

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

UMS PARTNERS, LLC

Plaintiff

v.

JOSEPH KELLER

Defendant

: March Term, 2016
:
: Case No. 00690
:
: Commerce Program
:
:
: Control No. 16062349

ORDER

AND NOW, this 20th day of July, 2016, upon consideration of defendant's petition to strike or open judgment by confession and for stay of execution, the response of plaintiff, and the respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**.

BY THE COURT,



MCINERNEY, J.

DOCKETED

JUL 20 2016

R. POSTELL
COMMERCE PROGRAM

Ums Partners Llc Vs Kel-ORDRC



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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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| | | |
|--------------------------|---|----------------------|
| UMS PARTNERS, LLC | : | March Term, 2016 |
| <i>Plaintiff</i> | : | Case No. 00690 |
| v. | : | Commerce Program |
| JOSEPH KELLER | : | |
| <i>Defendant</i> | : | Control No. 16062349 |

MEMORANDUM OPINION

Before the Court is defendant’s petition to strike or open judgment by confession and for stay of execution. For the reasons below, the petition is denied in its entirety.

BACKGROUND AND DISCUSSION

Plaintiff UMS Partners, LLC (“UMS”), is a Delaware investment company with an address in Philadelphia, Pennsylvania. Individual defendant Joseph Keller (“Keller”), has an address in Marlton, New Jersey.

On April 11, 2014, Keller executed a promissory note (the “Note”) for the principal sum of \$471,834.26.¹ Pursuant to the Note, Keller was obligated to repay to UMS the principal sum of the Note, plus interest of ten percent, no later than May 30, 2014. The Note contained a provision which stated in pertinent part as follows:

If Maker [Keller] shall fail to pay the sum when due ... then the entire unpaid balance of this Note shall ... become due and payable immediately with interest ... including the period following entry of judgment ... at a rate of two percent (2%) per month compounded monthly ... together with

¹ Promissory Note, Exhibit A to the complaint-in-confession-of-judgment.

attorney's fees for collection....²

In addition, the Note contained a warrant-of-attorney provision which stated in pertinent part that—

[KELLER] ... IRREVOCABLY AUTHORIZES ... ANY ATTORNEY OF ANY COURT OF RECORD TO APPEAR FOR AND CONFESS JUDGMENT THEREIN AGAINST [KELLER] FOR THE AMOUNT FOR WHICH [KELLER] MAY BE OR BECOME LIABLE TO [UMS] UNDER THIS NOTE ... PLUS REASONABLE ATTORNEY'S FEES....³

Keller placed the initials “JK” at the end of the afore-quoted warrant-of-attorney provision.⁴

On March 11, 2016, UMS confessed judgment against Keller in the amount of \$754,328.62. The complaint-in-confession-of-judgment averred that Keller had failed to repay the Note by the due date. The total amount claimed by UMS in its complaint is itemized as follows:

| | |
|---------------------------|------------------------------------|
| Principal Balance | \$471,834.26 |
| Interest | \$6,463.48 |
| Default Interest | \$251,030.88 |
| Attorney's Fees and Costs | \$25,000.00 |
| Total | \$754,328.62 . ⁵ |

On May 5, 2016, UMS recorded the instant Pennsylvania judgment in New Jersey, the State where Keller resides. On June 17, 2016, Keller filed the instant petition to strike or open the confessed judgment and for a stay of execution.

Petition to Strike

The law on striking judgments by confession is well-settled in Pennsylvania:

A motion to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the

² Id., ¶ 5.

³ Id., ¶ 6.

⁴ Id.

