

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

LIKELY LOST, INC. <i>et al.</i>	:	March Term, 2016
	:	
<i>Plaintiffs</i>	:	Case No. 00705
	:	
v.	:	Commerce Program
	:	
JOHN J. NOLANO <i>et al.</i>	:	
	:	
<i>Defendants</i>	:	Control No. 16053731

ORDER

AND NOW, this 27th day of June, 2106, upon consideration of the petition to strike or open judgment by confession filed by individual defendant Justin Ziegler, the response in opposition of plaintiffs, and the respective *memoranda* of law, it is

ORDERED as follows:

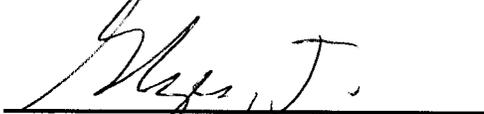
- I. The petition to strike is **GRANTED** and the judgment is **STRICKEN** as to individual defendant Justin Ziegler.
- II. The petition to open filed by individual defendant Justin Ziegler is **RENDERED MOOT**.
- III. The request of individual defendant Justin Ziegler for a stay of execution proceedings is **RENDERED MOOT**.

DOCKETED

JUN 27 2016

R. POSTELL
COMMERCE PROGRAM

BY THE COURT,



GLAZER, J.

Likely Lost, Inc. Etal -ORDOP



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MEMORANDUM OPINION

On April 23, 2007, an entity named Likely Lost, Inc. (“Likely Lost”), agreed to sell its restaurant and tavern business to an entity named BZN, LLC (“BZN”), as evidenced by an “Agreement of Sale.”¹ The Agreement of Sale was signed on behalf of BZN by an individual who at all times relevant hereto owned an interest in BZN. This individual was Justin Ziegler (“Ziegler”), who presently petitions this court to strike or open the confessed judgment of plaintiff Likely Lost.

On the same day, the principals of Likely Lost, as owners of the restaurant and tavern premises, leased said premises to BZN pursuant to a Business Property Lease (the “Lease”).² Ziegler executed the Lease on behalf of lessee BZN. The Lease contained a warrant-of-attorney provision allowing judgment by confession to be entered against BZN, if BZN defaulted on the Lease. This provision was set-off from the surrounding text by the use of italicized lettering which captioned the pertinent provision with the

¹ Agreement of Sale, Exhibit A to the complaint-in-confession-of-judgment of Likely Lost.

² Business Property Lease, Exhibit B to the complaint-in-confession-of-judgment of Likely Lost.

words “*Confession of Judgment.*”³

Also on April 4, 2007, BZN granted one J. Conor Corcoran, Esquire, with power-of-attorney to conduct the business of BZN as an agent thereof. The notice attached to the document specifically stated that the purpose for the power-of-attorney was to give to the agent “broad powers to handle matters regarding Restaurant Liquor License R—6691.”⁴ Ziegler signed this document on behalf of BZN.

On the same day, BZN executed a document titled Promissory Note and Confession of Judgment, for the benefit of Likely Lost (the “Note”).⁵ Pursuant to the section embodying the Note, BZN agreed to pay Likely Lost the sum of \$350,000.00 plus interest, by a specific date; pursuant to the section embodying the confession-of-judgment provision, BZN empowered any attorney of any court to confess judgment against BZN for the afore-mentioned sum. This document was only made of two short paragraphs and was titled in bold lettering. In addition, the warrant-of-attorney provision was sufficiently set-off from the language of the promissory note, and the signature space was immediately below the confession-of-judgment language.⁶ Ziegler signed this document on behalf of BZN.

At last, on the same date as all the afore-named papers, Ziegler executed a document titled Guaranty of Lease, Agreement of Sale and Promissory Note. A “Whereas” clause in this document stated that “the undersigned [Ziegler] unconditionally becomes a surety to [Likely Lost] for the obligations of BZN under the

³ *Id.* ¶ 12.

⁴ Power of Attorney executed by Ziegler on behalf of BZN, Exhibit D to the complaint-in-confession-of-judgment of Likely Lost.

⁵ Promissory Note and Confession of Judgment, Exhibit C to the complaint-in-confession-of-judgment of Likely Lost.

⁶ *Id.*

documents.”⁷ In addition, this document contained an untitled provision whose text was not set-off in a different type or font, was not set apart from the surrounding text by the inclusion of a heading, and was in no way whatsoever distinguishable from the surrounding provisions thereof.⁸ This un-distinguishable provision gave to Likely Lost the power to confess judgment against Ziegler as personal guarantor of BZN.

