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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY OCT 31 2023
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL


S. HARVEY, JR.
CIVIL TRIAL DIVISION

COBRA BLACK II, LLC, : February Term 2023
Plaintiff, :
v. : No. 1675
FERNANDO ALVEREZ, :
Defendant. : Commerce Program
:
: Control Number 23070729

ORDER

AND NOW, this 31st day of October 2023, upon consideration of Defendant Fernando Alvarez's Petition to Open and/or Strike Confessed Judgment, Plaintiff's Response in Opposition, Reply, and in accord with the attached Opinion, it hereby is **ORDERED** that the Petition to Strike is **GRANTED** and the Judgment is **Stricken** from the Judgment Index.

BY THE COURT



RAMY I. DJERASSI, J.

230201675-Cobra Black Ii, Llc Vs Alvarez



23020167500021

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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COBRA BLACK II, LLC,	:	February Term 2023
	Plaintiff,	:
v.	:	No. 1675
FERNANDO ALVEREZ,	:	
	Defendant.	: Commerce Program
	:	
	:	Control Number 23070729

OPINION

Presently before the Court is Defendant Fernando Alvarez’s (hereinafter “Defendant”) Petition to Open and/or Strike Confessed Judgment. For the reasons discussed below, the Petition to Strike is Granted and the Judgment is stricken from the Judgment index.¹

BACKGROUND

On July 22, 2021, Plaintiff Cobra Black II, LLC (“Plaintiff”), Pennsylvania Limited Liability Company², and Virtual Energy LLC (“Borrower”) and Defendant allegedly entered into a Loan and Security Agreement.³ The Loan and Security Agreement was executed by Defendant as the Manager of Borrower and as the Guarantor/Surety. Pursuant to the terms of the Loan and Security Agreement, Plaintiff agreed to lend Borrower the sum of \$1,000,000.00.⁴ The Loan was

¹ Since the Petition to Strike the Confessed Judgment is granted, the Petition to Open the Confessed Judgment is not addressed.

² The documents attached to the Complaint in Confession of Judgment identify the Plaintiff as Cobra Black 2 LLC, a Delaware Limited Liability Company. Plaintiff alleges that a scrivener error exists in the documents and that the correct name of the Lender/Plaintiff is Cobra Black II, LLC and that it is a Pennsylvania Limited Liability Company.

³ See, Loan and Security Agreement, attached to the Complaint in Confession of Judgment as Exhibit “C”.

⁴ Id.

to be made in two disbursements; \$250,000.00 paid on the closing date of the Loan (July 22, 2021) and \$750,000.00 thirty (30) days after the closing date of the loan as long as no default under any of the Loan Documents existed.⁵ The Promissory Note provides for interest to accrue on the outstanding principal balance of the Note at the annual rate equal to 2%⁶ and sets forth the following payment terms: monthly payments of accrued interest on the outstanding principal balance of the Note beginning August 5, 2021, and continuing on the fifth day of each month thereafter through the maturity date. A final balloon payment equal to the entire unpaid principal balance of the Note was payable two months from the date of the loan. This is referred to as the Maturity date.⁷ The Promissory Note attached to the Complaint in Confession of Judgment is not signed by Defendant.⁸

As security for the Loan, Borrower and Defendant respectively pledged all Intellectual Property with some exceptions, a security interest in personal property, and Defendant pledged 49% of the Membership Interest of Virtual Energy Holdings Real Estate, LLC in favor of Lender.⁹ Also, Defendant agreed to unconditionally and irrevocably guarantee and become a surety to Plaintiff for the prompt performance and payment in full of the Obligations pursuant to the Guaranty dated the same date herewith when he executed the Loan and Security Agreement.¹⁰

⁵ The Promissory Note dated July 22, 2021, attached the Complaint in Confession of Judgment as Exhibit "D" § 2 (a).

⁶ Id. § 1.

⁷ Id. at § 2 (a)(b).

⁸ Id.

⁹ Exhibit "C" §§ 2.3.1-3.

¹⁰ Id. §2.3.4.

