

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

DOCKETED
APR - 8 2016
R. POSTELL
COMMERCE PROGRAM

NOAH BANK	:	January Term, 2016
	:	
<i>Plaintiff</i>	:	Case No. 02810
	:	
v.	:	
	:	Commerce Program
VRAJ BRIG PA, LLC	:	
and	:	
SKYVIEW MANAGEMENT LLC	:	
and	:	
RAVI SHETH	:	
	:	
<i>Defendants</i>	:	Control No. 16030069

ORDER

AND NOW, this 7th day of April, 2016, upon consideration of the petition of defendants to strike, or in the alternative, to open confessed judgment and for a stay of execution, the answer in opposition of plaintiff, and the respective *memoranda* of law, it is **ORDERED** as follows:

- I. The petition to strike or open confessed judgment is **DENIED**.
- II. The amount of late fees is **MODIFIED**: Plaintiff may claim as late fees an amount not exceeding \$1,610.75. All other itemized amounts in the complaint-in-confession-of judgment shall remain in effect.
- III. The petition to stay execution is **DENIED**.

BY THE COURT,



RAMY L. DJERASSI, J.

Noah Bank Vs Skyview Ma-ORDRF



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MEMORANDUM OPINION

Plaintiff Noah Bank (“Lender”), is a Pennsylvania lending institution. Defendant Vraj Brig PA LLC, (“Vraj”) is a company based in Philadelphia, Pennsylvania. Defendant Skyview Management Limited Liability Company (“Skyview”), is an entity based in Philadelphia, Pennsylvania. Vraj and Skyview may be referred hereinafter as “Borrowers.” Defendant Ravi Sheth (“Sheth” or “Guarantor”), is an individual residing in Pennsylvania.

On September 16, 2013, Vraj and Skyview executed a promissory note (the “Borrowers’ Note”), whereby Vraj and Skyview promised to repay a \$5 million commercial loan to Lender over a period of five years.¹ On the same day, September 6,

¹ Petition to Strike or Open, ¶ 15; Borrower’s note, p. 4, Exhibit A to the complaint in confession of judgment of plaintiff; Guarantor’s Note, p. 4, Exhibit B to the complaint in confession of judgment of plaintiff

2013, individual defendant Sheth executed a promissory note (the “Guarantor’s Note”), whereby Sheth agreed to personally guarantee the commercial loan obtained by Vraj and Skyview.²

On January 22, 2016, Lender confessed judgment against Vraj and Skyview as borrowers, and against Sheth as a personal guarantor. The judgment entered by Lender claims a total accelerated amount of \$4,858,289.59, which includes the following items: principal of \$4,820,731.83, interest of \$19,367.92, late fees of \$9,664.74, and attorney fees of \$8,525.10. The complaint-in-confession-of-judgment asserts that borrowers defaulted on their loan obligations by failing to remit payments, as required, since January 1, 2016.

On March 1, 2016, Vraj, Skyview and Sheth filed their petition to strike or, in the alternative, to open the confessed judgment, and for a stay of execution.

Petition to Strike

In Pennsylvania—

A petition to strike a judgment raises a question of law and relief thereon will only be granted if a fatal defect appears on the face of the record.³

If a confessed judgment includes an item not authorized by the warrant of attorney, the judgment is void in its entirety and must be stricken. However, if judgment as entered is for items clearly within judgment note, but excessive in amount, the court will modify the judgment and a cause proper judgment to be entered.⁴

ATTORNEY FEES.

According to defendants, the confessed judgment should be stricken because

² Guarantor’s Note, Exhibit B to the complaint in confession of judgment of plaintiff.

³ RAIT P’ship, LP v. E Pointe Properties I, Ltd., 957 A.2d 1275, 1277 (Pa. Super. 2008).

⁴ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994).

Lender claims unreasonable and excessive attorney fees in the amount of \$8,525.10.”⁵ At the onset, the Court notes that unreasonable or excessive attorney fees do not necessarily constitute a fatal flaw or defect in the record as to require the judgment to be stricken. Therefore, the Court will focus on whether attorney fees are clearly within the judgment note: if such fees are within the judgment note but the amount thereof is excessive, then the Court will modify the claimed amount and cause a proper judgment to be entered.

In this case, a review of the Borrower’s and Guarantor’s Notes convinces the Court that Lender is clearly empowered to enter judgment against defendants, and to include therein a claim for “reasonable legal fees.”⁶ These documents, however, do not specify what percentage of legal fees are deemed reasonable. To determine whether the legal fees in this case are reasonable, the Court first determined that the claimed legal fees of \$8,525.10 constitute less than two-percent of \$4,820,731.83 which is the unpaid balance of the loan owed by Borrowers. Next, the Court examined relevant case law to determine whether attorney fees of two-percent or less of the unpaid loan are considered reasonable in Pennsylvania. The Court found that in Pennsylvania, attorney fees of fifteen percent (15%) are reasonable, if such a percentage is specifically contemplated in the warrant of attorney.⁷ Here, even though the Borrower Note and Guarantor Note do not specify what percentage of attorney fees is reasonable, the Court finds that legal fees of less than two-percent of the unpaid balance of a loan are reasonable; therefore, the Court rejects defendants’ argument asserting that the legal

⁵ Petition to Strike, ¶ 22.

