

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WILMINGTON SAVINGS FUND)
SOCIETY, F.S.B.,)

Plaintiff,)

v.)

MATTHEW B. SWANSON, and)
MARGARET T. SWANSON,)

Defendants.)

C.A. No. N16J-01223

Date Submitted: August 12, 2016
Date Decided: November 21, 2016

OPINION AND ORDER

Matthew G. Summers, Esquire and Erika R. Caesar, Esquire, Ballard Spahr LLP, Attorneys for Plaintiff.

Benjamin J. Berger, Esquire and David B. Anthony, Berger Harris LLP, Attorneys for Defendants.

PARKER, Commissioner

INTRODUCTION

In this matter, Plaintiff Wilmington Savings Fund Society, F.S.B. (“WSFS”) seeks to confess judgment against Defendants Matthew B. Swanson and Margaret T. Swanson in the amount of \$2,184,876.43, plus interest and reasonable attorneys’ fees and costs.

In February 2016, WSFS filed suit to confess judgment against the Swansons, as guarantors, for the outstanding balance of the defaulted loans made to their company. The Swansons opposed the entry of judgment and a hearing was held on June 14, 2016 to determine whether confessed judgment could be entered against them. At the conclusion of the hearing, this court held that their personal guarantees, which prominently included a confession of judgment clause, were valid and enforceable against them.

Following the hearing, the Swansons contended that WSFS should still not be permitted to confess judgment against them because documents executed after they executed their personal guarantees should be deemed to have superseded the confession of judgment provisions in their personal guarantees.

Briefing was conducted on this issue.

This is the court’s opinion and order that the confession of judgment clauses in the personal guarantees executed by the Swansons remain valid and enforceable against them and WSFS is hereby entitled to confess judgment against them.

BACKGROUND

The Swansons co-founded and co-managed a company, FineStationery Solutions, Inc. (“FineStationery”). FineStationery was an online retailer that sold high-end stationery. Matthew Swanson served as the President/CEO of the company and Margaret

Swanson handled the “creative side”. Both of the Swansons graduated from the University of Vermont with bachelor’s degrees. Matthew graduated in 1989 and Margaret in 1992. Margaret, a decedent of and heir to Alexis I. duPont, comes from a family of substantial financial resources.

After obtaining his college degree, Matthew later obtained a MBA from the University of Pennsylvania, Wharton School of Business. Matthew has served as an adjunct professor at the University of Delaware’s Lerner School of Business since 2013 where he teaches an Introduction to Entrepreneurship class. He also taught an on-line entrepreneurship class.

In 1999, the Swansons started FineStationery. On a couple of occasions the Swansons retained counsel to assist them with legal issues. They retained the law firm of Morgan Lewis & Bockius in the early 2000’s to assist them with raising investment capital for the company. They again retained Morgan Lewis to assist them with the sale of their company in 2011.

The Swansons enjoyed an on-going friendly banking relationship with WSFS. The Swansons’ relationship manager at WSFS was William J. Foley, III, a Vice-President at WSFS. WSFS provided the Swansons with their home mortgage, other loans, and provided the Swansons with commercial loans for the operation of their company, FineStationery.

The loans at issue in this matter include:

- 1) a commercial loan made by WSFS to FineStationery on October 3, 2007 in the original principal amount of \$2,300,000, which was subsequently decreased by modification to \$2,162,500 (“Loan 1”); and

2) a revolving line of credit made by WSFS to FineStationery on October 3, 2007 in the original principal amount of \$500,000, which was subsequently increased by modification several times, the last increase being to \$2,500,000 (“Loan 2”).

These loans were memorialized by, among other things, promissory notes. Loan 1 was memorialized by a Promissory Note in the original principal amount of \$2,300,000.¹ Loan 2 was memorialized by a Replacement Promissory Note dated March 31, 2010, in the original principal amount of \$999,816.86.²

These loans were secured, in part, by the personal guarantees of the Swansons. Matthew and Margaret each executed guarantees personally guaranteeing both of the loans made to their company.³

The Promissory Note memorializing Loan 1, the Promissory Note memorializing Loan 2, the Personal Guaranty of Margaret Swanson as to Loan 1; the Personal Guaranty of Margaret Swanson as to Loan 2; the Personal Guaranty of Matthew Swanson as to Loan 1; and the Personal Guaranty of Matthew Swanson as to Loan 2 all contained a confession of judgment clause.⁴

At the time the loans were made to FineStationery, the Swansons knew they could discuss with Mr. Foley, their WSFS relationship manager, anything they wanted to about the provisions of the loan documents and personal guarantees. Matthew Swanson was a highly educated business man. Margaret Swanson was also college educated. Before signing any of the loan documents and personal guarantees the Swansons read the documents.

