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

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**G. HART
CIVIL ADMINISTRATION**

EAGLE NATIONAL BANK
Plaintiff/Respondent

v.

PIER 1 HAYS TERMINAL, INC.
Defendant/Petitioner

: July Term, 2013
:
: Case No. 00864
:
:
: Commerce Program
: Control No. 13073798

EAGLE NATIONAL BANK
Plaintiff/Respondent

v.

HAYS ENTERPRISES, INC.
Defendant/Petitioner

: July Term, 2013
:
: Case No. 00928
:
:
: Commerce Program
: Control No. 13074106

EAGLE NATIONAL BANK
Plaintiff/Respondent

v.

HAYS TUG & LAUNCH SERVICE, INC.
Defendant/Petitioner

: July Term, 2013
:
: Case No. 00868
:
:
: Commerce Program
: Control No. 13074111

EAGLE NATIONAL BANK
Plaintiff/Respondent

v.

HARRY A. HAYS AND DOROTHY L. HAYS
Defendant/Petitioners

: July Term, 2013
:
: Case No. 00881
:
:
: Commerce Program
: Control No. 13074107

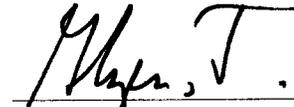
ORDER

AND NOW, this 15th day of November, 2013, upon consideration of the

petitions to strike/open judgments filed by defendants Pier 1 Hays Terminal, Inc., Hays

Enterprises, Inc., Hays Tug & Launch Service, Inc., and Harry A. Hays and Dorothy L. Hays, the responses in opposition of plaintiff Eagle National Bank, and the respective memoranda of law, it is **ORDERED** that the petitions are denied.

By The Court,

A handwritten signature in black ink, appearing to read "Glazer, J.", written over a horizontal line.

Glazer, J.

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OPINION

Before the court are four petitions to open/strike confessions of judgment entered by plaintiff Eagle National Bank (“Plaintiff”). For the reasons below, the

petitions are denied.

Background

On May 25, 2005, defendant Pier 1 Hays Terminal, Inc. (“Pier 1 Hays”) and Plaintiff, entered into a Building and Permanent Loan Agreement, in the amount of \$4.65 million, whereby Plaintiff loaned funds to Pier 1 Hays for the improvement of real property located at 2604R Penrose Ferry Road, in Philadelphia, Pennsylvania.¹ On the same day, Pier 1 Hays executed and delivered to Plaintiff a promissory note also in the amount of \$4.65 million.² The promissory note contained a confession of judgment provision which contemplated payment of attorney’s commissions in the event of default by Pier 1 Hays. The pertinent provision stated as follows:

CONFESSION OF JUDGMENT. BORROWER ... AUTHORIZES ... ANY ATTORNEY OR THE PROTHONOTARY ... OF ANY CLERK COURT IN THE COMMONWEALTH OF PENNSYLVANIA ... TO APPEAR ... FOR BORROWER FOR THE ENTIRE PRINCIPAL BALANCE OF THIS NOTE, ALL ACCRUED INTEREST ... AND WITH AN ATTORNEY’S COMMISSION OF 10 PERCENT (%) OF THE UNPAID PRINCIPAL BALANCE AND ACCRUED INTEREST, FOR COLLECTION, **BUT IN ANY EVENT NOT MORE THAN \$10,000 NOR LESS THAN FIVE HUNDRED DOLLARS (\$500)** ON WHICH JUDGMENT ... MAY ISSUE IMMEDIATELY....

BORROWER HEREBY WAIVES ANY RIGHT BORROWER MAY HAVE TO NOTICE OR TO A HEARING IN CONNECTION WITH ANY SUCH CONFESSION OF JUDGMENT, EXCEPT ANY NOTICE AND/OR HEARING REQUIRED UNDER APPLICABLE LAW WITH RESPECT TO EXECUTION OF JUDGMENT ... AND STATES THAT EITHER A REPRESENTATIVE OF LENDER SPECIFICALLY CALLED THIS CONFESSION OF JUDGMENT PROVISION TO BORROWER’S ATTENTION OR BORROWER HAS BEEN REPRESENTED BY INDEPENDENT LEGAL COUNSEL.³

To secure the obligations under the promissory note, Piers 1 Hays and several affiliates

¹ Building and Permanent Loan Agreement, Exhibit B to Plaintiff’s complaint in confession of judgment, case no. 1307-00864.