⁶ Borrower’s note, p. 4, Exhibit A to the complaint in confession of judgment of plaintiff; Guarantor’s Note, p. 4, Exhibit B to the complaint in confession of judgment of plaintiff.

⁷ Id.

fees in this case are unreasonable and excessive.

LATE FEES.

Next, defendants argue that the judgment should be stricken because the amount of late fees is “unconscionable.”⁸ Again, the Court notes that unconscionable late fees do not necessarily create a fatal flaw in the record as to require striking the judgment: excessive late fees, if any, may be modified by the Court to cause a proper amount to be entered.⁹

The Borrowers’ Note states as follows:

[i]f a payment on this Note is more than 10 days late, Lender may charge Borrower a late fee of up to 5.00% **of the unpaid portion of the regularly scheduled payment.**¹⁰

As a first step toward determining whether the claimed late fees are unconscionable, the Court will analyze the afore-quoted contractual language contained in the Borrowers’ Note. Specifically, the Court will examine whether the phrase “of the unpaid portion of the regularly scheduled payment” applies to the **entire balance** of the unpaid loan, or only to the **unpaid portion of a** regularly scheduled **monthly payment.**

In Pennsylvania—

the task of interpreting a contract is generally performed by the court with the primary objective being the effectuation of the intent of the parties as is reasonably manifested by the language of the written instrument. Towards this goal, it is a fundamental rule of construction and interpretation that words and phrases be given their plain and ordinary

⁸ Petition to Strike, ¶ 23.

⁹ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994). See also: Snyder v. Rogers, 499 A.2d 1369 (Pa. Super. 1985) (“where [a] confession of judgment clause is unconscionable, [the] court will not bind [a] party to it”).

¹⁰ Borrower’s Note, Exhibit A to the complaint-in-confession-of-judgment, p. 2 Continuation. (Emphasis supplied).

meaning when possible.¹¹

Although a court must not distort the meaning of the [contractual] language or resort to a strained contrivance in order to find an ambiguity, it must find that contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts. Where a provision of a policy is ambiguous, the policy provision is to be construed ... against the ... drafter of the agreement.¹²

After reading the late fees provision, this Court finds that the language therein is ambiguous. Specifically, the phrase “of the unpaid portion of the regularly scheduled payment” could be reasonably interpreted in two ways: it could indicate that Lender is entitled to charge no more than a five-percent late fee upon the entire balance of the unpaid loan; or it could indicate that Lender is entitled to charge no more than a five-percent late fee only upon the unpaid portion of a regularly scheduled monthly payment. Since the Court finds that the provision on late fees is ambiguous, it will interpret the ambiguous language in favor of Borrowers and Guarantor, and against Lender as drafter of the note.

Having determined that late fees of up to five-percent may be applied only on the unpaid portion of a regularly scheduled monthly payment, the Court must determine how many unpaid monthly payments have been claimed by Lender in its complaint-in-confession-of-judgment. Turning to the record, the Court notes that the event of default occurred on January 1, 2016.¹³ The court also notes that under the Borrowers’ Note, Borrowers were required to remit monthly payments at the beginning of each month in

¹¹Toombs NJ Inc. v. Aetna Cas. & Sur. Co., 591 A.2d 304, 307 (Pa. Super. 1991).

¹²Mitsock v. Erie Ins. Exch., 909 A.2d 828, 831 (Pa. Super. 2006).

¹³ Complaint-in-confession-of-judgment, ¶ 11. Further proof that the default occurred on January 1, 2016 is gleaned from Lender’s Writ of Execution attached to the complaint-in-confession-of-judgment. Specifically, the Writ of Execution claims an amount of interest calculated **as of January 1, 2016**.

fees of \$1,610.75.

DEFINITION OF DEFAULT.

Defendants assert that the record is fatally flawed because the Borrowers' Note does not define the term "occurrence of the default."¹⁵ The Borrowers' Note contains the following language: "Borrower is in default under this Note if Borrower does not make a payment when due under this Note."¹⁶ This language provides a clear and unambiguous definition because it informs Borrowers that they would trigger an "event of default" by failing to make any payments under the Note. For this reason, defendants' argument is rejected.

AMOUNTS DUE.

The last argument in the petition to strike asserts that the record is fatally flawed because Lender failed to provide an explanation of "how [the itemized] charges were computed."¹⁷ In Pennsylvania—

(a) The complaint [in confession of judgment] shall contain the following:

* * *

(7) an itemized computation of the amount then due, based on matters outside the instrument, if necessary, which may include interest¹⁸

In addition, to comply with the afore-cited requirements, plaintiff only needs to aver the occurrence of a default, and to merely allege the amounts due.¹⁹

¹⁵ Petition to Strike, ¶ 24.

