

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

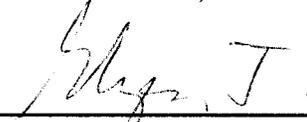
GENERAL TRADING CO., INC. : October Term, 2016
: :
Plaintiff : Case No. 02792
: :
v. : Commerce Program
: :
S&F MEAT CORP. : :
: :
Defendant : Control No. 16110103

ORDER

AND NOW, this 9th day of January, 2017, upon consideration of the petition to strike or open judgment by confession and for a stay of execution, the answer in opposition of plaintiff, the respective *memoranda* of law and defendant's reply brief, it is **ORDERED AS FOLLOWS:**

- I. The petition to strike is denied in its entirety.
- II. The petition to open is **GRANTED** and the **JUDGMENT IS OPENED.**¹

BY THE COURT,



GLAZER, J.

General Trading Co., In-ORDOP



DOCKETED

JAN - 9 2017

R. POSTELL
COMMERCE PROGRAM

¹ The court reminds the parties that “[i]f a judgment is opened ... the issues to be tried shall be defined by the complaint ... and by the petition, answer, and the order of the court opening the judgment. There shall be no further pleadings.” Pa. R.C.P. 2960.

MEMORANDUM OPINION

Plaintiff General Trading Co. Inc., (“GTC”), is a New Jersey company engaged in the business of food distribution and financing. Defendant S&F Meat Corp. (“S&F”) is a business with an address in Philadelphia, Pennsylvania. At all times relevant to this action, S&F held a leasehold interest in real property (hereinafter, “the Philadelphia Supermarket”), located at 1240 East Erie Avenue, in Philadelphia, Pennsylvania.²

On December 21, 2010, S&F entered into a Leasehold Mortgage agreement (the “Leasehold Mortgage”), with GTC. Pursuant to the Leasehold Mortgage, S&F mortgaged to GTC its leasehold interest in the Philadelphia Supermarket, and GTC agreed to provide S&F with financing.³ Specifically, the Leasehold Mortgage stated that—

this Leasehold Mortgage secures (i) obligations evidenced by the documents, agreements and instruments ... annexed hereto and made a part hereof ... and (ii) all now existing and hereafter arising accounts receivables owing to GTC, and extensions of credit, loans and advances by [GTC] to [S&F]....⁴

The Leasehold Mortgage also contained a provision titled Confession of Judgment for Possession. Pursuant to this provision, S&F authorized GTC to confess judgment for possession of the Philadelphia Supermarket “[u]pon the occurrence of an Event of Default.”⁵

On December 23, 2010, GTC, S&F and an affiliate of S&F identified as 476 Meat Corp. (“Meat-Corp”), entered into a “Cross—Corporate Guaranty.”⁶ Pursuant to the

² Lease Agreement, Exhibit B to the complaint-in-confession-of-judgment (effective May 1, 2011).

³ Leasehold Mortgage, Exhibit A to the complaint-in-confession-of-judgment at p. 1—Recitals. Pursuant to the Leasehold Mortgage, Lender named an affiliate company to act as mortgagee on behalf of Lender. Id., p. 1.

⁴ Id.

⁵ Id., § 10.7, p. 7.

⁶ Cross—Corporate Guaranty, Exhibit C to the complaint-in-confession-of-judgment.

Cross—Corporate Guaranty, S&F and Meat-Corp “[j]ointly and severally unconditionally guarantee[d] full and prompt payment when due ... and the full, prompt and unconditional performance of ... all Obligations” owed to GTC.⁷ The Cross—Corporate Guaranty defined the term “Obligations” as “all existing and future indebtedness, advances, extensions of credit, obligations, liabilities and duties of all kinds ... from ... [S&F and each Guarantor].”⁸ The Cross—Corporate Guaranty also contained a provision stating that the terms within that document would be exclusively controlled under the law of New Jersey.⁹ At the time the Cross—Corporate Agreement was executed, Meat-Corp held an interest in a supermarket based in Brooklyn, N.Y. (the “Brooklyn Supermarket”).

