁸ The “record” for this purpose is the court record behind the confessed judgment: the complaint in confession of judgment and any exhibits the petitioner attached to it.⁹

“A petition to open a confessed judgment is an appeal to the equitable powers of the court.”¹⁰ The court may open a confessed judgment “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.”¹¹ “A meritorious defense is one upon which relief could be afforded if proven at trial.”¹² Rule 2959(e) provides that “[t]he court shall dispose of the rule on petition and answer, and on any

⁵ Upon default, the interest rate remained thirty (30%) annually on amount owed. Complaint – Exhibit “A” pg. 2.

⁶ Defendant’s Petition to Strike and/or Open the Confessed Judgment is not verified by Defendant. Additionally, Defendant does not attach any exhibits to its Petition.

⁷ Execution on the judgment is proceeding as a motion to stay execution was not filed by Defendant.

⁸ *Resolution Trust Corp. v. Copley Qu-Wayne Assoc.*, 683 A.2d 269, 273 (Pa. 1996).

⁹ *Ferrick v. Bianchini*, 69 A.3d 642, 647 (Pa. Super. 2013)(citation omitted).

¹⁰ *Neducsin v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015).

¹¹ *Id.* at 506 (citation and emphasis omitted).

¹² *Id.*

testimony, depositions, admissions and other evidence,” and “[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.”

¹³ Therefore, “a judgment of confession will be opened if ‘a petitioner seeking relief therefrom produces evidence which in a jury trial would require issues to be submitted to a jury.’ ”¹⁴

A. The Petition to Strike is Denied.

In support of its Petition to Strike the Confessed Judgment, Defendant argues that the judgment should be stricken because the signatures on the Note do not bear a relation to the Confession of Judgment provision in the Note. Additionally, Defendant argues that the provision is not conspicuous as it contains the same or similar font size as the rest of the Note and the Note is unconscionable. For the reasons discussed below, the Petition to Strike is denied.

In *Graystone Bank v. Grove Estates, LP.*,¹⁵ the Superior Court explained the requirements of the warrant of attorney to authorize a confession of judgment and stated the following:

To validate a warrant of attorney appearing in a promissory note, the signature of the executor must “directly relate” to the warrant. How this relationship manifests may be understood by a review of precedent:

We have noted the need for strict adherence to rules governing confessed judgments.[] As a matter of public policy, Pennsylvania applies a similar strict standard to establish the validity of a clause. This is so because “a warrant of attorney to confess judgment confers such plenary power on the donee in respect of the adjudication of his own claims that certain specific formalities are to be observed in order to effectuate the granting of such a power.” *Frantz Tractor Co. v. Wyoming Valley Nursery*, 384 Pa. 213, 120 A.2d 303, 305 (1956). Accordingly, “[a] Pennsylvania warrant of attorney must be signed. And it will be construed strictly against the party to be benefited by it, rather than against the party having drafted it.” *Egyptian Sands Real Estate, Inc. v. Polony*, 222 Pa.Super. 315, 294 A.2d 799, 803 (1972) (citations omitted). “A warrant of attorney to confess judgment

¹³ Pa.R.C.P. 2959(e).

¹⁴ *Neducsin*, at 121 A.3d at 507 (quoting *Foerst v. Rotkis*, 368 A.2d 805, 807–08 (Pa. Super. 1976)).

¹⁵ 58 A.3d 1277 (Pa. Super. 2012), *affirmed sub nom. Graystone Bank v. Grove Estates, L.P.*, 81 A.3d 880 (Pa. 2013)

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.” *L.B. Foster Co. v. Tri-W Const. Co.*, 409 Pa. 318, 186 A.2d 18, 20 (1962) (emphasis added).

A general reference in the body of an executed lease to terms and conditions to be found is insufficient to bind the lessee to a warrant of attorney not contained in the body of the lease unless the lessee signs the warrant where it does appear. In short, a warrant of attorney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference. *Frantz Tractor Co., supra* at 305 [emphasis added]; *accord Egyptian Sands Real Estate, Inc., supra* at 804 (stating, “a warrant of attorney on the second page of a document will not be conclusive against the signer of the first page”), *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1274-1275 (3d Cir.1994) (same). *Hazer v. Zabala*, 26 A.3d 1166 (Pa.Super.2011) (holding cognovit invalid where located in unsigned addendum “incorporated by reference” in, and attached subsequent to signature page of, agreement.).

