

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

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SANTANDER BANK, N.A.

Plaintiff

v.

KING DRIVE CORP. *et al.*

Defendants

March Term, 2014

Case No. 03330

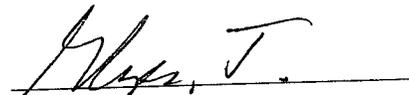
Commerce Program

Control No. 14042071

ORDER

AND NOW, this 23rd day of July, 2014, upon consideration of the petition of defendants King Drive Corp. *et al.* to stay, strike, order discovery, hold a hearing, and/or open judgment, the response in opposition of plaintiff Santander Bank, N.A., the respective *memoranda* of law, the supplemental brief of defendants filed on July 9, 2014, and after a hearing held on the same day, it is **ORDERED** that the petition is **DENIED**.

By The Court,


Glazer, J.

Santander Bank, N.A. Vs-ORDER



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MEMORANDUM OPINION

Before the Court is the petition of defendants to open, strike order discovery, hold a hearing or stay the complaint in confession of judgment of plaintiff. For the reasons stated below the petition is denied.

Background

Plaintiff Santander Bank (“Santander”) and defendants King Drive Corporation (“King Drive”) and A La Carte Enterprises (“A-La-Carte”), entered into a number of commercial loan agreements beginning in 2007. Under these contractual relationships, Santander agreed to provide funds to defendants for the development of a golf course and annexed facilities in Dauphin County, Pennsylvania.

On July 3, 2007, Santander and King Drive executed a Construction Loan and Security Agreement (“Loan No. 1”).¹ Under the terms of Loan No. 1, Santander agreed to provide to King Drive funds in the amount of \$2 million. The maturity date of this

¹ Construction Loan and Security Agreement, Exhibit A to the complaint in confession of judgment.

loan, July 1, 2009, could be extended for one year subject to the conditions contained in the Loan Agreement.² The Loan No. 1 agreement contained a pacing provision which required borrower to sell a specified number of property lots within each year. The promissory note on Loan No. 1 was guaranteed by individual defendants Richard C. Angino and Alice K. Angino (the “Anginos”).³ Furthermore, the promissory note on Loan No. 1 was secured by a mortgage on a property (the “Mockingbird Drive Property”), which was owned by defendant King Drive.

On November 28, 2007, King Drive executed and delivered to Santander a Mortgage Loan Note in the amount of \$3.5 million for a second loan provided by Santander (Loan No. 2).⁴ On the same date, King Drive also executed and delivered to Santander a Line of Credit Promissory Note, in the amount of \$750,000, for a loan provided by Santander to cover the working capital needs of King Drive (Loan No. 3).⁵ In addition, Loans Nos. 2 and 3 were secured by an Unlimited Guaranty and Suretyship Agreement executed by the Anginos. This agreement was accompanied by an “Explanation and Waiver of Rights Regarding Confession of Judgment,” which was executed by the Anginos.⁶ Pursuant to the language therein, the Anginos acknowledged that Santander could exercise the right to confess judgment against them.

On November 28, 2012, defendant A-La-Carte executed and delivered to Santander a Line of Credit Promissory Note for a fourth loan (“Loan No. 4”), in the amount of \$750,000. Pursuant to the Line of Credit Promissory Note, A-La-Carte empowered Santander to confess Judgment against A-La-Carte in any court of record in

² *Id.*, Article 1.1 Definitions—Maturity Date.

³ Guaranty and Suretyship Agreement from Richard C. Angino and Alice K. Angino, Exhibit C to the complaint in confession of judgment.

⁴ Exhibit D to the complaint in confession of judgment.

⁵ Exhibit E to the complaint in confession of judgment.

⁶ Exhibit F to the complaint in confession of judgment.

Pennsylvania or elsewhere.⁷ Loan No. 4 was also guaranteed by the Anginos under an Unlimited Guaranty and Suretyship Agreement dated November 28, 2014.⁸ The above mentioned guaranty and suretyship agreement was also backed by an Explanation and Waiver of Rights Regarding Confession of Judgment. Pursuant to the language in the waiver, the Anginos “irrevocably and unconditionally” waived any immunity for themselves, their properties and assets, in the event of any legal suit arising under Loan No. 4.⁹ In addition, Loan No. 4 was also guaranteed under the terms of an Unlimited Guaranty and Suretyship Agreement executed by Angino & Rovner, P.C. (“Angino & Rovner”), a law firm controlled in whole or in part by individual defendant Richard C. Angino, Esquire.