In addition to the executed Loan and Security Agreement and the unsigned Promissory Note, an Unconditional Guaranty and Suretyship Agreement (“Guarantee”) between Plaintiff and Defendant is attached to the Complaint in Confession of Judgment dated July 22, 2021.¹¹ The Guarantee provides that Defendant agreed to “jointly, severally, unconditionally and irrevocably guarantee[s]” to Plaintiff and become a surety to Plaintiff for the indebtedness and obligations of the Borrower.¹² The Guarantee also included a confession of judgment provision which included a warrant of attorney which provides in part as follows:

SURETY [Defendant] EMPOWERS ANY ATTORNEY OF ANY COURT OF RECORD IN PENNSYLVANIA TO APPEAR FOR SURETY IN ANY OR ALL ACTIONS, WHICH MAYBE BROUGHT AFTER DEFAULT UNDER OR BREACH OF THE OBLIGATIONS DESCRIBED HEREIN AGAINST SURETY UNDER THIS AGREEMENT, AND TO CONFESS UPON AND ENTER JUDGMENT AGAINST SURETY FOR THE UNPAID BALANCE OF PRINCIPAL REMAINING DUE FROM BORROWER AND FOR ANY OTHER LIABILITIES ARISING UNDER THE OBLIGATIONS, PLUS ALL COSTS, EXPENSES, AND REASONABLE ATTORNEYS’ FEES INCURRED (NOT TO EXCEED 15% OF THE BALANCE OF INDEBTEDNESS EXISTING AT THE TIME OF DEFAULT) INCURRED BY REASON OF SAID DEFAULT AND IN COLLECTION OF ALL OF THE OBLIGATIONS...

SURETY [Defendant], BEING FULLY AWARE OF THE RIGHT TO NOTICE AND A HEARING CONCERNING THE VALIDITY OF ANY AND ALL CLAIMS THAT MAY BE ASSERTED AGAINST SURETY BY LENDER BEFORE A JUDGMENT CAN BE ENTERED HEREUNDER OR BEFORE EXECUTION MAY BE LEVIED ON SUCH JUDGMENT AGAINST ANY AND ALL PROPERTY OF SURETY [Defendant], HEREBY WAIVES THESE RIGHTS AND AGREES AND CONSENTS TO JUDGMENT BEING ENTERED BY CONFESSION IN ACCORDANCE WITH THE TERMS HERETO AND EXECUTION BEING LEVIED ON SUCH JUDGMENT AGAINST ANY AND ALL PROPERTY OF SURETY, IN EACH CASE WITHOUT FIRST GIVING NOTICE AND THE OPPORTUNITY TO BE HEARD ON THE VALIDITY OF THE CLAIM OR CLAIMS UPON WHICH SUCH JUDGMENT IS ENTERED.

¹³

¹¹ Unconditional and Suretyship Agreement attached to the Complaint in Confession of Judgment as Exhibit “B”.

¹² Id. at ¶ 1.

¹³ Id. at ¶ 13.

The Unconditional Guaranty and Suretyship Agreement is not executed by Defendant.¹⁴

While the Unconditional Guaranty and Suretyship Agreement is not executed by Defendant, a document entitled Confession of Judgment Explanation and Disclosure of Rights/Waivers (Guarantor) (hereinafter referred to as “Disclosure Document”) dated July 29, 2021, is executed by Defendant. The Disclosure Document provides in part as follows:

1. The Undersigned has executed and delivered to the Lender the Unconditional Guaranty and Suretyship Agreement described above (the “Confession Document”). As an additional and material inducement to the Lender’s making the Loan, the Lender has required, and the Undersigned agreed to give the Lender, warrants of attorney to confess judgment against the Undersigned to collect payments due under the Confession Document. This document is executed and delivered to the Lender by the Undersigned to demonstrate that the Undersigned knowingly, intelligently, and voluntarily recognizes and waives the right to notice and hearing prior to the entry of the confessed judgment and such other rights that the Undersigned may have, if confessions of judgment were not included in the Confession Document.
2. The Undersigned clearly and specifically acknowledges, understands and agrees that”
 - (A) THE WARRANTS OF ATTORNEY TO CONFESS JUDGMENT CONTAINED IN THE CONFESSION DOCUMENT ARE PROVISIONS PERMITTING THE LENDER TO ENTER JUDGMENT BY CONFESSION AGAINST THE UNDERSIGNED.
 - (B) THE CONFESSION DOCUMENT ALSO CONTAINS PROVISIONS PERMITTING THE LENDER TO FORECLOSE UPON, ATTACH, LEVY OR TAKE POSSESSION OR OTHERWISE SEIZE PROEPRTY OF THE UNDERSIGNED, IN FULL OR PARTIAL PAYMENT OF THE JUDGMENT, WITHOUT EITHER NOTICE OR A HEARING.
 - (C) BY SIGNING THE CONFESSION DOCUMENT CONTAINING THE CONFESSION OF JUDGMENT CLAUSE, THE UNDERSIGNED WILL GIVE UP THE RIGHT TO ANY NOTICE OR OPPORTUNITY TO BE HEARD PRIOR TO THE ENTRY OF A CONFESSED JUDGMENT ON THE RECORDS OF THE COURT.
 - (D) BY SIGNING THE CONFESSION DOUCMENT CONTAINING THE