⁵ Complaint, ¶ 7.

record. If the record is self-sustaining, the judgment will not be stricken.⁶

In the petition to strike, Keller advances several arguments: first, the claimed default interest of \$251,030.88, calculated at 2% and compounded on a monthly basis, is “excessive and usurious.”⁷ This argument is rejected. In Pennsylvania—

A judgment by confession ... is [properly] stricken when it includes amounts not specified by the warrant of attorney[,] which [amounts] are foreign to and so unassimilable with the principal [so] that the total which was finally formed became a heterogeneous rather than a homogeneous whole.... Where the confessed judgment includes an item not authorized by the warrant the judgment is void in its entirety and must be stricken.⁸

In this case, paragraph 5 of the Note empowered UMS to claim default interest at the rate of 2% per month, compounded monthly, accruing after Keller’s default. Furthermore, the warrant-of-attorney clause in the Note, at paragraph 6, clearly states that judgment may be confessed against Keller “FOR THE AMOUNT FOR WHICH [KELLER] MAY BE OR BECOME LIABLE ... UNDER THIS NOTE.”⁹ Therefore, the warrant-of-attorney clause incorporates by reference the default interest described in the preceding clause, at paragraph 5.¹⁰ The Court finds that the default interest is not foreign to the judgment; therefore, such interest does not create a fatal flaw in the record and does

⁶ Fourtees Co. v. Sterling Equip. Corp., 242 Pa. Super. 199, 205, 363 A.2d 1229, 1232 (1976).

⁷ Complaint, ¶ 32.

⁸ Germantown Sav. Bank v. Talacki, 657 A.2d 1285, 1292 (Pa. Super. 1995).

⁹ Promissory Note, ¶ 6, Exhibit A to the complaint-in-confession-of-judgment.

¹⁰ The confessed judgment would not be stricken even if the default-interest terms had not been incorporated into the warrant-of-attorney clause. This is because “interest, [when] not specifically authorized by warrant of attorney, may be included in confessed judgment since interest is the ‘shadow of a debt.’” Germantown Sav. Bank v. Talacki, 657 A.2d 1285, 1292 (Pa. Super. 1995) (citing McDowell Nat. Bank of Sharon v. Vasconi, 178 A.2d 589, 591 (Pa. 1962) (“interest ... is not something separate and apart from the substantive debt—it is the bark which grows with the tree and is not regarded generally as being separable from the tree, except where the parties explicitly or implicitly agree to so strip it.”) Id.

not require that the confessed judgment be stricken.¹¹

Second, Keller asserts that the judgment should be stricken because the claimed amount of attorney's fees, \$25,000.00, is "extremely excessive."¹² This argument is rejected because in Pennsylvania, attorney's fees of up-to 15% of the principal amount are reasonable, if "specifically authorized by the warrant of attorney."¹³ In this case, the claimed amount of attorney's fees is slightly greater than 5% of the principal owed by Keller. Even though the warrant-of-attorney in this case does not specify the percentage of attorney's fees, this Court finds that the claimed amount of \$25,000.00 is reasonable because it is well below 15% of the principal. For this reason, inclusion of attorney's fees in the amount of \$25,000.00 does not create a fatal flaw in the record and shall not cause the judgment to be stricken.

Lastly, Keller asserts that the judgment is unconscionable and should be stricken. This argument is also rejected. In Pennsylvania, "where [a] confession of judgment clause in [a promissory] note [is] unconscionable, [the] court will not bind [a] party to it."¹⁴ However in this case, the sophisticated parties to the Note negotiated the terms of their deal and contemplated therein all of the obligations instantly asserted against Keller. Since Keller is a sophisticated party who negotiated and agreed to the terms of a

¹¹ The Court also notes that one of the purposes of the usury statute in Pennsylvania is "to protect the citizenry of this Commonwealth from being exploited at the hands of unscrupulous individuals seeking to circumvent the law at the expense of *unsuspecting* borrowers who may have no other avenue to secure financial backing for a, for example, business venture." *Smith v. Mitchell*, 616 A.2d 17, 20 (Pa. Super. 1992) (discussing 41 Pa. P.S. § 201 (2016)). In this case, Keller has offered no evidence showing that he was an *unsuspecting* borrower. On the contrary, Keller's negotiation of the terms of a substantial promissory note, in an amount close to \$500,000.00, suggests that he was sufficiently sophisticated to understand the consequences of his actions

¹² Complaint-in-confession-of-judgment, ¶¶ 33–34.