¹ June 14, 2016 Hearing, Exhibit A.

² June 14, 2016 Hearing, Exhibit E.

³ June 14, 2016 Hearing, Exhibits B, C, F & G.

⁴ June 14, 2016 Hearing, Exhibits A, B, C, E, F & G.

The Swansons discussed with Mr. Foley the business terms of the loans, the amount of the loan, interest rates, their personal guarantees, and whatever other questions they had. There was nothing preventing them from asking Mr. Foley any questions they had about any of the documents. Moreover, WSFS never precluded the Swansons from consulting with their own counsel, if they desired to do so, about the terms of the loans and their personal guarantees.

FineStationery, a once thriving company, took a downturn and started having financial problems beginning around 2008. Struggling to repay the loans, WSFS agreed to allow the Swansons to enter into various loan modifications, and then a forbearance agreement.

A loan modification was entered into on March 31, 2010 which decreased the loan amount from \$2,300,000 to \$2,162,500. Another loan modification was entered into on September 30, 2010 which changed the maturity date of the loan. A third loan modification was entered into on December 31, 2010.⁵ These loan modifications revised the repayment schedules, changed the maturity date of the loan, changed the interest rate of the loan, and revised certain financial covenants of the loan.⁶

FineStationery continued to have financial problems and the loans were in default. The Swansons made the decision to sell their company. The Swansons retained the law firm of Morgan Lewis & Bockius to assist them with the sale of FineStationery.

Because the loans were made to FineStationery (backed by the personal guarantees of the Swansons) and were secured, in part, by FineStationery's assets, the Swansons could not sell FineStationery without obtaining the permission of WSFS to do

⁵ June 14, 2016 Hearing, Exhibit D & H.

⁶ June 14, 2016 Hearing, Exhibit D & H.

so. As an accommodation to the Swansons, WSFS agreed to enter into a Forbearance Agreement and a Reaffirmation of Guaranty Agreement in order to allow the Swansons to sell their company.⁷

After the company was sold, the loans remained in default and as of February 9, 2016, the Swansons were obligated to WSFS, as guarantors of the loans, in the amount of \$2,184,876.43, together with interest, reasonable attorneys' fees and costs of suit.

On February 18, 2016, WSFS filed suit to confess judgment against the Swansons, as guarantors, for the amounts due and owing under the loans.

On June 14, 2016, this court held an evidentiary hearing on the issue of whether the confession of judgment clauses in the personal guarantees executed by the Swansons were valid and enforceable against them. At the conclusion of the hearing, this court held that the Swansons knowingly, intelligently and voluntarily entered into the confession of judgment provisions and waived their due process rights. This court recognized that the Swansons were intelligent, educated, articulate business people. Matthew Swanson had a MBA from the University of Pennsylvania, Wharton School of Business, and taught entrepreneurial classes at the college level. The Swansons had an on-going, friendly relationship with their WSFS relationship manager and could have asked anything they wanted to about any of the provisions of the loan documents and personal guarantees. WSFS did not discourage the Swansons in any way from retaining counsel on their own behalf if they desired to retain counsel. In fact, the Swansons retained counsel on the couple of occasions when they desired to do so. They retained Morgan Lewis & Bockius when seeking to raise money for their company and again when they decided to sell their company.

⁷ June 14, 2016 Hearing, Exhibit I & J.

The confession of judgment clauses in the Personal Guarantees signed by the Swansons were clear, conspicuous and unambiguous. The clause was in bold and in capital letters. The Swansons both represented and admitted that they read all of the documents before signing them and that they could have asked any question they wanted to before signing.

This court held that the Swansons were bound by the terms of the documents they signed, including the confession of judgment clauses. The court held that the confession of judgment clauses in their personal guarantees were valid and enforceable.

Following the court's ruling that the confession of judgment clauses were valid and enforceable, the Swansons then contended that the Forbearance Agreement⁸ and Reaffirmation of Guaranty Agreement⁹ superseded the prior loan documents and personal guarantees and that since these subsequent documents did not expressly contain confession of judgment clauses, WSFS was precluded from confessing judgment against them.

