

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

CRE/ADC VENTURE 2013—1, LLC	:	October Term, 2016
	:	
Plaintiff	:	Case No. 03011
	:	
v.	:	Commerce Program
	:	
WARING HOUSE, LLC	:	
	:	
Defendant	:	Control No. 16113143

ORDER

AND NOW, this 3rd day of January, 2017, upon consideration of the petition to strike or open confession of judgment filed by defendant Waring House, LLC, and the response in opposition with a *memorandum* of law filed by plaintiff CRE/ADC Venture 2013-1, LLC, it is **ORDERED** that the petition to strike or open confession of judgment is **DENIED IN ITS ENTIRETY**.

BY THE COURT,



GLAZER, J.

Cre/Adc Venture 2013-1 -ORDRC



DOCKETED

JAN 13 2017

R. POSTELL
COMMERCE PROGRAM

MEMORANDUM OPINION

Plaintiff CRE/ADC Venture 2013—1 LLC (“Plaintiff”), is a Delaware limited liability company with a principal place of business in the State of California.¹

Defendant Waring House LLC (“Defendant”), is a Pennsylvania limited liability company with an address in Philadelphia, Pennsylvania.²

On January 24, 2012, Plaintiff’s predecessor in interest (“Nova Bank”) provided Defendant with a business loan in the amount of \$149,000.00, pursuant to the terms of a Business Loan Agreement (the “Loan Agreement”).³ On the same day, Defendant promised to repay Nova Bank by executing a promissory note in the principal amount of \$149,000.00 (the “Note”).⁴ The Note contained the following repayment provisions:

PAYMENT. Borrower [Defendant herein] will pay this loan in 59 regular payments of \$761.46 each and one irregular last payment estimated at \$136,869.64. Borrower’s first payment is due March 1, 2012, and all subsequent payments are due on the same day of each month after that....⁵

* * *

DEFAULT. Each of the following shall constitute an event of default ... under this Note:

PAYMENT DEFAULT. Borrower [Defendant herein] fails to make any payments when due under this Note.⁶

On October 26, 2012, Nova Bank was shut down by the Pennsylvania Department of Banking and Securities. At some point thereafter, but no later than September 27, 2013, the Federal Insurance Deposit Corporation (“FDIC”) issued a statement titled

¹ Complaint-in-confession-of-judgment, ¶ 1; petition to strike or open judgment by confession, ¶ 2.

² Petition to strike or open judgment by confession, ¶ 1; complaint-in-confession-of-judgment, ¶ 2.

³ Loan Agreement between Nova Bank (a Pennsylvania bank), and Waring House, LLC, Exhibit A to the complaint-in-confession-of-judgment.

⁴ Promissory Note dated January 24, 2012, Exhibit B to the complaint-in-confession-of-judgment.

⁵ Id., p. 1.

⁶ Id.,

“Failed Bank Information” which advised the public that the FDIC had been appointed receiver of Nova Bank.⁷ In the statement, the FDIC instructed Nova Bank’s loan customers as follows:

[i]f you had a loan with NOVA BANK, you should continue to make your payments as usual.... Checks should be made as usual and sent to the same address until further notice....⁸

On March 18, 2013, the FDIC sent a letter to Defendant. This letter informed Defendant that an entity named Midland Loan Services, Inc., (“Midland”), had been appointed as servicer to the Loan Agreement between Nova Bank and Defendant. The letter instructed Defendant that “all payments should be forwarded to Midland” at Midland’s address in Chicago, Illinois.⁹ This letter included a request for remittance of the then current monthly amount owed by Defendant under the Loan Agreement, to be paid no later than by April 12, 2013.¹⁰ In addition, the letter contained an account statement showing that as of March 18, 2013, Defendant owed past due payments to Nova Bank in the amount of \$4,980.27, plus late charges of \$496.97.¹¹ On April 10, 2013, Midland informed Defendant that Midland was acting as servicer to the Loan Agreement.¹²

On October 17, 2013, all of Nova Bank’s rights in the Loan Agreement and Note

⁷ Failed Bank Information issued by the Federal Insurance Deposit Corporation, ¶ I-- Introduction, found at <https://www.fdic.gov/bank/individual/failed/novabank.html>, Exhibit C to Defendant’s petition to strike or open the confessed judgment. The Failed Bank Information shows that FDIC last updated its statement on September 27, 2013, p. 3 of 3 (un-numbered). Although the Failed Bank Information identifies thirteen headings related to specific topics, only topics I–XI are actually provided in the body of the text. Conversely, topics XII and XIII, respectively titled “NOVA BANK Contact Information” and “Balance Sheet Summary” are notably absent from the FDIC statement attached hereto as Exhibit C.