On July 14, 2011, Santander and defendants entered into a “Loan Modification Agreement.” Pursuant to this loan modification, the maturity date for repayment of all loans was extended to December 31, 2013.¹⁰ In addition, defendants King Drive, A-La-Carte, Angino & Rovner, Richard C. Angino and Alice K. Angino, agreed to supplement collateral security to the loans with additional mortgages upon the residence and vacation home of the Anginos, as well as a separate parcel of land owned by defendants.¹¹

On July 19, 2012, the parties entered into a “First Amendment to Agreement Modification of July 14, 2011.”¹² On December 27, 2012, the parties entered into a Second Amendment to the Modification Agreement dated July 14, 2011.¹³ The original

⁷ Exhibit I to the complaint in confession of judgment.

⁸ Exhibit J to the complaint in confession of judgment.

⁹ *Id.*, ¶ 6.7.

¹⁰ Exhibit M to the complaint in confession of judgment, ¶ 4(a).

¹¹ *Id.*, ¶ 12.

¹² Exhibit N to the complaint in confession of judgment.

¹³ Exhibit O to the complaint in confession of judgment.

loan modification agreement and its two amendments contained warrants of attorney to confess judgment against each defendant in any court of record.¹⁴

On February 1, 2013, the instant defendants filed a complaint in the Court of Common Pleas, Berks County, against Santander's predecessor in interest and two other parties.¹⁵ The complaint asserted claims which included breach of contract, breach of fiduciary duty and breach of the duty of good faith and fair dealing. On June 25, 2013, the Court of Berks County sustained the preliminary objections to the complaint, dismissed the complaint in its entirety, and granted the instant defendants leave to file an amended complaint. On July 11, 2013, the instant defendants filed an amended complaint in the Court of Berks County against Santander's predecessor in interest and another defendant, Weir and Partners, LLP. However, the Berks County court found that the amended complaint offered allegations which were substantially similar to those asserted in the original complaint. Consequently, the court in Berks County again sustained the preliminary objections to the amended complaint. Herein defendants filed an appeal which is still pending before the Pennsylvania Superior Court.

By letter dated July 17, 2013, Santander informed the Anginos that they were in default for failure to pay to Santander \$500,000 as required pursuant to the modifications to the loan agreements executed by the parties. The letter gave the Anginos ten (10) days to cure the default.¹⁶ None of the instant defendants was able to cure.

On March 20, 2014, Santander filed a praecipe for entry of judgment by

¹⁴ See e.g. Second Amendment to the Modification Agreement dated July 14, 2011, Exhibit O to the complaint in confession of judgment, ¶ 5.

¹⁵ Angino & Rovner, P.C., King Drive Corp., A La Carte Enterprises, Inc., Richard C. Angino and Alice K. Angino v. Sovereign Bank, N.A., Weir & Partners, LLP and Cushman and Wakefield National Corporation, case No. 13-1563.

¹⁶ Exhibit P to the complaint in confession of judgment.

confession with an accompanying complaint. On April 17, 2014, all defendants in the instant action filed a petition to stay, strike, order discovery, hold a hearing, and/or open judgment, accompanied by a *memorandum* of law. Santander timely filed a response and *memorandum* of law in opposition to the petition of defendants. On June 5, 2014, the parties met at an unsuccessful settlement conference chaired by a Court-appointed Judge *pro—tempore*. Subsequently, the Court held a hearing on July 9, 2014.¹⁷ At the hearing, individual defendant Richard C. Angino, Esquire, appeared as counsel on behalf of all defendants.

Discussion

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. 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. However, if the truth of the factual averments contained in such record is disputed, then the remedy is by a proceeding to open the judgment and not to strike.¹⁸

I. Defendants empowered Santander to bring the instant action in the Court of Common Pleas, Philadelphia County.

Defendants' petition argues that the forum selection clause of the Construction Loan and Security Agreement does not empower Santander to bring the instant action

¹⁷ The court notes that "in the context of a judgment confessed ... the hearing required to comport with due process means simply an opportunity to be heard; it does not require a proceeding comparable to a full trial, but may be satisfied by other procedural opportunities to be heard, such as a petition to open judgment, a stay of execution, a rule to show cause why the judgment should not be opened, depositions to support the allegations in the petition, and oral argument." Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., Inc., 431 Pa. Super. 541, 551, 637 A.2d 309, 313 (1994) citing N. Penn. Consumer Disc. Co. v. Shultz, 250 Pa. Super. 530, 536, 378 A.2d 1275, 1278 (1977).