RELEVANT FACTS

WSFS is seeking to confess judgment against the Swansons as the guarantors of the loans made to their company.

Both Matthew and Margaret Swanson executed personal guarantees absolutely and unconditionally guaranteeing the full and complete repayment of the loans made by WSFS to their company. Their personal guarantees remained and continued in full force and effect as to any renewals, substitutions or modifications of the loans.¹⁰

⁸ June 14, 2016 Hearing, Exhibit I.

⁹ June 14, 2016 Hearing, Exhibit J.

¹⁰ June 14, 2016 Hearing, Exhibit B- Personal Guaranty of Margaret Swanson for Loan 1, Page 1- Duration of Guaranty (This Guaranty will continue to bind Guarantor for all the renewals, substitutions or

Their personal guarantees contained a confession of judgment clause. The confession of judgment clause was in bold and in capital letters. The confession of judgment clause provided:

CONFESSION OF JUDGMENT. GUARANTOR HEREBY IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEY-AT-LAW TO APPEAR IN ANY COURT OF RECORD AND TO CONFESS JUDGMENT AGAINST GUARANTOR FOR THE UNPAID AMOUNT OF THIS GUARANTY . . .¹¹

In 2011, the Swansons decided to sell their company and needed WSFS to agree to allow them to do so. After all, the loans made by WSFS to the Swansons' company were collateralized, in part, by the assets of the company and if the company was sold those assets would be gone. On May 10, 2011, as an accommodation to the Swansons, WSFS and the Swansons entered into a Forbearance Agreement and a Reaffirmation of Guaranty Agreement in order to allow the Swansons to sell their company. The Swansons were represented by Morgan, Lewis and Bockius at the time these documents were entered into and throughout the sale of the company.

The Reaffirmation of Guaranty Agreement is a 2 ½ page document. Replete throughout the document, the existence of and enforceability of the prior personal guarantees of the Swansons is consistently, expressly and repeatedly affirmed.¹² The document is titled "**Reaffirmation of Guaranty Agreement**". From the title of the

modifications of the Indebtedness.); Exhibit C- Personal Guaranty of Matthew Swanson for Loan 1, Duration of Guaranty (This Guaranty will continue to bind Guarantor for all the renewals, substitutions or modifications of the Indebtedness.); Exhibit F-Personal Guaranty of Margaret Swanson for Loan 2- Duration of Guaranty (This Guaranty will continue to bind Guarantor for all the renewals, substitutions or modifications of the Indebtedness.); Exhibit G-Personal Guaranty of Matthew Swanson for Loan 2- Duration of Guaranty (This Guaranty will continue to bind Guarantor for all the renewals, substitutions or modifications of the Indebtedness.)

¹¹ June 14, 2016 Hearing, Exhibit B & Exhibit F- Personal Guaranty of Margaret Swanson for Loan 1 and Loan 2; Exhibit C & Exhibit G- Personal Guaranty of Matthew Swanson for Loan 1 and Loan 2.

¹² June 14, 2016 Hearing, Exhibit J.

document itself, throughout the entire document, it is clear that the parties intended that this document reaffirm the prior personal guarantees that the Swansons entered into.

The Reaffirmation of Guaranty Agreement explained that the Swansons personally guaranteed the loans made to their company, that the loans were in default and were due and payable in full, and that the Swansons requested that WSFS accommodate their request to forbear from taking certain enforcement action.¹³

The Reaffirmation of Guaranty Agreement expressly, clearly and unambiguously ratified, adopted, and reaffirmed the Swansons' prior personal guarantees. The Reaffirmation of Guaranty Agreement provided that the Swansons represent and warranty that: (a) they have not breached any term of their personal guaranty; b) all representations and warranties made in their Guaranty Agreement remain true, and c) "[t]he Guaranty Agreement is the valid and binding obligations of the Guarantors and is fully enforceable against each of them in accordance with all stated terms."¹⁴

The Reaffirmation then expressly stated: "Reaffirmation of Liability and Mortgage. The Guarantors hereby unconditionally ratify, confirm and reaffirm without condition, or reservation that all terms and conditions of the Guaranty Agreement continue unimpaired and in full force and effect . . ."¹⁵

The Reaffirmation concludes: "Ratification. The Forbearance Agreement and the Guaranty Agreement are hereby ratified and affirmed in all respects and without condition."¹⁶

¹³ June 14, 2016 Hearing, Exhibit J- Background, ¶1.

