NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WELLS FARGO BANK, N.A. Appellee v. MELVIN UFBERG Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1234 MDA 2011

Appeal from the Order Entered June 13, 2011
In the Court of Common Pleas of Lackawanna County
Civil Division at No(s): 10-CV-8787

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: Filed: February 5, 2013

Appellant, Melvin Ufberg, appeals from the order entered in the Lackawanna County Court of Common Pleas, denying Appellant's petition to strike and/or open the confessed judgment entered in favor of Appellee, Wells Fargo Bank, N.A. ("the Bank"). We affirm.

The relevant facts and procedural history of this case are as follows. On August 27, 2004, August 6, 2007, and September 27, 2007, Dijan, Inc. ("Dijan") executed three Promissory Notes in favor of the Bank for an aggregate sum of approximately $4.2 million. In separate documents signed the same days (respectively), Appellant guaranteed payment on each Note by executing three Unconditional Guaranties in favor of the Bank. The purpose of each Guaranty was "[t]o induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the

benefit of Borrower…." (***See, e.g.,*** Unconditional Guarantee, dated 8/27/04, at 1; R.R. at 21a.)[1] The Guaranties defined Dijan as "Borrower" and Appellant as "Guarantor." ***Id.***

Appellant's obligations to the Bank were carefully delineated in the Guaranties. Specifically, the Guaranties provided that Appellant "unconditionally guarantees…the timely payment and performance of all liabilities and obligations of [Dijan] to Bank…however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter contracted or acquired, and all modifications, extensions and renewals thereof (collectively, the 'Guaranteed Obligations')." ***Id.*** The Guaranties contained a paragraph on default events, specifically stating as follows:

> **DEFAULT**. If any of the following events occur, a default ("Default") under this Guaranty shall exist: (a) failure of timely payment or performance of the Guaranteed Obligations or **a default under any Loan Document**; (b) **a breach of any agreement or representation contained or referred to in the Guaranty, or any of the Loan Documents**, or contained in any other contract or agreement of Guarantor with Bank or its affiliates, whether now existing or hereafter arising; (c) the death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or the commencement of any insolvency or bankruptcy proceeding by or against Guarantor or any

[1] All three "Unconditional Guaranty" agreements are identical in their terms and obligations. For ease of reference, we cite to the first Unconditional Guarantee, dated August 27, 2004.

> general partner of or the holder(s) of the majority ownership interests of Guarantor; and/or (d) Bank determines in good faith, in its sole discretion, that the prospects for payment or performance of the Guaranteed Obligations are impaired or a material adverse change has occurred in the business or prospects of Borrower or Guarantor, financial or otherwise.
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> If a Default occurs, the Guaranteed Obligations shall be due immediately and payable without notice, other than Guaranteed Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements, and, Bank and its affiliates may exercise any rights and remedies as provided in this Guaranty and other Loan Documents, or as provided at law or equity. Guarantor shall pay interest on the Guaranteed Obligations from such Default at the highest rate of interest charged on any of the Guaranteed Obligations.

(***Id.*** at 5-6; R.R. at 25a-26a.) (emphasis added) The term "Loan Documents" is defined several pages later as:

> **MISCELLANEOUS**.
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> * * *
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> **Loan Documents**. The term "Loan Documents" refers to all documents executed in connection with or related to the Guaranteed Obligations and may include, without limitation, commitment letters that survive closing, loan agreements, other guaranty agreements, security agreements, instruments, financing statements, mortgages, deeds of trust, deeds to secure debt, letters of credit and any amendments or supplements (excluding swap agreements as defined in 11 U.S. Code § 101).

(***Id.*** at 6-7; R.R. at 26a-27a.) In addition, the Guaranties contained clauses allowing the Bank to confess judgment against Appellant in the event "a

Default occurs under this Guaranty or any other Loan Documents...." (***See id.*** at 8; R.R. at 28a.)

The Notes similarly contained detailed language on events constituting a default. Specifically, the "DEFAULT" section of the Notes identified "the commencement of any bankruptcy or insolvency proceeding against Borrower" as an event of default under the Notes. (***See*** Promissory Note, dated August 27, 2004, at 6; R.R. at 13a.) The Notes further stated that if a default occurred due to bankruptcy proceedings, "all Obligations...shall automatically and immediately be due and payable." ***Id.***

On August 11, 2010, Dijan filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Middle District of Pennsylvania. During the bankruptcy case, the court approved a cash collateral stipulation reached by bankruptcy counsel for Dijan and the Bank. In short, the stipulation allowed Dijan to use its cash collections on a limited and defined basis to pay operating and other expenses, provided Dijan's use of its cash did not impair the Bank's collateral position in Dijan's assets. (***See*** Cash Collateral Stipulation, dated 8/16/10, at 1-2; R.R. at 108a-109a.)