¹⁸ Resolution Trust Corp. v. Copley Qu-Wayne Associates, 546 Pa. 98, 106, 683 A.2d 269, 273 (1996).

in the Court of Common Pleas, Philadelphia County. The pertinent language in the Construction Loan Security Agreement states:

Borrower and each of the Sureties irrevocably consent to the exclusive jurisdiction of the Court of Common Pleas of Dauphin County and the Federal District Court for the Middle District of Pennsylvania ... **provided** that nothing contained in this Agreement will prevent [Santander] from bringing any action ... against Borrower ... within any other county, state or other foreign or domestic jurisdiction.... Borrower and each of the Sureties **waive** any objection to venue and any objection based on a more convenient forum in any action instituted under this Agreement.¹⁹

In Pennsylvania,

[t]he 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. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.²⁰

In this case, the language of the Construction Loan and Security Agreement clearly and unambiguously requires defendants to bring any action exclusively in the Court of Common Pleas of Berks County or in the Federal District Court for the Middle District of Pennsylvania. The same provision, however, empowers Santander to bring any legal action, including the instant complaint-in-confession-of-judgment, in any other county, state and jurisdiction. Defendants agreed to the terms of the agreement above and may not successfully challenge Santander's decision to file the instant

¹⁹ Construction Loan and Security Agreement, ¶ 10.13, Exhibit A to the complaint in confession of judgment (emphasis supplied).

²⁰ Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 304-05, 469 A.2d 563, 566 (1983).

confession-of-judgment in the Court of Common Pleas of Philadelphia County.

II. The Anginos gave additional collateral security through mortgages upon their private residence and vacation home.

Next, petitioners argue that Santander's complaint in confession of judgment should be stricken because it seeks to confess judgment against the Anginos personal residence and vacation home, which, according to defendants, should not be subject to confession and execution.²¹ This defense lacks any merit because the Loan Modification Agreement dated July 14, 2011 clearly and unambiguously required the Anginos to place their private residence and vacation home as additional security to their obligations.²² The Anginos, as guarantors and sureties to the loans, agreed to place their residence and vacation home as collateral and may not assert this defense against the complaint in confession of judgment of Santander.

III. Defendants were not entitled to extend the maturity date of their obligations.

Petitioners argue that Santander failed to allow defendants to extend the maturity date of their obligations in violation of the Construction Loan and Security Agreement. Consequently, petitioners argue that the complaint in confession of judgment should be stricken. The pertinent provision of the Construction Loan and Security Agreement states as follows:

Borrower [King Drive] may extend the maturity Date for (1) additional one (1) year period **provided** that at the time of the extension (i)there has not occurred and is continuing any Event of Default ... and (iii) Borrower [King Drive] pays to [Santander] an extension fee for the extension of the Maturity

²¹ Memorandum of law *contra* plaintiff Santander's notice of judgment and execution for entry of judgment by confession, ¶ 3.

²² Loan Modification Agreement dated July 14, 2011, Exhibit M to the complaint in confession of judgment, ¶ 12.

Date....²³

This language clearly and unambiguously shows that defendants had the option to extend the maturity date of their obligations provided, *inter alia*, that they paid an extension fee thereof. In this case, petitioners have not alleged that they paid an extension fee for the extension of the maturity date of the loans, and may not use this defense against the complaint in confession of judgment of Santander.

IV. Defendants agreed to all the terms and requirements under the loan documents, including the terms requiring borrower to sell its lots at the pacing rate of five per year.

Petitioners argue that the Construction Loan and Security Agreement, as well as all other loan documents executed by the parties, contain ambiguities that are fatal to Santander's complaint in confession of judgment.²⁴ In addition, petitioners argue that the loan documents are defective because they do not "acknowledge the impossibility of selling at the pacing rate of five lots per year ... when the country and Central Pennsylvania were experiencing the worst recession since the Great Depression and the residential depression continued until 2012...."²⁵ This defense has no merit because petitioners/defendants are sophisticated entities and individuals with a long history in real estate development. After defaulting upon their obligations, such sophisticated parties may not now claim that the loan documents, mortgages, notes, lines of credit and guaranties were ambiguous. For example, defendant Richard C. Angino, the individual who executed all loan and related documents on behalf of borrowers, is an attorney by trade and has experience in the real estate market dating back to at least

²³ Construction Loan and Security Agreement dated July 3, 2007, Exhibit A to the complaint in confession of judgment ¶ 2.7 (emphasis supplied).