¹⁶ Borrowers' Note, Exhibit A to the complaint-in-confession-of-judgment, 4—Default.

¹⁷ Petition to Strike, ¶26.

¹⁸ Pa. R.C.P. 2952(a)(7).

¹⁹Davis v. Woxall Hotel, Inc., 395 Pa.Super. 465, 469; 577 A.2d 636, 638 (Pa. Super. 1990).

the amount of \$32,215.07. Finally, the Court notes that Lender confessed judgment on January 22, 2016. Based on the foregoing, the Court finds that Lender claimed only the month of January 2016 in its complaint-in-confession-of-judgment. Based on this finding, the highest amount of late fees available to Lender may not exceed five-percent of the unpaid portion of the regularly scheduled monthly payment for the month of January 2016 –namely, five-percent of \$32,215.07. A simple computation shows that five-percent of \$32,215.07 equals \$1,610.75. The Court does not find this amount unconscionable, and Lender may charge it against Vraj and Skyview under the terms of the Borrowers' Note. For this reason, the judgment as to late fees against Borrowers is modified: Lender may only obtain late fees of \$1,610.75 from Vraj and Skyview.

The inquiry does not end here. The Court must also examine the Guarantor's Note to determine whether late fees could be claimed by Lender against individual defendant Sheth, as personal guarantor to the loan. The Guarantor's Note states as follows:

9.—General Provisions:

- A. Enforcement Expenses. Guarantor promises to pay **all expenses** Lenders incurs to enforce this Guarantee, including, but not limited to, attorney's fees and costs.¹⁴

This clear and unambiguous language shows that Sheth, guarantor to the loan obtained by Borrowers, bound himself to repay Lender all expenses which Lender incurred in the enforcement of the guarantee. In this case, all the expenses incurred by Lender in the enforcement of Sheth's guaranty include late fees for the month of January 2016; therefore, Guarantor Sheth is liable to Lender, jointly or severally, for late

¹⁴ Guarantor's note, ¶ 9.A., Exhibit B to the complaint in confession of judgment of Lender.

In this case, Lender has averred the occurrence of a default, and has alleged the amounts due under the Borrower's and Guarantor's Notes. Under the Rules of Civil Procedure and Pennsylvania case law, Lender is not required to explain how it computed its itemized charges. For this reason, the argument based on insufficient itemization is rejected, and the petition to strike judgment by confession is denied.

Petition to Open

In the petition to open, Borrowers and Guarantor assert two arguments: first, Lender failed to provide Borrowers with a notice of default; second, Guarantor did not knowingly waive his due process rights because the warrant of attorney contained in the Guarantor's Note was "buried" in the document.²⁰ In Pennsylvania—

[a] petition to open is an appeal to the court's equitable powers and is addressed to the sound discretion of the court.... However, the discretion exercised by the lower court must be guided by Rule 2959(e), Pa.R.C.P. which states in pertinent part: [i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury the Court shall open judgment.²¹

The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses [against judgment entered by confession].... The defenses raised [by the petitioning party] must be valid....²²

In this case, the Borrower's Note states that in the event of default, Lender may require, "[w]ithout notice ... immediate payment of all amounts owing under this Note."²³ Similarly, the Guarantor's Note states that "Guarantor waives any notice of ... [a]ny default under the Note."²⁴ The clear and unambiguous language thus quoted

²⁰ Petition to Open, ¶ 28(a), ¶ 28(b).

²¹ Indus. Valley Bank & Trust Co. v. Lawrence Voluck Associates, Inc., 428 A.2d 156, 158 (Pa. Super. 1981).

²² Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

²³ Borrowers' Note, ¶ 5.A., Exhibit A to the complaint in confession of judgment.

²⁴ Guarantor's Note, ¶ 6.B.1), Exhibit B to the complaint in confession of judgment.

shows that Borrowers and Guarantor waived their right to notice. For this reason, the defense based on lack of notice is rejected.

Finally, Guarantor asserts that he did not voluntarily waive his due process rights because the provision containing the warrant of attorney was not clearly identifiable within the Guarantor's Note. Review of the pertinent warrant-of-attorney shows that this provision, unlike any other provision in the text, is boxed in such a way as to bring attention upon its contents. Moreover, key words therein, such as "CONFESS AND ENTER A JUDGMENT" are set in conspicuous capital letters to underscore their nature and importance. In Pennsylvania,

[t]he failure to read a confession of judgment clause will not justify avoidance of it. This is particularly true where the confession of judgment clause is clear and conspicuous and part of a commercial transaction.²⁵

In this case, Guarantor Sheth executed a Note arising out of a commercial loan obtained by Borrowers. The Note contains a confessed-judgment provision which is conspicuously worded and sufficiently set apart from the rest of the text. For these reasons, the defense based on involuntary waiver is rejected, and the petition to open the confessed judgment is **DENIED**.

BY THE COURT,



RAMI I. DJERASSI, J.

²⁵ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994).