² Promissory Note, Exhibit A to the complaint in confession of judgment, case no. 1307-00864.

³ Id. (emphasis supplied).

executed and delivered to Plaintiff a number of collateral agreements and mortgages.⁴ Concurrently, Hays Enterprises, Inc., Harry and Dorothy Hayes and Hays Tug & Launch Service, Inc. (the “Guarantors”), executed and delivered to Plaintiff three separate Commercial Guaranties (the “Guaranties”). Pursuant to the Guaranties, Guarantors agreed to become liable for the obligations of Pier 1 Hays under the promissory note.⁵ Unlike the promissory note which specifically disallowed recovery of attorney’s commissions in excess of \$10,000, the Guaranties stated in pertinent part as follows:

CONFESSION OF JUDGMENT. FOLLOWING ... AN EVENT OF DEFAULT ... GUARANTOR AUTHORIZES THE PROTHONOTARY ... TO APPEAR ... FOR GUARANTOR [AND] CONFESS OR ENTER JUDGMENT AGAINST GUARANTOR FOR THE ENTIRE PRINCIPAL BALANCE ... **AND AN ATTORNEY’S COMMISSION OF TEN PERCENT (10%) OF THE UNPAID PRINCIPAL AND ACCRUED INTEREST ... BUT NO LESS THAN FIVE HUNDRED DOLLARS (\$500.00)....** GUARANTOR HEREBY WAIVES ANY RIGHT GUARANTOR MAY HAVE TO NOTICE OR TO A HEARING IN CONNECTION WITH ANY SUCH CONFESSION OF JUDGMENT AND STATES THAT EITHER A REPRESENTATIVE OF LENDER SPECIFICALLY CALLED THIS CONFESSION OF JUDGMENT PROVISION TO GUARANTOR’S ATTENTION OR GUARANTOR HAS BEEN REPRESENTED BY INDEPENDENT LEGAL COUNSEL.⁶

Between September 1, 2011 and November 1, 2012, Pier 1 Hays executed and delivered to Plaintiff six separate “Change in Terms Agreements,” each of which extended the maturity date of the promissory note by a specified period of time.⁷ In addition to extending the maturity date of the promissory note, the Change in Terms Agreements allowed recovery of attorney’s commissions in the amount of 10% of the unpaid balance on the loan. Specifically, the pertinent section of the final Change in

⁴ See complaints in confession of judgment, Exhibits B–H, which include a number of agreements to repay lender’s loan, and two mortgages securing the same.

⁵ Commercial Guaranty, Exhibit I to the complaints in confession of judgment, case nos. 1307-00881, 1307-00928, 1307-00868.

⁶ *Id.* at signature pages, (emphasis supplied).

⁷ Change in Terms Agreements, I–VI, Exhibit K to the complaint in confession of judgment, case no. 1307-00864.

Terms Agreements stated as follows:

CONFESSION OF JUDGMENT. BORROWER HEREBY IRREVOCABLY AUTHORIZES ... THE PROTHONOTARY ... TO APPEAR AT ANY TIME FOR BORROWER AFTER A DEFAULT UNDER THIS AGREEMENT AND ... CONFESS OR ENTER JUDGMENT AGAINST BORROWER FOR THE ENTIRE PRINCIPAL BALANCE OF THIS AGREEMENT ... **TOGETHER WITH ... AN ATTORNEY'S COMMISSION OF TEN PERCENT (10%) OF THE UNPAID PRINCIPAL BALANCE AND ACCRUED INTEREST ... NOT LESS THAN FIVE HUNDRED DOLLARS (\$500)....**