¹⁴ June 14, 2016 Hearing, Exhibit J-¶ 3 (c)

¹⁵ June 14, 2016 Hearing, Exhibit J- ¶4.

¹⁶ June 14, 2016 Hearing, Exhibit J- ¶8.

The Reaffirmation of Guaranty Agreement did not supersede the prior Guaranty Agreements, it reaffirmed and ratified all of the terms of the prior Guaranty Agreements. The confession of judgment clauses in the prior Guaranty Agreements remain valid and enforceable.

At the time the Swansons reaffirmed their personal guarantees, they also entered into a Forbearance Agreement. The Forbearance Agreement provided that WSFS was to receive proceeds from the sale of the company, that new collateral was pledged to secure the remaining outstanding balance of the loans, and made some adjustments to the repayment terms of the outstanding balance. Specifically, WSFS was paid \$1,325,000 following the sale of the company, the interest rate was increased on the outstanding principal, and new monthly payments were established.¹⁷

Irrespective of whether or not the Forbearance Agreement is to be deemed a later-in-time new agreement or a modification to the prior loan agreement, it is clear that the parties expressly agreed that the personal guarantees were to remain in full force and effect as to the Forbearance Agreement. If the Forbearance Agreement was a new contract, the Personal Guarantees of the Swansons were “reaffirmed” and remained valid and enforceable as to that new agreement as per their Reaffirmation of Guaranty Agreement. Likewise, if the Forbearance Agreement was a modification of the prior loan documents, the Personal Guarantees of the Swansons were “reaffirmed” and remained valid and enforceable as to this modification as per their Reaffirmation of Guaranty Agreement.

The Swansons also reaffirmed the validity and enforceability of their Personal Guarantees in the Forbearance Agreement as well as their Reaffirmation of Guaranty

¹⁷ Forbearance Agreement ¶¶4.1.3, 3.2, 6, 9.2.

Agreement. Thus, whatever the Forbearance Agreement is deemed to constitute (a new contract or a modification to the prior loan), the Swansons reaffirmed the validity and enforceability of their Personal Guarantees in both the Reaffirmation of Guaranty Agreement and Forbearance Agreement.

Although of no importance to the determination of the issue presented herein, it is however clear that the Forbearance Agreement was not a separate, new, stand-alone, agreement which superseded the prior loan documents. It is also clear that the Forbearance Agreement was intended to be viewed as integrated with, and complementary to, the prior loan documents.

Indeed, the express terms of the Forbearance Agreement establish that this document was intended to “unconditionally ratify, confirm and reaffirm” the prior loan documents except as to the modifications stated therein.¹⁸ The Forbearance Agreement expressly provided that it was entered into at the request of, and as an accommodation to, the Swansons and that the Swansons represented and warranted to WSFS that “this Agreement, the Loan Documents and the Guarantees are valid, binding and enforceable against Borrower and the Guarantors in accordance with their respective terms.”¹⁹ The Forbearance Agreement further provided that WSFS’s rights and remedies under the Loan Documents would not be diminished, altered or limited in any way.²⁰

The Forbearance Agreement expressly provided that it must be viewed as integrated with and complementary of the personal guarantees and other loan documents evidencing the loans.²¹

¹⁸ Forbearance Agreement ¶2.2,

¹⁹ Forbearance Agreement ¶7.1.3.

²⁰ Forbearance Agreement ¶9.1 & ¶9.2.

²¹ Forbearance Agreement ¶10.1.

ANALYSIS

In the subject action, the Swansons contend that the Forbearance Agreement and the Reaffirmation of Guaranty Agreement constitute separate later-in-time contracts that supersede the original Loan Documents and Personal Guarantees. In raising this defense, the Swansons appear to disregard the express, clear and unambiguous language of these documents themselves, which repeatedly and consistently provide that these documents are to be deemed interwoven and integrated with the prior loan documents and Personal Guarantees.