On October 28, 2010, the Bank informed Appellant that Dijan's bankruptcy triggered Appellant's performance under each Guaranty. After Appellant did not pay the amounts due, the Bank confessed judgment against Appellant for the amount of $2,608,725.33, representing the unpaid balance of Dijan's loans, plus interests and costs.

Appellant filed a petition to strike and/or open the confessed judgment on January 13, 2011. The court held a hearing on May 9, 2011, where Appellant advanced two positions in support of his petition. First, Appellant stated Dijan's bankruptcy did not constitute an event of default under the Guaranties. Second, Appellant claimed the cash collateral stipulation amended the Notes and essentially cured any default under the Guaranties. By order dated June 13, 2011, the court rejected Appellant's contentions and refused to strike or open the judgment. Appellant timely filed a notice of appeal on July 11, 2011.[2]

Appellant raises one issue for our review:

> DID THE TRIAL COURT COMMIT AN ERROR OF LAW BY DENYING [APPELLANT'S] PETITION TO STRIKE AND/OR OPEN THE JUDGMENT OF CONFESSION WHERE: (A) THE FILING FOR BANKRUPTCY BY [DIJAN] DID NOT CONSTITUTE AN EVENT OF DEFAULT UNDER THE TERMS OF [THE GUARANTIES] EXECUTED BY [APPELLANT] IN FAVOR OF [THE BANK]; (B) NO EVENT OF DEFAULT OCCURRED UNDER THE TERMS OF THE GUARANTIES; AND (C) THE CASH COLLATERAL AGREEMENT ENTERED INTO BY AND BETWEEN DIJAN AND THE BANK HAD THE EFFECT OF MODIFYING THE TERMS OF THE GUARANTIES AS WELL AS THE TERMS OF THE [LOAN DOCUMENTS] EXECUTED BY DIJAN IN FAVOR OF THE BANK SO THAT NO DEFAULT OCCURRED UNDER EITHER THE GUARANTIES OR THE LOAN DOCUMENTS?

(Appellant's Brief at 4).

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[2] The court did not order Appellant to file a concise statement of errors complained on appeal, pursuant to Pa.R.A.P. 1925(b); Appellant filed none.

"We review a trial court's order denying a petition to strike a confessed judgment to determine whether the record is sufficient to sustain the judgment." ***ESB Bank v. McDade***, 2 A.3d 1236, 1239 (Pa.Super. 2010). A petition to strike a judgment may be granted only if a fatal defect or irregularity appears on the face of the record. ***Id.*** Similarly, we review the order denying a petition to open the confessed judgment for an abuse of discretion. ***PNC Bank v. Kerr***, 802 A.2d 634, 638 (Pa.Super. 2002), *appeal denied*, 572 Pa. 735, 815 A.2d 634 (2002).

In Appellant's single issue, he presents distinct arguments that implicate his petition to strike the confessed judgment as well as his petition to open it. Regarding the petition to strike, Appellant complains Dijan's bankruptcy does not constitute a default event under the Guaranties. Appellant refers to the default paragraphs of the Guaranties and claims there is no specific language anywhere in those paragraphs allowing the Bank to declare Appellant in default because Dijan filed for bankruptcy. Additionally, Appellant claims the Bank cannot impute Dijan's default of the Loan Documents to Appellant for the simple reason that Appellant was not a party to the loan documents and, as a result, could not have breached those agreements.

Appellant's secondary argument on the petition to strike implicates the sufficiency of the Bank's complaint, namely, that it did not plead default with the requisite particularity. The complaint identified Dijan's bankruptcy filing

as triggering Appellant's performance under the Guaranties but, Appellant contends, that language is insufficient because it failed to identify the specific subsection of the default paragraph Appellant purportedly breached.