On March 10, 2016, Likely Lost and its principals confessed judgment against all herein defendants, including Ziegler, based on several alleged defaults by the defendants. On April 5, 2016, Likely Lost filed a praecipe to withdraw from the complaint-in-confession-of-judgment an individual defendant whose name was Pasquale Nolano. On the same day, BZN and an individual defendant named John Nolano filed a timely petition to strike or open the confessed judgment. On May 3, 2016, this court granted-in-part and denied-in-part the petition to strike or open the confessed judgment. Specifically, this court granted the petition to strike as to individual guarantor John Nolano, but denied in the entirety the petition to strike or open filed by BZN. In the first footnote to its Order, this court explained that the confessed judgment as to individual guarantor John Nolano was stricken because the Guaranty of Lease, Agreement of Sale and Promissory Note did not have a conspicuous warrant-of-attorney-provision and was therefore fatally flawed. In the second footnote to its Order, the court denied the petition to strike or open asserted by BZN because as to that defendant, there was neither any fatal flaw in the record, nor any evidence that could substantiate opening the judgment.⁹

⁷ Guaranty of Lease, Agreement of Sale and Promissory Note, Exhibit F to the complaint-in-confession-of-judgment of Likely Lost.

⁸ *Id.* at ¶ 6.

⁹ Order dated May 3, 2016, control No. 16040805. Plaintiff Likely Lost subsequently filed a motion for reconsideration which this court denied, and thereafter filed an appeal with the Pennsylvania Superior

On May 31, 2016, Ziegler untimely filed his petition to strike or open the confessed judgment of Likely Lost. This petition is the subject of this opinion.

In Pennsylvania, “[a] petition to strike a judgment may be granted only if a fatal defect or irregularity appears on the face of the record.”¹⁰ In addition—

[i]t is a firmly established rule of construction in the case of warrants of attorney to confess judgments that the authority thus given must be clear, explicit and strictly construed, that if doubt exists it must be resolved against the party in whose favor the warrant is given, and that all proceedings thereunder must be within the strict letter of the warrant. If the authority to enter judgment by confession on a warrant of attorney is not strictly followed, the judgment will be stricken.¹¹

Finally,

A warrant of attorney to confess judgment 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.¹²

In this case, the court has already indicated that the document signed by Ziegler—the Guaranty of Lease, Agreement of Sale and Promissory Note— contained a warrant-of-attorney which “was not set-off in a different type or font, was not set apart from the surrounding text by the inclusion of a heading, and was in no way whatsoever distinguishable from the surrounding provisions thereof.” This warrant-of-attorney is inconspicuous and the signature executed by Ziegler is not directly related to the warrant. The inconspicuous nature of the warrant-of-attorney and the lack of a direct relationship between such a warrant and Ziegler’s signature create a fatal defect which

Court on May 31, 2016. The appeal is pending.

¹⁰ Graystone Bank v. Grove Estates, L.P., 58 A.3d 1277, 1281-82 (2012), aff’d sub nom. Graystone Bank v. Grove Estates, L.P., 81 A.3d 880 (2013).

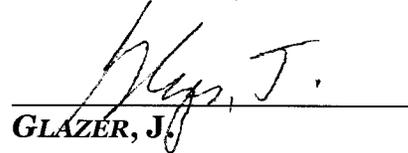
¹¹ Dime Bank v. Andrews, 115 A.3d 358, 364 (Pa. Super. 2015).

¹² L. B. Foster Co. v. Tri-W Const. Co., 186 A.2d 18, 20 (Pa. 1962) (emphasis supplied).

may “not be foisted upon anyone by implication or by general and nonspecific reference.”¹³ Such a fatal defect is identical to the one which compelled this court to strike the confessed judgment against another afore-mentioned guarantor, John Nolano. For the same reason, the court grants the petition to strike filed by Ziegler, and the confessed judgment against him is stricken. In addition, the petition to open, also filed by individual guarantor Ziegler, is denied because he failed to bear the burden of producing evidence necessary to substantiate any defenses.¹⁴

Finally, the untimeliness of Ziegler’s petition cannot prevent this court from striking the judgment. “[A] void judgment is a mere blur on the record, and which it is the duty of the court of its own motion to strike off, **whenever** its attention is called to it.... [A] void judgment is no judgment at all.”¹⁵

BY THE COURT,


GLAZER, J.

¹³ Frantz Tractor Co. v. Wyoming Valley Nursery, 120 A.2d 303, 305 (Pa. 1956). The court notes that the Pennsylvania Commercial Code states as follows:

“Conspicuous” [w]ith reference to a term means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it. **Whether a term is conspicuous or not is a decision for the court.** Conspicuous terms include the following:

- (i) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font or color to the surrounding text of the same or lesser size.
- (ii) Language in the body of a record or display in larger type than the surrounding text, in contrasting type, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language. 13 Pa. Stat. and Cons. Stat. Ann. § 1201 (2016) (emphasis added).

¹⁴ Haggerty v. Fetner, 781 A.2d 641, 644 (Pa. Super. 1984).

¹⁵ M & P Mgmt., L.P. v. Williams, 937 A.2d 398, 401 (Pa. 2007) (citing Clarion, M. & P. R. Co. v. Hamilton, 127 Pa. 1, 3, 17 A. 752 (Pa. 1889) (emphasis added)).