In construing a contract, the document is to be considered as a whole, and, if the contract language is unambiguous, it must be given its plain meaning.²² Confession of judgment clauses are strictly construed, but are enforceable according to their terms, if clearly stated.²³ Clear and unambiguous contractual language will be given its ordinary and usual meaning²⁴

In Delaware, there is no requirement that confession of judgment clauses be restated in full in a subsequent document in order to remain valid and enforceable.²⁵ The Delaware Supreme Court has held that when a subsequent contract provides that a prior contract remains in full force and effect except as amended therein, a confession of judgment provision although absent from the amendment remains valid and enforceable.²⁶

In *Delle Donne and Son, L.P.*, the parties entered into a lease for five floors of office space. The lease contained a confession of judgment clause. The parties

²² *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 887-888 (Del. 2003).

²³ *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 887-888 (Del. 2003).

²⁴ *Rhone-Poulenc Basic Chem, Co. v. Am. Motorists, Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

²⁵ *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 888 (Del. 2003).

²⁶ *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 886-888 (Del. 2003).

subsequently entered into an amendment in which the tenant would lease additional space. The amendment did not explicitly contain a confession of judgment provision. The amendment added material terms. It identified new lease space, set the rental rate for the new space and established the term of the lease on the new space. The amendment provided that the terms and conditions of the original lease were to remain in full force and effect except as amended therein.²⁷ The Delaware Supreme Court held that the confession of judgment clause in the original lease remained valid and enforceable.²⁸ The right to confess judgment, as well as all other provisions of the original lease, applied to the new space identified in the amended lease.²⁹

In the subject action, WSFS is seeking to confess judgment against the Swansons as guarantors. The personal guarantees executed by the Swansons clearly, unambiguously and expressly contained a confession of judgment clause. On May 10, 2011, the Swansons executed a Reaffirmation of Guaranty Agreement. From the title of the document itself, *Reaffirmation of Guaranty Agreement*, and throughout the entire document it reaffirms, incorporates, and ratifies the Personal Guarantees of the Swansons. The Reaffirmation of Guaranty Agreement provides that:

- “The Guarantors hereby unconditionally ratify, confirm and reaffirm without condition or reservation that all terms and conditions of the Guaranty Agreement continue unimpaired and in full force and effect. . .”³⁰

²⁷ *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 886-888 (Del. 2003).

²⁸ *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 886-888 (Del. 2003).

²⁹ *Eugene A. Delle Donne and Son, L.P. v. Applied Card Systems*, 821 A.2d 885, 888 (Del. 2003).

³⁰ Reaffirmation of Guaranty Agreement ¶ 4.

- “The Guaranty Agreement is the valid and binding obligation of the Guarantors and is fully enforceable against each of them in accordance with all stated terms.”³¹
- “The Guaranty Agreement is also incorporated hereby by reference thereto as if fully set forth in this Reaffirmation.”³²
- “The Forbearance Agreement and the Guaranty Agreement are hereby ratified and affirmed in all respects and without condition.”³³

The court will not torture contractual terms to impart ambiguity where none exists.³⁴ Where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties.³⁵ The plain, clear and express language of the Reaffirmation of Guaranty Agreement provides that the Swansons’ Personal Guarantees remain in full force and effect.

Whether the Forbearance Agreement constitutes a modification to the prior loan documents or constitutes a new agreement is not relevant on the issue as to whether the Swansons’ personal guarantees remain valid, binding and in full force and effect as to the Forbearance Agreement. In their Reaffirmation of Guaranty Agreement, the Swansons expressly provided that their Personal Guarantees remained valid, binding and in full force and effect as to the Forbearance Agreement.

For the sake of completeness, however, it is clear that the Forbearance Agreement was intended by the parties to be a modification to the prior loan documents and not to

³¹ Reaffirmation of Guaranty Agreement ¶ 3(c).

³² Reaffirmation of Guaranty Agreement ¶1.

³³ Reaffirmation of Guaranty Agreement ¶8.

³⁴ *Hudson’s Bay Co. Luxembourg, S.A.R.L. v. JZ LLC*, 2013 WL 1457019, at *11 (Del.Super. 2013).

³⁵ *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1278 (Del.Super. 2001).

constitute a new, separate, stand-alone agreement. The Swansons contend that because changes were made to the prior loan documents, the Forbearance Agreement should be deemed a new, separate agreement. Collateral was substituted, the interest rate was changed and a revised repayment schedule was entered into.