BORROWER HEREBY WAIVES ANY RIGHT BORROWER MAY HAVE TO NOTICE OR TO A HEARING IN CONNECTION WITH ANY SUCH CONFESSION OF JUDGMENT AND STATES THAT EITHER A REPRESENTATIVE OF LENDER SPECIFICALLY CALLED THIS CONFESSION OF JUDGMENT PROVISION TO THE BORROWER'S ATTENTION OR BORROWER HAS BEEN REPRESENTED BY INDEPENDENT LEGAL COUNSEL.⁸

In addition, the final Change in Terms Agreement contained a provision detailing how Pier 1 Hays, as borrower, should repay the loan upon maturity. The pertinent section of that provision stated as follows:

PAYMENT. Borrower [Pier 1 Hays] will pay this loan in 4 regular payments of \$21,818.45 each and **one irregular payment estimated at \$2,206,249.18.... Borrower's final payment will be due on April 1, 2013 and will be for all principal and all accrued interest not yet paid.⁹**

On April 1, 2013, Pier 1 Hays defaulted under the terms of the loan. On July 3, 2013, Plaintiff filed four complaints in confession of judgment averring that Pier 1 Hays had failed to pay the promissory note upon maturity. At the time of the filing of the complaints in confession of judgment, Pier 1 Hays had not taken any steps to cure the default. The complaints in confession of judgment ask the court to enter judgment in favor of Plaintiff in the amount of \$2,496,681.67, together with continuing interest and

⁸ Id. (emphasis supplied).

⁹ Id. (emphasis supplied).

costs, including accruing attorney's commissions of no less than \$226,971.06.¹⁰ On July 30, 2013, Pier 1 Hays and its Guarantors filed their respective petitions to open/strike confessions of judgment. The four petitions assert the following arguments:

- (1) Plaintiff failed to give defendants notice of default as required under the loan;
- (2) the amount of attorney's commissions in the confessed judgment exceeds the amount authorized by the promissory note;
- (3) the amount of attorney's commissions is unreasonable; and,
- (4) defendants/petitioners were not aware that the amount of attorney's commissions in the Change of Terms Agreements and Guaranties deviated from those contained in the promissory note; therefore, defendants did not knowingly waive their due process rights for a hearing.¹¹

Answers in opposition to the four petitions were timely filed and the petitions are now ripe for a ruling.

Discussion

In Pennsylvania,

The party against whom judgment is confessed has the burden of disproving the averments it challenges.¹²

A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.¹³

Where a proceeding to confess judgment is instituted by complaint, the complaint and confession of judgment clause

¹⁰ Complaints in confession of judgment, ¶ 20–24 and wherefore clauses.

¹¹ Petition to strike/open judgment, case no. 1307-00864, ¶¶ 9, 11–14.

¹² Davis v. Woxall Hotel, Inc., 395 Pa. Super. 465, 470; 577 A.2d 636, 638 (1990).

¹³ Brooks v. B & R Touring Co., 2007 Pa. Super. 387; 939 A.2d 398, 400 (Pa. Super. 2007).

must be read together to determine whether there are defects on the face of the record.¹⁴

I. Plaintiff had no obligation to provide defendants with notice of default.

Petitioners challenge Plaintiff's right to confess judgments because Plaintiff "declined to give notice of default as it was required to do under the loan agreement."¹⁵ Although petitioners assert that Plaintiff declined to provide notice of default as required under the loan agreement, they have failed to point to any provision therein requiring such notice to be given upon maturity of the obligation.

In this case, the final Change in Terms Agreement between Plaintiff and Pier 1 Hayes required "Borrower's final payment [to] be due on April 1, 2013 and [to] be for all principal and all accrued interest not yet paid."¹⁶ Petitioners admit that Pier 1 Hays "was unable to make payment" on April 1, 2013, after Plaintiff refused to extend maturity of the loan and "demanded immediate payment of the principal balance" thereof.¹⁷ Petitioners' failure to point to any provision requiring notice of default upon maturity of the note, their admission of default, and the clear and unambiguous language of the Change of Terms Agreement requiring payment of all principal and accrued interest at maturity, leave this court with no doubt: Pier 1 Hays failed to fulfill its last obligation under the note, and a notice of default would have been futile thereafter.