²⁴ Defendants' petition to stay, strike, order discovery, hold a hearing, and/or open judgment, ¶¶ 2-4.

²⁵ Defendants' petition to stay, strike, order discovery, hold a hearing, and/or open judgment.

2002.²⁶ When signing the loan documents on behalf of borrowers, Mr. Angino should have understood that real estate markets could fluctuate and become depressed as a result of a severe financial crisis. Since borrowers in general and Mr. Angino in particular understood the potential risks involved in the commercial and residential real estate markets, they may not now argue that the documents they executed were ambiguous and defective as to require this Court to strike Santander's complaint in confession of judgment.

V. Defendants cannot show that Santander breached a duty of good faith and fair dealing.

At the hearing held on July 9, 2014, Defendants argued that Santander breached its duty of good faith and fair dealing. Defendants specifically stated that a duty of good faith and fair dealing was breached by Santander, notwithstanding a long ongoing business relationship with defendants, when the bank refused to extend loan maturity dates, renew letters of credit, and account for the impossibility or impracticability of defendants to perform their obligations after the collapse of the real estate market of 2007–2008.²⁷ This defense has no merit. In Pennsylvania—

a lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor. The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of the contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself. As such, a lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons. A lending institution also is not required to delay attempts to recover from a

²⁶ Defendants' memorandum of law contra plaintiff Santander Bank's entry of judgment by confession, p. 6–7.

²⁷ Defendants' supplemental brief dated July 9, 2014.

guarantor after the principal debtor has defaulted.²⁸

In this case Santander, as lender, merely asserts its rights under the loan Agreement and any other loan documents executed by Defendants. Santander did not breach any duty of good faith and fair dealing by failing to account for the alleged impossibility or impracticability of performance occasioned by the financial and real estate crises of 2007–2008, or by its refusal to grant maturity extensions to the loan and renew letters of credit. Defendants may not prove that Santander breached its duty of good faith and fair dealing and their petition to open or strike Santander’s confessed judgment on such grounds is denied.

VI. Petitioners may not rely on the doctrine of *lis pendens* to open or stay judgment by confession.

Petitioners argue that the complaint in confession of judgment should be opened or stayed under the doctrine of *lis pendens*. Petitioners declare that they filed a lawsuit against Santander in Berks County prior to the filing by Santander of the instant action in confession of judgment. Petitioners further declare that the claims asserted in the prior action, currently on appeal, offered the same meritorious arguments which are advanced herein through their petition to strike, open or stay the confessed judgment of Santander.²⁹ This Court finds that the doctrine of *lis pendens* is not a meritorious defense against the complaint in confession of judgment of plaintiff Santander.

In Pennsylvania,

[w]hen **two lawsuits are pending**, the common law doctrine of *lis pendens* permits the dismissal of the newer suit if both suits involve the same parties, the same relief requested, the same causes of action, and the same rights

²⁸ Creeger Brick and Building Supply, Inc. v. Mid—State Bank and Trust Company, 560 A. 2d 151, 154 (Pa. Super. 1997).

²⁹ Defendants’ memorandum of law contra plaintiff Santander complaint in confession of judgment, ¶ 7.

asserted....³⁰

In this case, the Berks County action is pending on appeal before the Pennsylvania Superior Court; however, Santander's instant judgment by confession is not a pending lawsuit but a mere ministerial act performed by the Office of the Prothonotary, whose duty is to merely enter the judgment by confession in accordance with the Pennsylvania Rules of Civil Procedure.³¹ Since the instant case does not involve two pending actions, Petitioners may not rely on the doctrine of *lis pendens* against Santander's complaint in confession of judgment.

The Court shall issue a simultaneous Order consistent with this *Memorandum* Opinion.

BY THE COURT,


GLAZER, J.

³⁰ Barren v. Com., 2013 Pa. Super. 224; 74 A.3d 250, 253 (Pa. Super. 2013) (emphasis supplied).

³¹ Lenson v. Klovsky, 430 Pa. 193, 197, 241 A.2d 66, 68 (1968); Agric. Trust Co. v. Brubaker, 73 Pa. Super. 468, 473 (1920); Pa. R.C.P. 2956.