Appellant alternatively argues the court should have opened the judgment because the Notes were materially altered during the course of Dijan's bankruptcy proceedings. Specifically, Appellant points to the cash collateral stipulation reached by Dijan and the Bank in the bankruptcy case. Appellant takes the position that the cash collateral stipulation modified the Notes to remove Dijan's bankruptcy as a default event and reestablished Dijan's payment obligations under the Notes. Because default no longer exists under the Notes, Appellant claims the Bank cannot claim a default is occurring under the Guaranties. For those reasons, Appellant concludes the court improperly denied his petition to strike as well as his petition to open the confessed judgment. We disagree.

"A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record." ***Resolution Trust Corp. v. Copley Qu-Wayne Associates***, 546 Pa. 98, 106, 683 A.2d 269, 273 (1996). "A petition to strike is not a chance to review the merits of the allegations of a complaint." ***City of Philadelphia v. David J. Lane Advertising, Inc.***, 33 A.3d 674, 675 (Pa.Cmwlth. 2011). "Rather, a petition to strike is aimed at defects that affect the validity of the judgment and that entitle the petitioner, as a matter of law, to relief." ***Id.*** Courts

considering a petition to strike may review "only the record as filed by the party in whose favor the warrant was given, *i.e.*, the complaint and the documents which contain confession of judgment clauses." ***Resolution Trust Corp., supra*** at 106, 683 A.2d at 273. Matters outside the record will not be considered and the judgment will be upheld if the record is self-sustaining. ***Id.*** "Entry of a valid judgment by confession can only be accomplished if such entry is made in rigid adherence to the provisions of the warrant of attorney; otherwise, such judgment will be stricken." ***Dollar Bank, Federal Sav. Bank v. Northwood Cheese Co., Inc.***, 637 A.2d 309, 311-12 (Pa.Super. 1994), *appeal denied*, 539 Pa. 692, 653 A.2d 1231 (1994). "A warrant to confess judgment must be explicit and will be strictly construed, with any ambiguities resolved against the party in whose favor the warrant is given." ***Id.***

When the factual averments contained in the confession of judgment are disputed, a party may challenge the factual basis in a petition to open the judgment. ***Resolution Trust Corp., supra*** at 106, 683 A.2d at 273. A petition to open a confessed judgment is an appeal to the equitable powers of the court. ***PNC Bank, supra*** at 638. A court may grant a petition to open if:

> The petitioner (1) acts promptly, (2) alleges a meritorious defense, and (3) can produce sufficient evidence to require submission of the case to a jury. The decision of the trial court on a petition to strike or open judgment will not be disturbed unless there is an error of law or a manifest abuse of discretion.

RAIT Partnership, LP v. E Pointe Properties I, Ltd., 957 A.2d 1275, 1277 (Pa.Super. 2008).

In the present case, the Bank's complaint to confess judgment stated defaults occurred under the Notes because Dijan filed for bankruptcy in the Middle District of Pennsylvania, and attached copies of the Guaranties and the Notes. The default paragraph of the Guaranties stated in relevant part that "default under any Loan Document" would trigger a default under the Guaranties. Appellant's central claim, that Dijan's bankruptcy did not trigger the Guaranties, turns on whether the Notes qualify as "Loan Documents," as that term is defined within the Guaranties.

There is no dispute that: (1) a bankruptcy filing by Dijan qualifies as a default under the Notes; and (2) default under any Loan Document triggers the Guaranties. (***See*** Promissory Note at 6; R.R. at 13a.) (providing default would occur upon, *inter alia*, "the commencement of any bankruptcy or insolvency proceeding against [Dijan]"). (***See also*** Unconditional Guaranty at 5; R.R. at 25a.) (stating default events include: "default under any Loan Document"). The Guaranties define "Loan Document" as including "all documents executed in connection with or related to Guaranteed Obligations and may include…loan agreements." (***See id.*** at 7; R.R. at 27a.) After reviewing both the Notes and the Guaranties, the trial court found the Notes qualified as Loan Documents under the Guaranties, and Dijan's default on

the Notes triggered the Guaranties. We agree with the court's conclusion, as a straightforward reading of the Notes and the Guaranties supports it.

The Notes were contracts executed between Dijan and the Bank, where the Bank agreed to lend Dijan specific sums of money in exchange for, *inter alia*, a promise to repay. On the same day Dijan executed the Notes, Appellant executed each Guaranty agreement. The Guaranties directly reference the Notes in several instances. (***See id.*** at 1; R.R. at 21a.) The entire reason for the Guaranties is to "unconditionally guarantee[]...the timely payment and performance of all liabilities and obligations of [Dijan] to Bank." ***Id.*** Like the trial court, we read the Notes and Guaranties as interrelated and conclude the term "Loan Documents" in each Guaranty includes the Notes.