II. The amount of attorney's commissions claimed by Plaintiff is consistent with the terms contained in the Guaranties and in the final Change-in-Terms Agreement.

¹⁴ PNC Bank, Nat. Ass'n v. Bluestream Tech., Inc., 2010 Pa. Super. 215; 14 A.3d 831, 843 (Pa. Super. 2010).

¹⁵ Petition to strike/open judgment, case no. 1307-00864, ¶ 9.

¹⁶ Change in Terms Agreement, Maturity 04-01-2013, Exhibit K to complaint in confession of judgments, case no. 1307-00864 (emphasis supplied).

¹⁷ Petition to strike/open judgment, ¶¶ 7, 8.

Petitioners assert that the confessed judgments should be stricken because the attorney's commissions claimed therein differ from the amounts recoverable under the promissory note. However, after reading the pertinent provisions of the Guaranties and final Change in Terms Agreement above, this court is convinced that Pier 1 Hays and its Guarantors freely entered into agreements contemplating attorney's commissions consistent with the amounts claimed by Plaintiff.¹⁸

III. The amounts of attorney's commissions are not unreasonable.

Petitioners assert that the confessed judgments should be stricken because the amount of attorney's commissions claimed therein is unreasonable. However, "relevant Pennsylvania law finds attorney's fees of 10% to be reasonable."¹⁹ In this case, the Guaranties and the final Change in Terms Agreement clearly and unambiguously state that lender may recover 10% of the loan's unpaid principal balance. Petitioners freely agreed to be bound by the provisions in those documents and are now under an obligation to pay reasonable attorney's commissions, equal to 10% of all unpaid principal and accrued interest on the loan, pursuant to Pennsylvania law.

IV. Petitioners knowingly waived their due process rights.

Finally, petitioners assert they did not know that the amount of attorney's commissions in the Change of Terms Agreements and Guaranties deviated from those contained in the promissory note. Thus petitioners argue that they did not knowingly

¹⁸ "The 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." Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 304-05; 469 A.2d 563, 566 (Pa. 1983).

¹⁹ Citicorp Mortgage, Inc. v. Morrisville Hampton Vill. Realty Ltd. P'ship, 443 Pa. Super. 595, 601, 662 A.2d 1120, 1123 (Pa. Super. 1995).

waive their due process rights when they executed the Change of Terms Agreements and Guaranties.

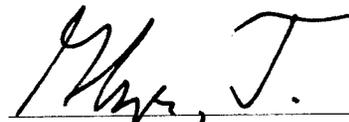
In Pennsylvania,

[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.²⁰

The final Change in Terms Agreement executed by Pier 1 Hays, and the Guaranties respectively executed by Hays Enterprises, Inc., Harry and Dorothy Hays and Hays Tug & Launch Service, Inc. contain confession-of-judgment provisions which clearly and conspicuously state that attorney's commissions of 10% of the unpaid balance may be recovered by Plaintiff in the event of default. In addition, the final Change in Terms Agreement and the Guaranties contain clear and conspicuous language specifically calling the attention of Pier 1 Hays, Hays Enterprises, Inc. Harry and Dorothy Hays, and Hays Tug & Launch Service, Inc., upon the terms in confession-of-judgment provisions. Pier 1 Hays, Hays Enterprises, Inc., Harry and Dorothy Hays and Hays Tug & Launch Services, Inc. knowingly executed the agreements above and waived their due process rights.

The court shall simultaneously enter an Order consistent with this Opinion.

BY THE COURT,



GLAZER, J.

²⁰ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., Inc., 431 Pa. Super. 541, 550, 637 A.2d 309, 313 (1994).