

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CUSTOMERS BANK, formerly	:	
known at New Century Bank,	:	C.A. No. K13J-00649 WLW
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MICHAEL A. ZIMMERMAN,	:	
CONNIE JO ZIMMERMAN,	:	
BBC PROPERTIES, INC. and	:	
GOVERNORS CLUB PROFESSIONAL:	:	
CENTER, LLC.,	:	
	:	
Defendants.	:	

Submitted: September 27, 2013

Decided: November 22, 2013

**ORDER**

Upon Hearing Held on Confession of Judgment.

*Judgment Entered.*

Richard M. Beck, Esquire of Klehr Harrison Harvey Branzburg LLP, Wilmington, Delaware; attorney for Plaintiff.

Peter K. Schaeffer, Jr., Esquire of Avenue Law, Dover, Delaware; attorney for Defendants.

WITHAM, R.J.

## **INTRODUCTION**

Plaintiff has filed a complaint with this Court seeking to confess judgment against Defendants. Defendants have objected. Pursuant to Superior Court Civil Rule 58.1(g)(3), this Court held a hearing on the issue of whether Defendants effectively waived their due process rights to notice and a hearing. The Court's factual findings from the hearing and holding on the issue of waiver follows. For the reasons discussed herein, confession of judgment is **ENTERED** against Defendants.

## **FACTS AND PROCEDURE**

The Defendants in this matter are Michael A. Zimmerman (hereinafter "Michael"); Michael's wife, Connie Jo Zimmerman (hereinafter "Connie") (collectively "the Zimmermans"); BBC Properties, Inc. (hereinafter "BBC"); and Governors Club Professional Center, LLC (hereinafter "Governors Club") (collectively "Defendants"). Plaintiff is Customers Bank (hereinafter "Plaintiff"), formerly known as New Century Bank at times relevant to the instant proceeding.

Plaintiff filed a complaint with this Court on June 21, 2013 seeking to confess judgment against Defendants on two separate commercial loans totaling \$602,163.30 and \$1,558,792.95, respectively, not including interest that has accrued since June 20, 2013. Defendants executed a series of promissory notes and other related instruments from 2006 through 2011. The instrument under which Plaintiff is seeking to confess judgment against Defendants is a forbearance agreement executed in 2011 (hereinafter "the Forbearance Agreement"), as it is the most recently executed agreement to include a confession of judgment provision. Defendants objected to the

*Customers Bank v. Michael Zimmerman, et al.*  
C.A. No. K13J-00649 WLW  
November 22, 2013

entry of confessed judgment, and on September 27, 2013 the Court held a hearing on whether Defendants voluntarily, knowingly and intelligently waived their rights to notice and a hearing. Plaintiff presented testimony from only one witness, Robert DeYoung (hereinafter “DeYoung”), Vice President of Customers Bank and previously a loan processor employed by the bank since 2007. Both parties also submitted exhibits in support of their respective positions.

The Zimmermans are commercial real estate developers. Both Michael and Connie are members of the Governors Club LLC. Michael is the President of BBC. Defendants entered into loan transactions with Plaintiff to refinance mortgages that encumbered the Governors Club property in Dover. Defendants defaulted on their loan obligations to Plaintiff, and in 2011 executed the Forbearance Agreement, under which Plaintiff agreed to forbear from exercising its rights and remedies on the notes underlying the loans. It is the Forbearance Agreement that contains notice and authorization under which Plaintiff seeks to confess judgment against Defendants.

DeYoung testified that he was involved in the negotiations surrounding the Forbearance Agreement, and had personal knowledge that both parties were represented by counsel throughout negotiations. DeYoung also testified that the attorneys for both parties carefully negotiated the terms of the Forbearance Agreement. DeYoung testified that all of the parties agreed to the provisions of the Forbearance Agreement, and that both Michael and Connie personally executed the

agreement.<sup>1</sup> DeYoung testified that multiple defaults occurred under the terms of the Forbearance Agreement, which led Plaintiff to file the instant complaint.