¹³ *Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co.*, 431 Pa. Super. 541, 552, 637 A.2d 309, 314 (1994).

¹⁴ *Snyder v. Rogers*, 499 A.2d 1369, 1371 (Pa. Super. 1985) (striking judgment against a wife who could not be said to have made a meaningful choice when she felt compelled to co-sign with her husband a promissory note, lest she face public humiliation stemming exclusively for the illegal acts of her husband).

substantial Note in the amount of nearly half-a-million dollars, he may not now seek to strike the judgment on grounds of unconscionability.

Petition to Open

The law on opening judgments by confession is well-settled 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; and a reviewing court will not reverse the determination of the lower court absent clear and manifest abuse of discretion.... [T]he standard of sufficiency the court must employ is that of a directed verdict, viewing all evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense, while rejecting the adverse allegations of the party obtaining the judgment.¹⁵

In addition—

The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses ... The defenses raised must be valid ones.¹⁶

Finally—

A judgment taken by confession will be opened only if the petitioner ... alleges a meritorious defense....¹⁷

According to Keller, several meritorious defense require that this Court open the confessed judgment. First, Keller avers that the amounts claimed by UMS are not authorized.¹⁸ This argument is rejected because the Court already determined in its analysis of Keller's petition to strike that all of the amounts claimed by UMS are authorized under the warrant-of-attorney.

Second, Keller asserts that the judgment should be opened because he neither

¹⁵ *Indus. Valley Bank & Trust Co. v. Lawrence Voluck Associates, Inc.*, 428 A.2d 156, 158 (Pa. Super. 1981).

¹⁶ *Haggerty v. Fetner*, 481 A.2d 641, 644 (Pa. Super. 1984).

¹⁷ *Rittenhouse v. Barclay White Inc.*, 625 A.2d 1208, 1210 (Pa. Super. 1993).

¹⁸ Complaint-in-confession-of-judgment, ¶ 48—a.

“understood nor appreciated” the consequences of the cognovit clause within the Note, “insofar as he was asked to sign the Note” in the office of UMS “without the benefit of ... counsel.”¹⁹ This argument has not merit and is rejected. In Pennsylvania—

[t]here is ... no merit to [petitioner's] assertion that [his] purported lack of knowledge and/or understanding of the warrant of attorney provisions in the note ... requires that the judgment be ... opened. The 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

In this case, Keller executed a commercial Note of substantial value which contained a clearly- worded and conspicuously-typed cognovit clause. His alleged failure to read, understand or familiarize himself with the consequences embedded in that clause is not a meritorious defense, and may not be asserted to open the judgment. This is especially true in the instant case, where Keller has failed to provide any evidence that he was coerced into signing the Note, or deprived of the right to consult with counsel before he affixed his signature thereon.

Finally, Keller appears to aver that the Note is “suspect” because certain terms therein “could have been changed after [Keller’s] signature.”²¹ Keller offers the afore-quoted suggestions on grounds that “[t]here was no Notary Public present when [Keller] executed the Note, although there is now a notary seal affixed to the Note.”²² This argument is rejected because Keller, as the petitioning party, “bears the burden of producing sufficient evidence to substantiate” the defense that the Note was altered

¹⁹ *Id.*, ¶ 48–b.

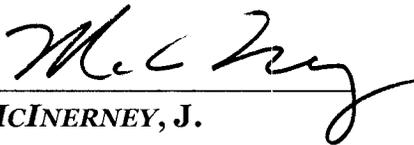
²⁰ *Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co.*, A.2d 309, 313 (Pa. Super. 1994).

²¹ Complaint-in-confession-of-judgment, ¶ 48–c.

²² *Id.*

after he affixed his signature thereon.²³ In this case, Keller did not provide evidence that the Note he actually signed in the offices of UMS had terms that were in any manner different from those on the Note of record, nor has he shown that a notarial seal was added to the Note after he had executed such a document. For this reason, Keller's final challenge to the confessed judgment is rejected.

BY THE COURT,



MCINERNEY, J.

²³ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).