Appellant's view, that Dijan's bankruptcy did not trigger the Guaranties, is overly narrow and simply incorrect. The Guaranties constitute express assurance to the Bank if Dijan breached or defaulted on the Notes. Because the Notes qualified as "Loan Documents" and expressly identified Dijan's bankruptcy as a default event, default on the Notes by Dijan (through its bankruptcy filing) triggered Appellant's performance under the Guaranties. As a result, the Bank was entitled to accelerate the debt and demand payment from Appellant under the Guaranties. The Bank did exactly that, and Appellant's subsequent failure to honor his obligations led the Bank to confess judgment against him. Therefore, we conclude the trial

court properly rejected Appellant's claim that Dijan's bankruptcy was not a default event that activated the Guaranties.

We additionally reject Appellant's claim regarding the Bank's complaint as facially defective because it did not identify the specific sub-section of the default paragraph of the Guaranties Appellant had breached. The Bank's complaint adequately set forth the default event that ultimately led to the confession of judgment—the bankruptcy filing by Dijan. ***See*** Pa.R.C.P. 2952(a)(6) (stating complaint in confession of judgment must set forth "an averment of the default or of the occurrence of the condition precedent"). Appellant has presented no authority requiring the Bank to cite to the specific subsection of a default provision or plead default with particularity. In fact, this Court has previously held general averments of default are sufficient under Rule 2952(a)(6), while rejecting claims that default should be pled with particularity. ***See Stahl Oil Co, Inc. v. Helsel***, 860 A.2d 508, 513 (Pa.Super. 2004), *appeal denied*, 584 Pa. 709, 885 A.2d 43 (2005). Therefore, the record supports the trial court's determination that the Bank's complaint sufficiently identified the defaulting event.

Regarding his petition to open the confessed judgment, Appellant's reliance on the cash collateral stipulation as somehow modifying the Notes is misplaced. The cash collateral stipulation was an agreement reached in Dijan's bankruptcy case between bankruptcy counsel for Dijan and the Bank, and approved by the bankruptcy court. The Bank was a secured creditor of

Dijan and held a security interest in Dijan's assets. Once Dijan entered bankruptcy, it was prohibited from using its cash without the Bank's permission or a court order. The cash collateral stipulation allowed Dijan to use its cash flow on a limited basis during the bankruptcy proceedings to fund its operations and simultaneously protect the value of its remaining assets (*i.e.*, the business). No language in the cash collateral stipulation even suggests that the cash collateral agreement relieved Dijan of its obligations under the Notes or canceled any default caused by the bankruptcy filing. In fact, the express terms of the stipulation belies Appellant's position on this issue. Specifically, the stipulation provided in relevant part:

> **I. <u>Miscellaneous</u>**
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> 9. Except as expressly provided herein, the parties' execution of this Stipulation shall not be deemed to constitute a waiver of any of their respective rights or remedies under the Bankruptcy Code or other applicable law. By way of amplification, but not limitation, the Bank is not waiving any of its rights and remedies with respect to any of its claims, rights, security interests or remedies under or contained in the Pre-Petition Loan Documents.

(Cash-Collateral Stipulation at 8; R.R. at 115a.) Thus, the stipulation explicitly states the Bank "is not waiving any of its rights and remedies with respect to its claims...in the Pre-Petition Loan Documents." ***Id.***

Appellant fails to recognize the cash collateral stipulation was simply an agreement reached in the bankruptcy case, unique to the bankruptcy

proceedings. The stipulation did not amend the Notes, excuse the default under the Notes, or eliminate the bankruptcy filing as an event of default under the Notes. Even with the cash collateral agreement, Dijan's bankruptcy remained a default event under the Notes, which in turn triggered the Guaranties. When Appellant failed to honor the Guaranties, the Bank exercised its right to confess judgment against Appellant under the Guaranties. Thus, the court correctly refused to open the confessed judgment against Appellant on this basis. Accordingly, we conclude Appellant is not entitled to relief on the grounds asserted and affirm the order denying his petition to strike and/or open the confessed judgment.

Order affirmed.