On March 4, 2015, Meat-Corp executed a \$264,288.40 promissory note (the “Note”) payable to GTC. The Note stated as follows:

The occurrence of any one or more of the following events shall constitute an event of default ...:

- A. The failure of ... [Meat-Corp] to pay any payment due and payable under this Note, when the same is due and payable;
- B. The failure of the ... [Meat-Corp] to perform or observe, in a prompt and timely manner, any term ... or agreement in this Note....¹⁰

At some point, Meat-Corp defaulted on the \$264,288.40 Note. Following the default, GTC and Meat-Corp entered into a “Peaceful Surrender Agreement” whereby Meat-Corp admitted its defaults and agreed to surrender its interest in the Brooklyn

⁷ Id., § 3—GUARANTY CLAUSE.

⁸ Id., at § 1: “Obligations” and “Obligor.”

⁹ Id. at § 12.

¹⁰ Promissory Note, Exhibit D to the complaint-in-confession-of-judgment, § 4—EVENTS OF DEFAULT.

Supermarket.¹¹ The Peaceful Surrender Agreement, which bears the date of April 4, 2016, contains language purporting to waive the right of Meat-Corp to assert defenses against GTC, and also shows that Meat-Corp agreed to empower GTC to sell the Brooklyn Supermarket in accordance with the requirements set forth in the Uniform Commercial Code.¹² After execution of the Peaceful Surrender Agreement, GTC held an auction for the Brooklyn Supermarket, placed the only bid in the proceedings, and acquired the property for \$10,000.00.

On October 19, 2016, GTC confessed judgment against S&F. Through this action, GTC seeks possession of the Philadelphia Supermarket pursuant to § 10.7 of the Leasehold Mortgage dated December 21, 2010.¹³ GTC confessed judgment against S&F because S&F remains a cross--corporate guarantor of Meat-Corp pursuant to the Cross - Corporate Agreement of December 23, 2010. Specifically, the complaint-in-confession-of-judgment avers that S&F is a party-guarantor under the terms of the Cross - Corporate Guaranty; therefore, S&F is responsible to GTC for Meat-Corp's default on the Note.¹⁴

On October 31, 2016, S&F filed its petition to strike or open the confessed judgment and for a stay of execution. In the petition, S&F avers that a number of fatal defects in the record require striking the confession of judgment. Alternatively, S&F asserts a number of challenges to judgment which would require it to be opened.

THE PETITION TO STRIKE

In Pennsylvania --

¹¹ Peaceful Surrender Agreement, Exhibit B--30 to GTC's response in opposition to the petition to strike or open.

¹² Id., 2.

¹³ Complaint-in-confession-of-judgment, ¶ 13; Leasehold Mortgage, Exhibit A to the complain-in-confession-of-judgment, § 10.7.

¹⁴ Complaint-in-confession-of-judgment, ¶ 5 and WHEREFORE CLAUSE.

[a] motion to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. If the record is self-sustaining, the judgment will not be stricken.¹⁵

In the petition to strike, S&F asserts that the fatally defective record requires the confessed judgment to be stricken. First, S&F asserts that GTC violated the Pennsylvania Rules of Civil Procedure “because the instrument upon which the obligation was incurred, the ... Promissory Note, does not have a confession of judgment clause.”¹⁶ This argument is rejected.

In Pennsylvania, the complaint-in-confession of-judgment “shall contain ... a demand for judgment **as authorized by the warrant.**”¹⁷ In addition, “a warrant of attorney is a contractual agreement between the parties and **the parties are free to determine the manner in which the warrant may be exercised.**”¹⁸

In this case, GTC and S&F entered into a Leasehold Mortgage. Under the terms of the Leasehold Mortgage, S&F agreed to a warrant of attorney provision which empowered GTC to confess judgment upon the occurrence of certain events of default. Furthermore, the Leasehold Mortgage specified that an event of default would occur if “any guarantor under **any Guaranty**” ceased its operations which, “in ... [GTC’s] sole and absolute discretion, [would] adversely affect... the security of any of the Obligations.”¹⁹ S&F also executed a Cross—Corporate Guaranty in which S&F agreed to “unconditionally guarantee full and prompt payment when due ... and the full, prompt

¹⁵ *Fourteens Co. v. Sterling Equip. Corp.*, 242 Pa. Super. 199, 205, 363 A.2d 1229, 1232 (1976)

¹⁶ *Memorandum of law* in support of the petition to strike, p. 10.

