

MIDWEST FINANCIAL ACCEPTANCE
CORPORATION

Appellant

v.

RONY E. AND SUSAN M. LOPEZ

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1896 MDA 2011

Appeal from the Order Entered October 4, 2011
In the Court of Common Pleas of Centre County
Civil Division at No(s): 2010-1662

BEFORE: GANTMAN, J., LAZARUS, J., and MUNDY, J.

CONCURRING OPINION BY MUNDY, J.:

FILED AUGUST 23, 2013

I concur in the result reached by the learned Majority. As the Majority aptly notes, Appellees executed a payment plan agreement with Appellant on May 11, 2010. The payment plan contained the following provision.

9. **Acknowledgment:** Debtor acknowledges that: (i) the Judgment is valid and enforceable, Debtor was duly served with all process, Debtor has no defenses to the lawsuit, and **Debtor hereby waives any right to seek to vacate the Judgment for any reason**; (ii) Debtor executed the loan documents underlying the Judgment; (iii) MFAC is the lawful owner and holder of the loan documents[;] and (iv) Debtor is in default under the loan documents and the balance due there under is due and payable and fully accelerate[d].

Majority Opinion at 6 (emphasis added), *quoting* Payment Plan, 5/11/10, at

3. In light of this provision, I agree that the trial court erred in granting

Appellee's petition to strike the judgment, as Appellees had already signed away any possible defenses to the judgment.

In my view, because the record unequivocally establishes that Appellees waived any defense to the judgment, that should end our inquiry in this case. As a result, I would not address the broader question presented by Appellant as to whether "the venue rules governing 'civil actions' appl[y] with equal force to 'actions' under the rules of civil procedure governing the confession of judgment for money." Appellant's Brief at 12. Thus, I concur in the Majority's result in this case.

I also write separately to note my disagreement with the Majority's interpretation of the warrant of attorney clause included in the original promissory note as containing a forum selection clause. As the Majority notes, said clause provides in relevant part, as follows.

CONFESSION OF JUDGMENT. BORROWER HEREBY IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEY OR THE PROTHONOTARY OR CLERK OF ANY COURT IN THE COMMONWEALTH OF PENNSYLVANIA, OR ELSEWHERE, TO APPEAR AT ANY TIME FOR BORROWER AFTER A DEFAULT UNDER THIS NOTE, AND WITH OR WITHOUT COMPLAINT FILED, AS OF ANY TERM, CONFESS OR ENTER JUDGMENT AGAINST BORROWER FOR THE ENTIRE PRINCIPAL BALANCE OF THIS NOTE, ALL ACCRUED INTEREST, LATE CHARGES, AND ANY AND ALL AMOUNTS EXPENDED OR ADVANCED BY LENDER RELATING TO ANY COLLATERAL SECURING THIS NOTE TOGETHER WITH INTEREST ON SUCH AMOUNTS, TOGETHER WITH COSTS OF SUIT, AND AN ATTORNEY'S COMMISSION OF TEN PERCENT (10%) OF THE UNPAID PRINCIPAL BALANCE AND ACCRUED INTEREST FOR COLLECTION, BUT IN ANY

EVENT NOT LESS THAN FIVE HUNDRED DOLLARS (\$500) ON WHICH JUDGMENT OR JUDGMENTS ONE OR MORE EXECUTIONS MAY ISSUE IMMEDIATELY; AND FOR SO DOING, THIS NOTE OR A COPY OF THIS NOTE VERIFIED BY AFFIDAVIT SHALL BE SUFFICIENT WARRANT.

Majority Opinion at 2-3 (emphasis removed; citation omitted). As the trial court noted, “[t]his paragraph is not a form [sic] selection clause, but rather a Warrant of Attorney.” Trial Court Opinion, 12/9/11, at 2. The trial court further observed that this Court has previously treated such provisions as warrant of attorney clauses.¹ ***See Germantown Sav. Bank v. Talacki,***

¹ In ***Germantown***, the following provision was at issue.