¹⁴ Unconditional Guaranty and Suretyship Agreement attached to the Complaint in Confession of Judgment as Exhibit “B”. Exhibit “B” is an 8-page document. The first seven pages are numbered. The last page, the signature page, is not numbered.

CONFESSION OF JUDGMENT CLAUSE, THE UNDERSIGNED AGREES THAT THE LENDER CAN ENTER JUDGMENT AFTER THE OCCURRENCE AND DURING THE CONTINUANCE OF AN EVENT OF DEFAULT...

3. THE UNDERSIGNED ACKNOWLEDGES, KNOWS AND UNDERSTANDS THAT IT IS THE CONFESSION OF JUDGMENT CLAUSE IN THE CONFESSION DOCUMENT WHICH GIVES THE LENDER THE RIGHTS ENUMERATED IN THE SUBPARAGRAPHS A THROUGH F OF PARAGRAPH 2 ABOVE. IF THE UNDERSIGNED DOES NOT SIGN THE CONFESSION DOCUMENT WHICH CONTAINS CONFESSION OF JUDGEMENT CLAUSE (S), THE UNDERSIGNED UNDERSTANDS THAT THE UNDERSIGNED WOULD HAVE THE FOLLOWING RIGHT. ...
4. **The Undersigned, with full and complete understanding of these rights, NEVERTHELESS FREELY, KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY CHOOSES TO SIGN THE CONFESSION DOCUMENT WITH THE INTENTION BEING TO GIVE UP, WAIVE, RELINQUISH, AND ABANDON THE UNDERSIGNED'S KNOWN RIGHTS (AS DESCRIBED IN PARAGRAPH 3 ABOVE) AND TO BE SUBJECT TO THE CIRCUMSTANCES DESCRIBED IN PARAGRAPH 2 ABOVE. ...¹⁵**

Lender alleges that Borrower defaulted under the Loan and Security Agreement for failing to remit principal and interest payments when due. Additionally, Plaintiff alleges that Borrower is in default because it failed to deliver an executed Unconditional Guaranty and Suretyship Agreement. Additionally, Plaintiff alleges that Defendant failed to deliver to Plaintiff an executed Pledge Agreement that expressly requires Defendant to pledge 49% of the Membership Interests of Virtual Energy Holdings Real Estate LLC in favor of Plaintiff.

On January 9, 2023, Plaintiff provided Defendant's Counsel with a notice of default and gave Defendant an opportunity to cure the default. ¹⁶

¹⁵ The Unconditional Guaranty and Suretyship Agreement attached to the Complaint in Confession of Judgment as Exhibit "A".

¹⁶ The Court notes that the documents attached to the Complaint in Confession of Judgment whether executed or not do not contain a notice provision designating an address and person to be notified.

On February 15, 2023, Plaintiff Cobra Black II, LLC filed a Complaint in Confession of Judgment against Defendant in the amount of \$798,077.59¹⁷. Defendant was served with the Complaint in Confession of Judgment with all attachments on February 23, 2023.¹⁸ Plaintiff filed writs of execution. On July 6, 2023, Defendant filed a Petition to Open and/or Strike Confessed Judgment. Plaintiff responded and the Petition is now ripe for review.

DISCUSSION

A petition to strike a confessed judgment and a petition to open a confessed judgment are distinct remedies; they are not interchangeable.¹⁹ 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.²⁰ In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, *i.e.*, the complaint and the documents which contain confession of judgment clauses. Matters *dehors* the record filed by the party in whose favor the warrant is given will not be considered. If the record is self-sustaining, the judgment will not be stricken. An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.²¹

¹⁷ This figure represents the following: Principal Amount Due: \$762,445.78, Interest from date of last payment September 1, 2022, through February 15, 2023 (2% + 5% default rate) \$24,758.31 and attorneys' fees \$10,873.50.