The Forbearance Agreement includes a “Warrant of Attorney to Confess Judgment” provision. The provision is typed in all capital letters, and “Warrant of Attorney to Confess Judgment” is in capital letters, bold-faced type, and underlined. Further, any time the words “confessed judgment” or “confess judgment” appear in the provision, the words are in bold-faced type. Documents executed by Defendants prior to the Forbearance Agreement included nearly identical confession of judgment provisions. These include: three promissory notes executed in 2006, 2007 and 2008, respectively; a commercial guaranty executed in 2007; a forbearance agreement executed in 2009; and a guaranty and suretyship agreement executed in 2011.

During Defendants’ cross-examination, DeYoung testified that he did not personally meet or interact with Connie during any of the loan transactions or negotiation of the 2011 Forbearance Agreement. However, DeYoung stated that he had knowledge via memoranda related to the Governors Club loan transactions of Connie’s professional experience as BBC’s business manager.

During closing arguments, Defendants argued that Plaintiff failed to meet its burden in establishing a knowing and voluntary waiver. Defendants specifically contended that: Plaintiff did not establish that Connie had any personal involvement

---

<sup>1</sup> In the Forbearance Agreement as well as the other instruments involved in this case, Michael and Connie signed each of the instruments in their individual capacities. The Zimmermans also signed the instruments in their capacities as members of the Governors Club LLC, and Michael signed each of the instruments in his capacity as President of BBC.

in the loan transactions; Plaintiff did not prove that necessary steps were taken to ensure the Defendants read and understood the terms of the Forbearance Agreement; and Plaintiff did not establish that Defendants consulted an attorney prior to signing the other loan documents that preceded the Forbearance Agreement.

Defendants raised several other arguments in the course of the hearing unrelated to the issue of waiver, including: Plaintiff failed to establish that Michael's indictment for bank fraud constituted a default; Delaware is the improper forum for this action under the terms of the Forbearance Agreement; Pennsylvania law, not Delaware law, applies under the Forbearance Agreement's choice of law provision; the affidavit attached to Plaintiff's complaint is defective under Rule 58.1; and Plaintiff failed to comply with the requirements of 10 *Del. C.* § 2306(c) by failing to file an additional affidavit executed by Michael and Connie, as is required for defendants who are nonresidents.<sup>2</sup> Plaintiff was not notified prior to the hearing that Defendants intended to raise these arguments.

Plaintiff argued that there was overwhelming evidence to illustrate that Defendants effectively waived their due process rights, including the Zimmermans' relatively high business sophistication, the fact that the Forbearance Agreement was heavily negotiated, and the fact that Defendants were represented by counsel during

---

<sup>2</sup> See 10 *Del. C.* § 2306(c). Defendants argued that Michael and Connie were Florida residents at the time when the Forbearance Agreement was executed, thus triggering the protections of this provision. In support of this argument, Defendants submitted a notarized Affidavit of Florida Residency executed by the Zimmermans along with photocopies of the Zimmermans' Florida driver licenses.

these negotiations. Plaintiff also argued that the additional arguments raised by Defendants were outside the narrow scope of the hearing, and, if Defendants wished to pursue them, they could raise these defenses at a later hearing prior to execution upon the judgment.

### **DISCUSSION**

***The majority of Defendants’ arguments are outside the limited scope of the hearing***

Rule 58.1(g)(3) provides that if a debtor objects to an entry of confessed judgment, the Court shall hold a hearing at which “the burden shall be on the plaintiff to prove that debtor effectively waived debtor’s right to notice and a hearing prior to the entry of judgment against debtor.”<sup>3</sup> The opportunity for a hearing prior to an entry of confessed judgment is also secured by statute pursuant to 10 *Del. C.* § 2306(b).<sup>4</sup> Rule 58.1(h)(3)(III) further provides that prior to the issuance of a first writ of execution upon a confessed judgment, the debtor may object to said execution, and the Court shall hold another hearing at which the “debtor may raise any appropriate

---

<sup>3</sup> Del. Super. Ct. Civ. R. 58.1(g)(3); *see also Harrington Raceway, Inc. v. Vautrin*, 2001 WL 1456873, at \*3 (Del. Super. Aug. 31, 2001) (stating that Rule 58.1 “provides some protection for a debtor’s due process constitutional rights by providing the debtor with an opportunity to demand a hearing to determine whether or not the waiver of those due process rights was effective.”).

