

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

VIST BANK : JUNE TERM, 2013
: :
v. : NO. 01884
: :
JOSEPH PAONE, JR. : Control No. 13082872

ORDER

AND NOW, this 13th day of December, 2013, upon consideration of defendant's Petition to Open or Strike Confessed Judgment, the response thereto, and the supplemental materials provided by the parties, and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Petition is **DENIED**, and the stay entered by the Court on October 30, 2013, is **LIFTED**.

BY THE COURT:



GLAZER, J.

Vist Bank Vs Paone-ORDOP



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OPINION

In October, 2011, plaintiff VIST Bank (“VIST”) entered into a Loan Agreement with the following: non-party Paone Woodworking Corporation (“PWC”); the defendant in a related action, Emerald Street Associates, L.P. (“ESA”); and defendant herein, Joseph Paone Jr. (“JPJr.”) (collectively the “Borrowers”). Pursuant to that Loan Agreement, VIST extended five loans to the Borrowers, which were represented by 5 different loan Notes and several mortgages.

Pursuant to separate Surety Agreements, each Note was guaranteed by one or more of the following persons and entities who are related to the Borrowers: Emerald Street Management, Inc. (“ESM”), Joseph Paone, III (“JPIII”), Michael Paone (“MP”), Joseph Paone t/a J&T Enterprises (“J&T”), the Michael Paone Trust (“MP Trust”), and the Joseph Paone III Trust (“JPIII Trust”) (collectively, with JPJr, the “Sureties”). The following chart shows which persons and entities are connected to each loan Note:

Loan	Borrower	Sureties	Original Loan Amount
Note A – Mortgage Cross Default - All	ESA	ESM JPIII JPJr MP J&T	\$170,000
Note B – Mortgage Cross Default - All	JP Jr.	J&T	\$360,000
Note C – Mortgage Cross Default – All	JP Jr.	J&T	\$190,000

Note D – Term Loan Cross Default – D, E	PWC	MP Trust JPIII Trust JPJr	\$750,000
Note E – Line of Credit Cross Default- B, C, D	PWC	MP Trust JPIII Trust JPJr	\$2,500,000

On June 13, 2013, VIST confessed judgment against two of the Borrowers and the Sureties in ten separate actions as a result of certain alleged defaults by the Borrowers under the Notes and Loan Agreement. VIST did not confess judgment against the primary Borrower, PWC, which filed for bankruptcy on July 22, 2013. The remaining Borrowers and the Sureties moved to open or strike all of the confessed judgments.

The primary defaults cited by VIST in its notice of default, which it sent to the Borrowers and the Sureties on May 22, 2013, and in its Complaints in Confession of Judgment were: “failure to maintain the collateral securing the Loans;” and “exceeding the permissible borrowing base for [Loan] E.”¹ In its Complaints, but not in its prior notice, VIST also claimed the Borrowers had defaulted by “permitting additional liens to be placed on the collateral securing the Loans.”²

The court ordered the parties to conduct discovery regarding the events of default and to file supplemental briefs and exhibits. Based on the parties’ submissions, the following undisputed facts appear of record.

PWC’s main client for approximately 40 years was Wawa for which PWC built custom counters and other store fixtures. The relationship ended in 2012, and PWC was left with an inventory of Wawa cabinetry for which there was no other purchaser. PWC destroyed much of that inventory.

¹ VIST’s Supplemental Brief, Ex. O; Complaint, ¶ 13.

² Complaint, ¶ 13

PWC's inventory was part of the collateral securing the Loans. Specifically, Loan E, which is evidenced by a Secured Revolving Line of Credit Note, provided that the aggregate principal extended under Loan E should not exceed "70% of the value of Borrower's finished goods inventory" as certified by the Borrowers' delivery of a Borrowing Base Certificate to VIST.³

In January, 2012, the aggregate principal extended under Note E was increased to \$2,700,000.⁴ In June, 2012, the Borrowers certified to VIST that their eligible inventory of finished goods was \$2,419,939.67.⁵ In December, 2012, the Borrowers delivered a Borrowing Base Certificate to VIST showing that their eligible inventory of finished goods was \$8,848.00, which meant that the most they could borrow under Loan E was \$6,193.60.⁶

The Loan Agreement provides that it shall be an "Event of Default" if "[VIST] reasonable [sic] deems itself insecure; the occurrence of a material adverse change in the business, properties, prospects, operation or condition (financial or otherwise) of Borrower or Surety."⁷ Based upon the remaining value of the eligible inventory of finished goods, it cannot be disputed that such events constitute a material adverse change in PWC's business, properties, prospects, operations or condition and, therefore, an event of default.