The purpose of the Forbearance Agreement was to permit the Swansons to sell their company, to ensure that WSFS received proceeds from the sale, to pledge new collateral to secure the remaining outstanding balance of the loans, and to adjust the repayment terms of the remaining balance of the loans. Specifically, WSFS was paid \$1,325,000, which reduced the outstanding balance owed, the amount of interest was increased on the outstanding principal, and new monthly payments were established.³⁶

The Forbearance Agreement was not the first modification made to the loans. In previous modifications, among other things, changes were made to the interest rate and repayment schedule.³⁷

It is clear that the parties intended the Forbearance Agreement as well as the Reaffirmation of Guaranty Agreement to be construed as supplementing, integrated and complementary of the prior loan documents and Personal Guarantees and not to be deemed as reducing, constricting or limiting WSFS's rights under the prior loan documents and Personal Guarantees in any way.³⁸ The Forbearance Agreement as well as the Reaffirmation of Guaranty Agreement also expressly stated that the parties

³⁶ Forbearance Agreement ¶¶4.1.3, 3.2, 6, 9.2, 10.9.

³⁷ See, June 14, 2016 Hearing, Exhibits D & H.

³⁸ Forbearance Agreement ¶ 10.1.

intended that the Loan Documents and Personal Guarantees were to remain in full force and effect and were to remain valid, binding and enforceable.³⁹

Delaware courts have routinely held that loan guarantees are not superseded when forbearance agreements describe pre-existing agreements as “binding”, “enforceable” or “in full force and effect.”⁴⁰ The express language of the forbearance Agreement and Reaffirmation of Guaranty Agreement provide that the Loan Documents and Personal Guarantees are not superseded, but remain in full force and effect.

The Swansons point to a few sentences of the forbearance Agreement in the abstract, in isolation and out of context from the remainder of the document in support for their contention that the forbearance Agreement was a separate contract that superseded the prior loan documents. The Swansons point to the language in the forbearance Agreement that states: “the documents executed and delivered pursuant hereto, constitute the entire agreement between the parties. . .”⁴¹, to support their position that the forbearance Agreement was intended to be a separate contract.

First, this sentence of the forbearance Agreement is taken out of context. The Swansons entirely disregard that replete throughout the forbearance Agreement it

³⁹ Forbearance Agreement ¶¶ 2.2, 7.1.3, 9.2 (WSFS’s remedies will be in addition to the rights and remedies given by the Loan Documents and the Guarantees); 10.1 (the forbearance Agreement shall be construed as augmenting and not restricting WSFS’s rights under the Loan Documents and Loan Guaranties); ¶ 10.1 (Forbearance Agreement and the Loan Documents, including the Loan Guaranties, shall be construed as integrated and complementary of one another)

Reaffirmation of Guaranty Agreement ¶ 3 and ¶ 4 (all terms and conditions of the Loan Guaranties continue unimpaired and in full force and effect).

⁴⁰ See, *Community Bank Delaware v. Far East Capital, Inc.*, 2013 WL 357567, at *1 (Del.Ch. 2013)(forbearance agreement did not supersede loan documents when it expressly stated that the bank’s remedies under the loan documents “remain in force and available” and the loan documents “remain in full force and effect and constitute the legally binding and enforceable obligation of the Borrower”); *TBC Dewey Hotel, LLC v. Tamari Sand Palace, LLC*, 2012 WL 6060978, at *3 (Del.Super. 2012)(forbearance agreement that altered note’s maturity date and payment schedule did not prohibit suit on note when it expressly provided that the lender “shall be entitled to take any and all actions permitted by law, equity, the Loan Documents, [the] Agreement and/or otherwise.”).

⁴¹ Forbearance Agreement ¶10.9.

expressly states that the Forbearance Agreement is to be deemed comprised of the prior loan documents and personal guarantees, which were ratified, confirmed, incorporated into, and constituted part of the Forbearance Agreement.

In bold, the Forbearance Agreement provides:

Ratification of Loan Documents and Guarantees. The Borrower and the Guarantors each hereby unconditionally ratify, confirm and reaffirm, without condition or reservation, all of the terms, covenants and conditions set forth in the Loan Documents and the Guarantees. The Borrower and the Guarantors each hereby unconditionally acknowledge and agree that they are absolutely liable to the Bank in accordance with the terms of the Loan Documents and the Guarantees and that all liens, security interests, encumbrances, assignments and pledges created pursuant thereto continue unimpaired and in full force and effect and secure all of the Obligations. The Borrower and the Guarantors hereby waive any and all defenses that they may have under the Loan Documents and the Guarantees.⁴²