⁸ Id., ¶ VII.

⁹ Letter issued by the FDIC to Defendant Waring House, LLC, dated March 18, 2013, Exhibit D to Defendant’s petition to strike or open the confessed judgment.

¹⁰ Id.

¹¹ Id.

¹² Letter from Midland dated April 10, 2013, Exhibit E to Defendant’s petition to strike or open the confessed judgment.

were assigned to Plaintiff pursuant to the language of an “*Omnibus Assignment*” executed by FDIC.¹³ The *Omnibus Assignment* stated as follows:

FDIC IN ITS CAPACITY AS RECEIVER FOR NOVA BANK ... for value received, does by these presents grant, bargain, sell, assign, transfer and set over *as is, where is, without recourse* ... to **CRE/ADC Venture 2013—1 LLC** [herein Plaintiff] ... all of [FDIC’s] right, title and interest in and to the loan documents associated with that certain loan made by ... Nova Bank ... dated January 24, 2012 in the amount of \$149,000.00....¹⁴

On April 20, 2016, Plaintiff forwarded to Defendant a notice of default and a demand for full repayment within five days.¹⁵ Defendant failed to cure within five days and Plaintiff entered judgment by confession against Defendant on October 20, 2016. Defendant filed its petition to strike or open the judgment on November 27, 2016, and the petition is ripe for a ruling.

PETITION TO STRIKE.

In Pennsylvania—

[a] petition to strike a judgment will not be granted unless a fatal defect in the judgment appears on the fact [*sic*] of the record. Matters outside of the record will not be considered, and if the record is self-sustaining, the judgment will not be stricken.¹⁶

The petition filed by Defendant asks the court to strike the judgment because Plaintiff’s complaint “fails to aver the date of default.”¹⁷ This Argument is quickly rejected because under the Pennsylvania Rules of Civil Procedure, “if the [confessed]

¹³ *Omnibus Assignment*, Exhibit C to the complaint-in-confession-of-judgment.

¹⁴ *Id.*

¹⁵ Letter dated April 20, 2016 from Plaintiff’s counsel to Defendant, Exhibit D to the complaint-in-confession-of-judgment, pp. 1-2 (un-numbered).

¹⁶ *Morgan v. Morgan*, 117 A.3d 757, 761 (Pa. Super. 2015).

¹⁷ Petition to strike, ¶ 27.

judgment may be entered only after a default or the occurrence of a condition precedent, [then the complaint-in-confession-of-judgment shall contain] an averment of the default or of the condition precedent.”¹⁸ Stated differently, this Rule requires that, in an action based upon a confessed judgment, plaintiff is only required to aver the occurrence of an event of default without any need to identify a date.

Turning to the issue at hand, the court notes that Plaintiff attached to its complaint the copy of a letter dispatched to Defendant on April 20, 2016. That letter contained a notice of default which specifically stated as follows:

[n]otice of **DEFAULT** is hereby given under the Loan Documents for Borrower’s [herein Defendant’s] failure to pay the amounts due under the Loan ... as of March 31, 2016....¹⁹

As attached to the complaint, this notice sufficiently complied with the requirements of the Pennsylvania Rules of Civil Procedure, and particularly with the requirement contained in Pa. R.C.P. 2952 (a)(6). The Rules of Civil Procedure do not impose upon this Plaintiff an obligation to aver a date of default, and Defendant has failed to cite any authority in support of such an argument. The lack of a date of default does not constitute a fatal flaw in the record, and for this reason Defendant’s first argument in the petition to strike is rejected.

Defendant also asks the court to strike the judgment because “Plaintiff’s complaint fails to include a verification of the Note copy.”²⁰ Defendant’s argument is rejected. In Pennsylvania—

[the term] **verified** when used in reference to a written

¹⁸ Pa. R.C.P. 2953(a)(6) (2017).

¹⁹ Letter dated April 20, 2016 from Plaintiff’s counsel to Defendant, Exhibit D to the complaint-in-confession-of-judgment, p. 1.