¹⁸ The docket reflects that the Court's attempt to serve Defendant was not successful as the mail was marked returned on April 10, 2023.

¹⁹ *Hazer v. Zabala*, 26 A.3d 1166, 1169 (Pa. Super. 2011).

²⁰ *Centric Bank v. Sciore*, 263 A.3d 31, 36–37 (Pa. Super. 2021), citing *Resolution Trust Corp. v. Copley Qu-Wayne Associates*, 546 Pa. 98, 683 A.2d 269, 273 (1996).

²¹ *Id.* citing *Hazer v. Zabala*, 26 A.3d 1166, 1169 (Pa. Super. 2011) (quoting *Resolution Trust Corp.*, *supra*).

In contrast, a petition to open a confessed judgment is an appeal to the equitable powers of the court. 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.”²² “A meritorious defense is one upon which relief could be afforded if proven at trial.”²³ When determining a petition to open a judgment, matters *dehors* the record filed by the party in whose favor the warrant is given, *i.e.*, testimony, depositions, admissions, and other evidence, may be considered by the court.²⁴

Thus, 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 affects the validity of the judgment and entitles the petitioner to relief as a matter of law.²⁵ Here, there is a fatal defect and irregularity appearing on the face of the record and the judgment must be stricken.

“[A] warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law” and is “equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword.”²⁶ For that reason, Courts of this Commonwealth require a warrant of attorney to confess judgment to be self-sustaining; the warrant must be in writing and signed by the person to be bound by it; and the requisite signature must bear a direct

²² *Ferrick v. Bianchini*, 69 A.3d 642, 647 (Pa. Super. 2013).

²³ *Id.*

²⁴ *Id.*

²⁵ *Stoltzfus v. Green Line Labs, LLC*, 2023 WL 6206454, at *4 (Pa. Super. 2023).

²⁶ *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234, 236 (1953).

relation to the warrant and may not be implied extrinsically nor imputed from assignment of the instrument containing the warrant.²⁷

Here, Plaintiff relies upon the Disclosure Document, signed by Defendant, to confess judgment against Defendant. The signature on the Disclosure Document is not sufficient to authorize this confession of judgment as the signature does not bear a direct relation to the warrant of attorney contained in the Guarantee. While the Disclosure Document does discuss confession of judgments, explains its ramifications, and seeks an acknowledgment that a confession of judgment provision exists, it is not warrant of attorney. Consequently, the Disclosure Document is insufficient to bind Defendant to the Guarantees' warrant of attorney.

The decision of the Court in *Griffin Oil Co. v. Toms*²⁸, a case factually similar to this matter, is instructive. In *Griffin*, plaintiff entered a judgment against defendant on a warrant of attorney contained in an "Equipment Agreement." The "Equipment Agreement", like the Guarantee here, was not signed by defendant, but it was attached to an Owner's Consent which was signed by defendant. The Owner's Consent, like the Disclosure Document here, acknowledged notice of the agreement and contained an assent to its terms and conditions. The trial court struck the judgment. On appeal, the Superior Court affirmed the trial court's decision to strike the judgment. The Court held that there was no authority to enter a judgment by confession against defendant who had not signed the warrant of attorney; a judgement by confession must be self-sustaining on the record.²⁹

²⁷ *Crum v. F.L. Shaffer Co.*, 693 A.2d 984, 988 (Pa. Super. 1997), quoting *Shidemantle v. Dyer*, 421 Pa. 56, 218 A.2d 810, 811 (1966).

²⁸ 170 Pa. Super. 203, 85 A.2d 595 (1952).

²⁹ *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953), citing *Griffin Oil Co. v. Toms*, 170 Pa. Super. 203, 85 A.2d 595.

A warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law.³⁰ As such, it is imperative that the signature on any document containing such a provision be present and that the signature relates to the warrant provision. Here, Defendant did not sign the Guarantee which contained the confession of judgment provision and the signature on the Disclosure Document, a separate document, is not sufficient to confess judgment as it does not directly relate to the warrant and is not self-sustaining.

CONCLUSION

Based on the foregoing, Defendant's Petition to Strike the Judgment is Granted and the judgment shall be stricken from the judgment index.

Date: October 31, 2023

BY THE COURT



RAMY I. DJERASSI, J.

³⁰ *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953).