The Forbearance Agreement expressly stated that it is “integrated [with] and complementary to” the Loan Documents.⁴³

The Forbearance Agreement further provides:

Inducement to the Bank. To induce the Bank to enter into this Agreement, Borrower and the Guarantors represent warrant to the Bank that . . . [t]his Agreement, the Loan Documents and the Guarantees are valid, binding and enforceable against Borrower and the Guarantors in accordance with their respective terms.⁴⁴

Second, as previously discussed, even if the Forbearance Agreement is a separate, new, later-in-time contract that supersedes and replaces the prior loan documents, the Swansons’ prior personal guarantees as reaffirmed in the Reaffirmation of Guaranty Agreement remain in full force and effect. The Swansons’ Personal Guarantees as

⁴² Forbearance Agreement ¶2.2 (bold in original).

⁴³ Forbearance Agreement ¶10.1.

⁴⁴ Forbearance Agreement ¶7.1.3.

reaffirmed by the Reaffirmation of Guaranty Agreement remained valid and enforceable as to the Forbearance Agreement. The Reaffirmation of Guaranty Agreement could not have been any clearer in this respect. Indeed, the primary purpose, in fact, perhaps the sole purpose, of the Swansons executing the Reaffirmation of Guaranty Agreement was to reaffirm their prior personal guarantees in all respects as to the Forbearance Agreement.

The Swansons cite to the Pennsylvania case of *Egyptian Sands Real Inc. v. Polony*,⁴⁵ as support for their position that the confession of judgment clause in their personal guarantees as reaffirmed by the Reaffirmation of Personal Guaranty should not be enforceable. That Pennsylvania case is markedly different from the facts and circumstances presented in this matter.

In *Egyptian Sands Real Inc.*, the court held that there was obvious overreaching and refused to enforce a confession of judgment clause in a lease agreement. The lessees did not have formal training in English, they did not read the confession of judgment provision, and they were told that they should use the lessor's attorney rather than retaining one of their own.⁴⁶ The *Egyptian Sands Real Inc.* case did not involve a subsequent agreement between the parties, but involved whether the confession of judgment clause in their lease agreement was valid and enforceable.⁴⁷

The Swansons also cite to another Pennsylvania case, *Note Acquisition, LLC v. Morrison*,⁴⁸ in further support of their position. In *Note Acquisition*, the Pennsylvania court held that the confession of judgment clause which was not restated in a loan

⁴⁵ *Egyptian Sands Real Inc. v. Polony*, 294 A.2d 799 (Pa.Super. 1972).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Note Acquisition, LLC v. Morrison*, 2015 WL 6870607 (Pa.Super. 2015).

modification was still valid and enforceable under the facts and circumstances of that case. In *Note Acquisition*, the new promissory note changed the payment terms and maturity date of the loan. The Pennsylvania court in *Note Acquisition* held that these changes to the prior loan were not material, and that an immaterial change to a judgment note does not prevent the entry of judgment by confession contained in the prior note. The Pennsylvania court upheld the enforceability of a confession of judgment clause in the prior loan document.⁴⁹

In *Note Acquisition*, the guarantor did not expressly enter into a Reaffirmation of Guaranty Agreement, like the Swansons did in this case, at the time the modification was made to the loan. Unlike the Swansons, the guarantor in *Note Acquisition* did not expressly reaffirm the validity and enforceability of his prior personal guaranty. Yet, the Pennsylvania court still held in *Note Acquisition* that, under the facts and circumstances presented therein, the confession of judgment clause in the prior loan documents remained valid and enforceable.

Every case must be considered under its own particular facts and circumstances. In this case, the Swansons expressly, unambiguously and clearly reaffirmed the validity and enforceability of their Personal Guarantees in their Reaffirmation of Guaranty Agreement. The confession of judgment clause did not need to be explicitly restated in the Reaffirmation of Guaranty Agreement to remain in full force and effect.


⁴⁹ *Id.* at 5-6.

CONCLUSION

The confession of judgment provisions in the Personal Guarantees, as reaffirmed by the Reaffirmation of Guaranty Agreement, remained valid and enforceable against the Swansons. Judgment is hereby entered against the Swansons and in favor of WSFS in the amount of \$2,184,876.43 as of February 9, 2016, plus interest and reasonable attorneys' fees and costs.

IT IS SO ORDERED.

Dated: November 21, 2016


Commissioner Lynne M. Parker