²⁰ Petition to strike, ¶ 28.

statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.²¹

In this case, the individual charged with authority to sign Plaintiff's pleadings executed a verification which is found immediately below Exhibit D attached to Plaintiff's complaint-in-confession-of-judgment. The verification states as follows:

I, William Dyer, hereby state that I am a Portfolio Manager and authorized signatory for [plaintiff] ... and as such, am authorized to make this **Verification** on the Plaintiff's behalf. I have read the statements contained in the ... Complaint in Confession of Judgment and the statements ... therein are true and correct to the best of my knowledge, information, and belief.

I have reviewed the exhibits attached to the Complaint in Confession of judgment and such exhibits are true and correct copies of the originals.... **I understand that these statements are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.**

S/ William Dyer.²²

The court is satisfied that the Note at issue, which includes a *cognovit* clause, is attached as Exhibit B to the complaint-in-confession-of-judgment. Therefore, the court finds that the complaint and attached Note are verified, the record does not contain a fatal flaw, and defendant's second argument in its petition to strike is meritless.

PETITION TO OPEN

In Pennsylvania—

[t]he trial court may open a confessed judgment if the petitioner

²¹ PA. R.C.P. 76 (2017) (emphasis supplied).

²² Verification found immediately below Exhibit D to the complaint-in-confession-of-judgment (emphasis supplied).

- (1) acts promptly,
- (2) alleges a meritorious defense, and
- (3) can produce sufficient evidence to require submission of the case to a jury.

[A] judgment of confession will be opened if a petitioner seeking relief therefrom produces evidence which in a jury trial would require issues to be submitted to a jury.... The standard of sufficiency here is similar to the standard for a directed verdict, in that [the court] must view the facts most favorably to the moving party ... accept as true all the evidence and proper inferences in support of the defense raised, and ... reject all adverse allegations.²³

In the petition to open, Defendant argues that its failure to make payments under the Loan Agreement stemmed not from any fault of its own, but from Nova Bank's failure to provide Defendant with a lender's or servicer's contact following the shut-down of that institution.²⁴ This argument is easily rejected because Defendant has failed to provide any evidence in support of its argument. For example, Defendant has offered no evidence showing that it paid or attempted to pay the monthly amounts owed to Nova Bank by mailing such payments to the address clearly listed in the Loan Agreement and Note. Alternatively, Defendant has offered no evidence showing that it escrowed the monthly amounts as they became due, notwithstanding the alleged lack of contact with lender or its servicers. Defendant has failed to sustain its burden of proof: for this reason, the court rejects the argument seeking to fault Nova Bank or its successors for Defendant's failure to pay the monthly amounts owed under the Loan Agreement.

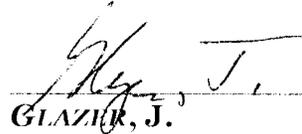
Second, Defendant argues that the judgment should be opened because the

²³ *Neduesin v. Caplan*, 121 A.3d 498, 507 (2015), appeal denied, 131 A.3d 492 (Pa. 2016).

²⁴ Petition to open, ¶¶ 29–30, 32.

complaint and notice of default contain inflated amounts.²⁵ This argument is also rejected for the same reason articulated above –that is, Defendant has failed to provide any evidence showing that the amounts as confessed exceeded those allowed under the Note and other loan documents.²⁶

BY THE COURT,



GLAZIK, J.

²⁵ *Id.*, ¶¶ 31, 35 –36.

²⁶ Defendant also asserts an argument which is somewhat related to the one under examination –namely, that the judgment should be opened because “[t]he notice of default, attached to Plaintiff’s complaint, states an inflated amount to cure which includes escrow, although escrow is not part of the defined payment under the Note.” *Id.* ¶ 34. The court has examined the entire document titled Notice of Default, attached as Exhibit D to the complaint-in-confession-of-judgment, and has found nowhere embedded in the text any reference to an amount in escrow. Instead, the Notice of Default lists the various amounts owed by Defendant as “(i) principal in the amount of \$147,232.63, plus (ii) past due interest of \$22,547.99, plus (iii) default interest in accordance with the Loan Documents in the amount of \$24,851.56, plus (iv) fees and advances in the amount of \$13,577.70. For this additional reason, the challenge to the judgment by confession is rejected.