VIST hired a consultant in the Spring of 2013 to work with the Borrowers "to evaluate the [Borrowers] in connection with a request for an expansion of the lines of credit to help the

³ Secured Revolving Line of Credit Note E, ¶3(a).

⁴ This increase was accomplished through a Loan Agreement Modification Agreement between VIST, ESA, JPJr, and PWC.

⁵ VIST's Supplemental Brief, Ex. L.

⁶ *Id.*

⁷ Loan Agreement, ¶ 6.1.11.

Borrowers weather the fallout from the end of their relationship with Wawa.”⁸ In March, 2013, the consultant prepared an additional Borrowing Base Certificate, which confirmed the Borrowers’ December 2012 Certificate showing that the eligible inventory was significantly depleted.⁹ On May 22, 2013, the Bank sent the notice of default to the Borrowers and Sureties.¹⁰ Although the Borrowers and the Sureties dispute VIST’s declaration of default, they do not claim that they ever cured the alleged inventory default by either paying down the capital borrowed under Loan E or increasing the eligible inventory.

In addition to the inventory default, VIST claims Borrowers defaulted by allowing another lender to file a UCC against PWC’s inventory in March, 2012.¹¹ According to the Sureties, this loan was for only \$100,000, which they claim was not material in comparison to the \$3.8 million loaned to the Borrowers by VIST.¹² Be that as it may, the UCC filing is still a default. The Loan Agreement provides that it is an “Event of Default” for

Any attachments, liens or additional Security Interests [to be] placed upon any of the Collateral, other than Permitted Encumbrances and not dismissed or bonded against within thirty (30) days.¹³

The Sureties do not claim this UCC filing was a permitted encumbrance, nor do they claim it was dismissed or bonded against within 30 days. Instead, it remained an impermissible lien against PWC’s collateral for over one year before the default was called.

⁸ Defendant’s Supplemental Brief, p. 3.

⁹ There are disputed issues of fact as to who prepared the March 2013 certificate and if the Eligible Inventory amount of \$0 is accurate. These disputes are immaterial, since the Borrowers admit they prepared the December 2012 Certificate showing there was, at most, \$8,848 in Eligible Inventory remaining.

¹⁰ VIST’s Supplemental Brief, Ex. O.

¹¹ *Id.* Ex. G.

¹² Defendant’s Supplemental Brief, p. 8-9.

¹³ Loan Agreement, ¶ 6.1.5.

In addition to disputing whether PWC was sufficiently in default of the Loan Agreement to justify the confessions of judgment, the Borrowers and Sureties also dispute VIST's right to collect the additional \$200,000 in capital extended under the Loan Agreement Modification Agreement from the Sureties of Loan E, MP Trust, JPIII Trust, and JPJr. However, the Sureties expressly agreed in the Surety Agreements they signed that:

The obligations of Surety hereunder shall not be affected, modified, impaired or discharged, in whole or in part, by . . . the modification or amendment (whether material or otherwise) of any obligation, covenant or agreement set forth in any of the Loan Documents.¹⁴

Such an agreement constitutes an enforceable waiver of the Sureties' right to be informed of any increase in the risk they bear.

[I]t is well settled that a surety's consent to material modifications in the creditor-debtor relationship may be obtained as part of the suretyship contract. Where the surety has given such prior consent, the surety is contractually bound to accept the material modifications in the creditor-debtor relationship.¹⁵

¹⁴ JPIII Trust Surety Agreement, ¶3(h).

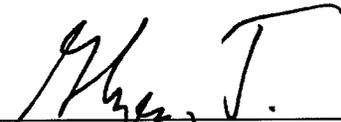
¹⁵ Cont'l Bank v. Axler, 353 Pa. Super. 409, 417, 510 A.2d 726, 730 (1986).

CONCLUSION

Borrowers and Sureties have failed to point to any fatal defect or irregularity of record, so their Motion to Strike the Confessed Judgments must be denied. They have also failed to produce evidence of a meritorious defense to the entry of judgment, so their Motion to Open must also be denied.

Dated: December 13, 2013

BY THE COURT:



GLAZER, J.