“The warrant of attorney in the Guaranty Agreement provide[d]:”

6. Each Guarantor hereby irrevocably authorizes and empowers any attorney of record, or Prothonotary or Clerk or any court in the Commonwealth of Pennsylvania or elsewhere, to appear for such Guarantor in any such court at any time and from time to time following the occurrence of an event of default under any of the Loan Documents, and therein to confess or enter judgment against such Guarantor in favor of Bank for the full amount of the Guaranteed Obligations, as evidenced by an affidavit signed by a duly authorized designee of Bank setting forth such amount, plus attorneys’ fees, with costs of suit, release of errors and without right of appeal ...

Germantown, supra at 1288 (emphasis added). The language in ***Germantown*** is virtually identical to the language of the clause in the instant case.

657 A.2d 1285 (Pa. Super. 1995). Despite previous Court precedent finding the language of this clause to be merely a warrant of attorney clause, the Majority finds the language to contain a forum selection clause though “not in the traditional sense.” Majority Opinion at 30. In contrast to the Majority, I would agree with the trial court’s reasoning on this point. Specifically, the trial court concluded as follows.

The clause cannot, however, be construed as a forum selection clause because if so construed, it would allow any court in Pennsylvania “*or elsewhere*” to serve as the forum. This Court will not assume the contracting parties intended to select a forum of any court in any location, **as this would amount to selecting no forum at all.**

Trial Court Opinion, 12/9/11, at 2 (*italics in original; emphasis added*). I would not read “empower[ing] any attorney or the Prothonotary or clerk of any court in the Commonwealth of Pennsylvania or elsewhere” as the parties selecting a forum. Majority Opinion at 2. Instead, I interpret that phrase as declining to identify a forum in order to account for a possible change in circumstances, such as if a party were to relocate. Thus, rather than selecting venue, in my view, the clause presupposes that a valid venue exists.

If we were to view the warrant of attorney clause in this case as containing a forum selection clause, it would lead to unreasonable applications and fail under ***Autochoice Unlimited, Inc. v. Avangard Auto Fin., Inc.***, 9 A.3d 1207 (Pa. Super. 2010), as it allows for venue to be

exercised in literally any and every court willing to exercise jurisdiction. **See** Majority Opinion at 2 (noting the warrant of attorney clause authorized confession of judgment in “any court in the Commonwealth of Pennsylvania, **or elsewhere**”) (capital letters removed; emphasis added); **see also Morgan Trailer Mfg. Co. v. Hydraroll, Ltd.**, 759 A.2d 926, 930-931 (Pa. Super. 2000) (holding that a forum selection clause requiring venue in the United Kingdom was unreasonable); **Churchill Corp. v. Third Century, Inc.**, 578 A.2d 532, 536 (Pa. Super. 1990) (concluding forum selection clause establishing venue in Morbley, Missouri was unreasonable, in part because it “would seriously impair [the defendants’] ability to pursue their defenses[.]”), *appeal denied*, 592 A.2d 1296 (Pa. 1991). Importantly, the warrant of attorney clause in this case is even broader in scope than either of the clauses in **Morgan Trailer** and **Churchill**. Applying a clause granting unlimited venue to an out-of-state or foreign court “would seriously impair [a defendant’s] ability to pursue [any] defenses[.]” and would “deprive [a defendant] of an opportunity to be heard.” **Churchill, supra; Autochoice, supra**. Based on these considerations, in reversing the trial court, I would not rely on the warrant of attorney clause to suggest that Appellees agreed to the entry of confession of judgment filed in Allegheny County. Rather, I would rely on Appellees waiver of any challenge thereto as contained in the May 14, 2010 payment plan agreement.

In summary, I agree that the trial court erred in granting Appellees' motion to strike the judgment. Because Appellees' waived all defenses to the judgment, the trial court was not permitted to consider venue, much less grant the motion to strike on that basis. For this reason, I would reverse the trial court's order and end the analysis at that point. I would resist the temptation to resolve the conflict between Philadelphia County and Cumberland County and not address the broader question reached by the learned Majority as to the applicability of the general venue rules. In my view, it is unnecessary to the resolution of this case. As a result, I respectfully concur in the result only.