¹⁷ Pa. R.C.P. 2952(a)(8) (emphasis supplied).

¹⁸ *Atl. Nat. Trust, LLC v. Stivala Investments, Inc.*, 922 A.2d 919, 924 (Pa. Super.2007) (emphasis supplied).

¹⁹ Leasehold Mortgage, § 5(iv) (emphasis supplied), Exhibit A to the complaint-in-confession-of-judgment.

and performance of ... all Obligations owed [by Meat-Corp] to GTC.” Finally, the complaint-in-confession-of-judgment avers *inter alia* that Meat-Corp defaulted on the Note by failing to remit payments under the Note, and by ceasing its operations.²⁰ The record shows that S&F entered into the Leasehold Mortgage containing the warrant of attorney, and freely determined the manner in which that provision would be exercised by GTC. Stated another way, S&F freely empowered GTC under the Leasehold Mortgage to seek possession of the Philadelphia Supermarket in the event Meat-Corp defaulted upon the Note. Lender exercised its right to confess judgment in accordance with the Leasehold Mortgage, no fatal defect appears on the face of the record, and F&S’s first argument is rejected.

Second, S&F challenges the judgment on grounds that there is no direct relation between the warrant-of-attorney provision and S&F’s signature. S&F asserts that the warrant is not conspicuous or properly set-off; therefore, S&F contends that it did not knowingly or intelligently consent to the terms of that provision. This argument is also rejected.

In Pennsylvania, a confession-of-judgment clause that is properly labeled and easily readable will not fail just because the words are set in small type.²¹ In addition—

[t]here is ... no merit to the assertion that [a petitioner’s] purported lack of knowledge and/or understanding of the warrant of attorney provisions in the note and guaranty agreement requires that the judgment be stricken or opened....²²

In this case, the individual who executed the Leasehold Mortgage and the Cross-Corporate Guaranty on behalf of S&F was represented by counsel at the time he placed

²⁰ Complaint-in-confession-of-judgment, ¶¶ 7–10.

²¹ Plum Tree, Inc. v. Seligson, 307 A.2d 298, 299 (Pa. Super.1973).

²² Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994).

his signature on the documents.²³ S&F may not contend that the individual who signed the documents on its behalf did not knowingly and intelligently consent to the terms of the *cognovit* clause within the Leasehold Mortgage and the Cross-Corporate Guaranty. For this reason, the court rejects S&F’s second challenge in its petition to strike the confessed judgment.

THE PETITION TO OPEN

In Pennsylvania—

if the truth of the factual averments contained in the complaint in confession of judgment and attached exhibits are disputed, then the remedy is by proceeding to open the judgment.²⁴

In the petition to open, S&F advances a number of defenses. The court shall focus on the defense based on GTC’s alleged failure to dispose of the Brooklyn Supermarket in a commercially reasonable manner. Specifically, S&F asserts that GTC rejected a third-party’s offer to assume the leasehold interest, in the amount of \$550,000.00, and “chose instead to auction the [leasehold interest] at a private auction where it purchased the [leasehold interest] for \$10,000.00 as a ploy to then go after S&F for the contrived shortfall.”²⁵ According to S&F, acceptance of the third party’s offer would have satisfied “all of the amounts” necessary to extinguish the obligations of Meat-Corp under the Note, thereby rendering unnecessary the instant action in confession of judgment against S&F.²⁶ Opposing this position, GTC argues that S&F may not assert a defense based on commercial unreasonableness because such a defense

²³ Leasehold Mortgage, § 10.7; Cross-Corporate Guaranty § 2.

²⁴ *Neducsin v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015), appeal denied, 131 A.3d 492 (Pa. 2016).

²⁵ Petition to open, ¶ 85. Under this argument, S&F avers that the offer from the willing third-party purchaser would have extinguished the entire obligation owed by S&F and Meat-Corp to GTC. See *Memorandum* of law in support to the petition to open, p. 2.