<sup>4</sup> 10 *Del. C.* § 2306(b) (providing that the debtor shall be provided written notice of “an opportunity for a judicial determination as to whether the defendant-obligor understandingly waived his or her right to notice and an opportunity to be heard prior to the entry of final judgment against him or her.”).

defenses.”<sup>5</sup> This hearing is also statutorily mandated.<sup>6</sup> This Court has previously noted the bifurcated nature of a debtor’s right to separate hearings on the issue of waiver and on any defenses to execution upon the confessed judgment.<sup>7</sup>

As noted *supra*, Defendants attempted to raise a host of defenses wholly unrelated to the issue of waiver at the September 27 hearing. The foregoing authority clearly illustrates that such arguments were beyond the narrow scope of the hearing. Defendants will still have the opportunity to raise these arguments at a later hearing prior to Plaintiff’s execution upon the judgment, at which time the Plaintiff may present evidence to refute these claims.<sup>8</sup> For the instant proceeding, however, such arguments are irrelevant. Further, and perhaps most importantly, counsel for Plaintiff indicated that he was unaware Defendants intended to raise these defenses at the September 27 hearing, and would have evidence to present to refute these arguments

---

<sup>5</sup> Del. Super. Ct. Civ. R. 58.1(h)(3)(III).

<sup>6</sup> 10 *Del. C.* § 2306(j) (“[a] stay of execution shall be automatically given on all judgments entered hereunder until the defendant-obligor is afforded an opportunity for hearing to present those defenses not deemed to have been waived.”).

<sup>7</sup> *Auth Sausage Co. v. Dutch Oven II, Inc.*, 2001 WL 209817, at \*1 (Del. Super. Jan. 16, 2001) (“[i]f plaintiff carries its burden to prove waiver of notice and hearing, the burden of proof then transfers to the defendant to raise defenses in accordance with 10 *Del. C.* § 2306(j) *at a subsequent hearing.*”) (emphasis added) (citing *Barclay Am. Bus. Credit, Inc. v. Otterstrom*, 673 F. Supp. 128, 134 (D. Del. 1987)).

<sup>8</sup> However, to the extent that Defendants intend to argue that this action should be dismissed for improper venue, Defendants are precluded from moving to dismiss on this basis because Defendants never argued improper venue in a separate motion or in their answer to Plaintiff’s complaint. *See* Del. Super. Ct. Civ. R. 12(b)(3); 12(b)(h)(1).

at a later hearing. Thus, this Court will not hear these arguments at this time.

***Defendants effectively waived their due process rights***

For a waiver of rights to be knowing, voluntary, and intelligent, it must be “an intentional relinquishment or abandonment of a known right or privilege.”<sup>9</sup> The Court’s determination as to whether a debtor has made an effective waiver is based on the totality of the circumstances.<sup>10</sup> In *RBS Citizens, N.A. v. Caldera Mgmt., Inc.*,<sup>11</sup> the District of Delaware summarized the following non-exhaustive list of factors that Delaware courts examine in determining whether there has been an effective waiver for purposes of entering a confessed judgment:

(1) the defendant’s business sophistication and experience with similar documents []; (2) whether the defendant consulted an attorney []; (3) whether all bargaining parties took the necessary steps to ensure that the terms of the agreement were read and understood at the time the transaction was entered []; and (4) whether defendant had the opportunity and time to review the document containing the confession of judgment. . . .<sup>12</sup>

As to the final factor listed by the District of Delaware, a debtor’s failure to read a confession of judgment provision does not weigh against a finding of effective waiver

---

<sup>9</sup> *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 476 (Del. 1991) (citing *D.H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 187 (1972)).

<sup>10</sup> *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982).

<sup>11</sup> 2009 WL 3011209 (D. Del. Sept. 16, 2009).