Here, contrary to Defendant’s averment, the Confession Judgment provision appears conspicuously in the Note in all caps at the top of page five and is clearly demarked as a confession of judgment provision, “**CONFESSION OF JUDGMENT**”¹⁶ and is clearly separated from the other text on the page.¹⁷ Additionally, the signature of Defendant’s Managing Members¹⁸ bears direct relation to the Confession of Judgment provision as it appears immediately after the Confession of Judgment provision and immediately before the following paragraph which is also conspicuous in all caps and emphasized:

PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, BORROWER AGREES TO THE TERMS OF THE NOTE.¹⁹

¹⁶ Emphasis in the original.

¹⁷ Complaint – Exhibit “A” pg. 5.

¹⁸ Michaela Hayes and Zorana Mitic.

¹⁹ Complaint – Exhibit “A” pg 5.

As Defendant's Managing Members' signatures appear on the same page as the Confession of Judgment provision and directly below the Confession of Judgment provision, the signatures of Defendant's Managing Members relate directly to the Confession of Judgment provision which renders the Confession of Judgment provision self-sustaining.²⁰ The Confession of Judgment provision is clear and conspicuous and part of this commercial transaction. Accordingly, the Petition to Strike on this ground is denied.

Defendant also argues that the Complaint in Confession of Judgment should be stricken because the interest rate and late fee set forth in the Note are excessive and therefore unconscionable. It is well established that "[a]bsent fraud or unconscionability, courts should not set aside terms on which sophisticated parties agreed."²¹ If a confessed judgment includes an item not authorized by the warrant, the judgment is void in its entirety and must be stricken. However, if 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. If the judgment was entered for an amount which was grossly excessive, the judgment must be stricken in its entirety.²²

Here, the Confession of Judgment provision authorizes the entry of judgment for "THE ENTIRE PRINCIPAL BALANCE OF THIS NOTE AND ALL ACCRUED INTEREST, LATE CHARGES". Therefore, the inclusion of interest and the late fee is authorized. With respect to the claim of excessiveness, it is well established that any right to charge interest is a privilege

²⁰ Defendant's reliance on the blank initial line on page 5 of the Note is not persuasive as Defendant's Managing Members' signatures appear on page 5 directly below the Confession of Judgment provision.

²¹ *Pops PCE TT, LP v. R & R Rest. Grp., LLC.*, 208 A.3d 79, 87 (Pa. Super. 2019) (quoting *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d 696, 708 (Pa. Super. 2003)).

²² *Centric Bank v. Sciore*, 263 A.3d 31, 43 (Pa. Super. 2021) quoting *Dollar Bank, Fed. Sav. Bank*, 637 A.2d at 314 (citations omitted).

granted by statute and subject to legislative control.²³ Title 41 Pa. C. S. A. § 201 Maximum Lawful Interest Rates governs the maximum lawful interest rate that may be charged on a loan. However, this statute does not apply to business loans.²⁴ As the Note at issue here is a business loan and there is no maximum lawful interest rate that may be charged²⁵, Defendant's Petition to Strike is Denied as there are no fatal defects or irregularities on the face of the record.

b. The Petition to Open is Denied.

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 to require the submission of the issues to a jury.²⁶ A meritorious defense is one upon which relief could be afforded if proven at trial.²⁷ The standard of sufficiency is similar to the standard for a directed verdict, in that we must view the facts most favorably to the moving party, we must accept as true all the evidence and proper inferences in support of the defense raised, and we must reject all adverse allegations.²⁸ Here, other than bold conclusory averments, Defendant has not produced any evidence of its defenses. Defendant has not verified the Petition to Open nor are there any

²³ *Smith v. Mitchell*, 420 Pa. Super. 137, 616 A.2d 17, 21 (1992).

²⁴ *See* 41 Pa. C.S.A. § 201(b)(3) (stating that Section 201(a) "shall not apply to ... business loans").