²⁶ *Id.*, 87.

was waived by Meat-Corp when it surrendered the Brooklyn Supermarket pursuant to the Peaceful Surrender Agreement.²⁷ To determine whether Meat-Corp waived the right to assert a defense based on commercial unreasonableness, this court will analyze the applicable sections of Title 12A of the New Jersey Statute, also known as the New Jersey Commercial Transactions Statute.²⁸

At the onset, the court notes that S&F, as a guarantor of Meat-Corp under the Cross-Corporate Guaranty, may assert any defenses which would be available to Meat-Corp as a debtor under the Note executed in favor of GCT.²⁹ With this in mind, the court turns its attention to the New Jersey Commercial Transactions Statute, whose pertinent sections state that—

the debtor or obligor **may not waive** or vary the rules stated in the following listed sections:³⁰

(a) Disposition after default. After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) **Commercially reasonable disposition. Every aspect of a disposition of collateral**, including the method, manner, time, place, and other terms, **must be commercially reasonable**. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) Purchase by secured party. A secured party may purchase

²⁷ Answer of GCT in opposition to the petition to open, § 87; *memorandum* of law in support of the answer in opposition to the petition to open, pp. 11–12.

²⁸ As noted earlier, the parties to the Cross—Corporate Guaranty agreed that such a document be governed under the laws of New Jersey. *See* Cross—Corporate Guaranty, Exhibit C to the complaint-in-confession-of-judgment, § 12.

²⁹ “Equitable in nature ... the defense of impairment of collateral is available to a guarantor just as much as to the debtor. No less can be said for the defenses of lender bad faith and misconduct.” *Nat’l Westminster Bank N.J. v. Lomker*, 649 A.2d 1328, 1331 (N.J. Super. 1994).

³⁰ N.J. Stat. Ann. § 12A:9-602 (2017) (emphasis supplied).

collateral:

- (1) at a public disposition; or
- (2) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.³¹

In addition, the court notes that under New Jersey law,

[a] creditor must ... overcome the presumption that the value of the collateral at least equaled the debt it secured. The presumption may be overcome by introducing independent proof of the fair and reasonable value of the collateral (plus or minus any payments or charges incurred in disposing of the collateral) and comparing it with the price achieved at the actual sale. Similarly, the debtor should be afforded opportunity to present such independent proof of value.³²

Based on the foregoing, the court notes that S&F avers the existence of a market value for the Brooklyn Supermarket, in the amount of \$550,000.00, representing the price which a third-party was willing to pay to assume the premises.³³ The court further notes that under New Jersey law, Meat-Corp was statutorily precluded from waiving the defense grounded on the commercially unreasonable disposition of the Brooklyn Supermarket. The court finally notes that both S&F and GCT have submitted affidavits in support of their filings. According to the affidavit supplied by S&F, a third-party's offer to assume the leasehold interest in the Brooklyn Supermarket failed as a result of GCT's insistence that such a party operate the supermarket under an exclusive agreement with GCT.³⁴ Conversely, GCT states in its affidavit that it "never heard" of

³¹ N.J. Stat. Ann. § 12A:9-610 (2017).

³² *Sec. Sav. Bank, SLA v. Tranchitella*, 592 A.2d 284, 290 (N.J. Super. 1991) (held: although mere inadequacy of price is insufficient to establish a commercially unreasonable disposition, one who fails to make a good faith effort to dispose of the collateral at the highest possible price does not act in a commercially reasonable manner).

³³ Petition to open, § 85.

³⁴ Affidavit of Sergio Marte on behalf of S&F, Exhibit 1 to the petition to strike or open, §§ 30–31.

the existence of a third-party willing to assume the leasehold interest in the Brooklyn Supermarket.³⁵ The averments in the parties' pleadings, and the contradictory statements contained in the respective affidavits, create an issue of fact the resolution of which requires this court to open the judgment-by-confession. Since F&S is entitled to assert the defense based on the commercially unreasonable disposition of the Brooklyn Supermarket, the petition to open is granted and judgment-by-confession is opened.

BY THE COURT,



GLAZER, J.

³⁵ Affidavit of Jonathan Abad on behalf of GCT, Exhibit B to GCT's answer in opposition to S&F's petition to open, § 47.