<sup>12</sup> *Id.* at \*3 (internal citations omitted).



if there was still adequate opportunity to review the document.<sup>13</sup> Additionally, the form of the confession of judgment provision itself is also a factor for the Court to consider.<sup>14</sup>

In *RBS Citizens*, the plaintiff attempted to enforce a confession of judgment provision in a guaranty against a defendant who guaranteed loans made by a business entity controlled by the defendant's husband.<sup>15</sup> The defendant had previously executed at least five other commercial financing documents containing similar provisions in the past.<sup>16</sup> The defendant had extensive experience as a home care nurse, but did not participate in the business operations of her husband's business nor did she seem to have any other business experience of any kind.<sup>17</sup> The District of Delaware concluded that the plaintiff had failed to meet its burden that the defendant made an effective waiver of her due process rights.<sup>18</sup> A central reason for the court's holding was that the defendant did not have "any level of business sophistication or experience with similar documents which would engender the understanding that

---

<sup>13</sup> *See Pellaton*, 592 A.2d at 477.

<sup>14</sup> *See Mazik*, 449 A.2d at 204.

<sup>15</sup> *RBS Citizens*, 2009 WL 3011209, at \*1.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Id.* at \*4.

signing the Guaranty” would waive the defendant’s due process rights.<sup>19</sup>

The Court concludes that Plaintiff has met its burden in establishing a knowing, voluntary and intelligent waiver by Defendants prior to execution of the Forbearance Agreement. Firstly, DeYoung testified that the Zimmermans were represented by attorneys throughout the negotiation of the Forbearance Agreement, and that the parties’ attorneys carefully negotiated the specific terms of the agreement.<sup>20</sup> Secondly, the form of the “Warrant of Attorney to Confess Judgment” provision was clear, conspicuous and unambiguous, appearing in all capital letters and bold-faced type. Thirdly, Defendants have prior experience with such provisions, as illustrated by the inclusion of nearly-identical provisions in six other documents related to the Governors Club loans.

Finally, and most importantly, the Zimmermans are sophisticated business professionals who were likely to understand the implications of the confession of judgment provisions when they signed the Forbearance Agreement and other relevant instruments. Defendants’ waiver argument mainly focused on Connie and her lack of personal involvement in the loan transactions. However, Connie personally

---

<sup>19</sup> *Id.*

<sup>20</sup> It also appears from the evidence presented at the hearing that Defendants were represented by counsel during the execution of most, but not necessarily all, of the promissory notes and other instruments related to the Governors Club loans. For example, in the “Disclosure for Confession of Judgment” provision of the 2008 promissory note, signed by Michael, a check-box indicating that Michael was represented by his own independent legal counsel at the time was left unmarked. However, the Court notes that the next line, indicating that the confession of judgment provision was called to Michael’s attention by a representative of Plaintiff, was marked.

*Customers Bank v. Michael Zimmerman, et al.*  
C.A. No. K13J-00649 WLW  
November 22, 2013

executed the Forbearance Agreement and other documents in her individual capacity. Further, the Court notes that Connie should be viewed differently than the defendant in *RBS Citizens*. Unlike the defendant in that case, Connie possesses a high degree of business acumen, based on her experience in commercial real estate. Further, Connie was personally involved in the management and operation of her husband's businesses: Connie was a member of the Governors Club LLC, and was business manager of BBC for a number of years. Connie's business sophistication and experience with similar documents thus would engender Connie's understanding that her signing of the Forbearance Agreement would waive her due process rights.<sup>21</sup>

### **CONCLUSION**

Based on the totality of the circumstances, Plaintiff has met its burden in showing that Defendants made an effective waiver of their due process rights for the purposes of entering a confession of judgment. Accordingly, judgment is **ENTERED** against Defendants in the amounts of \$602,163.30 and \$1,558,792.95, not including interest that has accrued since June 20, 2013. Plaintiff may present an order for signature. IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh

---

<sup>21</sup> While Defendants did not raise similar lack of sophistication and lack of involvement arguments in regards to Michael, the Court notes that the record compels the conclusion that Michael was also a sophisticated business professional who understood the ramifications of his signature.