²⁵ *Gur v. Nadav*, 178 A.3d 851, 857-58 (Pa. Super. 2018) (allowing a 50% interest rate on a business loan because Section 201 "specifically exempts business loans of any principal amount from this statutory limitation, effectively authorizing higher, albeit unspecified, rates in the business setting"); *First Sur. Fin. LLC, v. Taylor Assocs. LP*, 2014 WL 7913573, at *4 (Pa. Ct. Com. Pl. 2014) (allowing a business loan with an interest rate exceeding 25% given the Section 201 exception), *aff'd*, 2015 WL 6460422, at *4 n.2 (Pa. Super. 2015).

²⁶ *Crum v. F.L. Shaffer Co.*, 693 A.2d 984 (Pa. Super. 1997).

²⁷ *Ferrick v. Bianchini*, 69 A.3d 642, 647 (Pa. Super. 2013).

²⁸ *Neducsin v. Caplan*, 121 A.3d 498, 507 (Pa. Super., 2015) citing *Greenwood v. Kadoich*, 239 Pa. Super. 372, 357 A.2d 604, 606 (1976).

supporting affidavits in support of the averments. A Petitioner must offer clear, direct, precise and believable evidence of a meritorious defense, sufficient to raise a jury question.²⁹ Defendant has failed to sustain its burden of proof.

First, Defendant avers that the Note is unconscionable making performance impossible. As discussed above, Pennsylvania law does not mandate a maximum interest rate for a business loan.³⁰ As such the defense of unconscionability as it pertains to the interest rate is not supported by the law. Notwithstanding the settled law with respect to maximum rates of interest in business loans, the notion of unconscionability is not well suited in this case. A contract is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it.³¹ Where “a contract provision affects commercial entities with meaningful choices at their disposal, the clause in question will rarely be deemed unconscionable.”³² Here, there is no indication in the record that Defendant was prevented from negotiating the terms of the Note or that it was forced to agree to terms. Given the lack of evidence and the commercial nature of the agreement in question, the defense of unconscionability fails.

Additionally, Defendant appears to argue that performance under the Note was impossible due to the interest rate and late fees charged. However, the doctrine of impossibility, “will not apply if a performance remains practicable and is merely beyond a particular party's capacity to

²⁹ *Stahl Oil Co., Inc v. Helsel*, 860 A.2d 508, 512, 2004 PA Super 349 (Pa. Super. 2004).

³⁰ 41 Pa. C. S. A. § 201 (b)(3).

³¹ See *Denlinger, Inc v. Dendler.*, 415 Pa. Super. 164, 177, 608 A.2d 1061,1068 (citing *Witmer v. Exxon Corp.*, 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981)).

³² *Citizens Bank National Association v. Acuite Consulting Solutions, LLC.*, 2021 WL 1998451 *3 (Pa. Super. 2021) citing *Vasilis v. Bell of Pennsylvania*, 598 A.2d 52, 54 (Pa. Super. 1991).

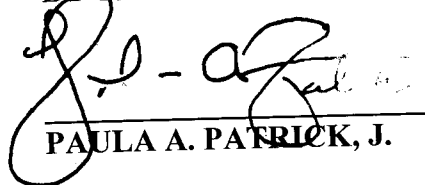
render it ... the financial inability of one of the parties to complete obligations under the contract will not effect a discharge.”³³ As Defendant’s impossibility defense is directly related to its financial ability to perform, the impossibility defense fails.

Lastly, Defendant argues that the judgment should be opened because an oral modification was made to the Note extending the term and the interest rate. Defendant failed to produce clear, direct and precise evidence of this modification. As such, the Petition to Open in this regard is also denied.

CONCLUSION

Based on the foregoing, the Petition to Open and/or Strike is Denied.

BY THE COURT:



PAULA A. PATRICK, J.

³³ 9795 *Perry Highway Management, LLC v. Bernard*, 273 A.3d 1098, 1104 (Pa.Super., 2022) citing *Luber v. Luber*, 418 Pa.Super. 542, 614 A.2d 771, 774 (1992); see also *Felix v. Giuseppe Kitchens & Baths, Inc.*, 848 A.2d 943, 947 (Pa. Super. 2004) (“It is well-settled that a party assumes the risk of his or her own inability to perform contractual duties. A claim of personal inability to perform the actions contemplated ... does not rise to the level of legal impossibility.”).

