



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL A. ZIMMERMAN,)	
CONNIE JO ZIMMERMAN,)	
BBC PROPERTIES, INC., and)	No. 668,2013
GOVERNORS CLUB)	
PROFESSIONAL CENTER, LLC,)	
)	
Defendants Below, Appellants,)	Court Below - Superior Court
)	of the State of Delaware in and
v.)	for Kent County
)	Case No.: K13J-00649 WLW
CUSTOMERS BANK, formerly)	
Known as New Century Bank,)	
)	
Plaintiff Below, Appellee.)	

APPELLANTS' AMENDED OPENING BRIEF

AVENUE LAW

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NATURE OF PROCEEDINGS

On June 21, 2013, Plaintiff Below/ Appellee herein, Customers Bank, filed with the Prothonotary of the Superior Court of the State of Delaware in and for Kent County Entry of Judgment by Confession under Super. Ct. R. Civ. P. 58.1 against Defendants Below/ Appellants herein, Michael A. Zimmerman, Connie Jo Zimmerman, BBC Properties, Inc., and Governors Club Professional Center, LLC, (“Defendants”), Case No. K13J-00749.

Defendants filed an objection to the entry of judgment under Super. Ct. R. Civ. P. 58.1(d)(5), at which time the Court below scheduled a hearing where “... the plaintiff will be required to prove that the debtor has effectively waived debtor’s rights to notice and a hearing prior to the entry of judgment.”¹

The hearing on objection by the debtors was held on September 27, 2013. On November 22, 2013, the Order² being appealed herein was issued in favor of Customers Bank.

Defendants hereby timely appeal the Order.

¹ Super. Ct. R. Civ. P. 58.1(d)(5).

² Order at Attachment No. 1.

SUMMARY OF ARGUMENT

1. The remedy of confession of judgment is not available against non-residents if the creditor fails to provide the statutorily and procedurally mandated affidavit required by 10 *Del. C.* § 2306(c) and Super. Ct. R. Civ. P. 58.1(a)(3).
2. The burden of proof established by procedure, Super. Ct. R. Civ. P. 58.1(d)(5), was not met by the creditor/plaintiff as to the factual issue that the debtors effectively waived their rights to notice and a hearing prior to the entry of judgment.

STATEMENT OF FACTS

Defendants Below/Appellants Michael A. and Connie Jo Zimmerman are Florida residents who obtained commercial loans on behalf of their companies, BBC Properties, Inc. and Governors Club Professional Center, LLC, from Eagle National Bank (predecessor in interest to Plaintiff Below/Appellee Customers Bank) on or about February 24, 2006. Appellants later defaulted on these loans and -- in an effort to restructure -- entered into a forbearance agreement on June 21, 2011 (Appendix at A-3, the "Forbearance Agreement").

In the Forbearance Agreement, a Warrant of Attorney to Confess Judgment is stated at paragraph 22.: "Borrowers and surety each irrevocably authorize and empower any attorney or any clerk of any court of record, upon the occurrence of an event of default under this agreement or the loan documents, to appear for and confess judgment against each and all of them...."³

Asserting the following alleged defaults: (i) Michael Zimmerman's January 23, 2013 indictment in the matter of *United States of America v. Michael A. Zimmerman*, United States District Court for the District of Delaware, Criminal Action No.: 13-10 GMS, (ii) failure of all Defendants to inform Customers Bank of the criminal charges, and (iii) failing to submit required financial reports, Customers Bank sought to confess judgment against both Michael A. Zimmerman and his wife, Connie Jo Zimmerman.

³ App. at A-14, paragraph 22.

The Zimmermans resisted. Specifically, they contend that no default occurred, there are valid defenses to the default obligations established by the Forbearance Agreement, that the confession was facially deficient for failure to comply with Super. Ct. R. Civ. P. 58.1, the mandatory requirements of 10 *Del. C.* § 2306(c) were not met by Plaintiff, and that the bank had not established any knowing and voluntary waiver of the Zimmermans' Due Process rights as to the confession of judgment language.

After a hearing on September 27, 2013, the Superior Court determined that only the issues of facial validity and effective waiver were ripe, and that the remaining issues were properly raised only after the first attempt to execute on the judgment.⁴ Resolving the pending voluntariness and validity issues in the Plaintiff's favor, the Superior Court found in favor of the Appellee on November 22, 2013 and entered the requested judgments in the amounts of \$602,163.30 and \$1,558,792.95 against the Zimmermans.⁵

The Defendants timely appealed on December 9, 2013.

⁴ Order at p. 7.

⁵ The appellants have no objection to the later consideration of the alternative defenses. However, they do note that by limiting this appeal to the issue of knowing and voluntary waiver and procedural and statutory defects, they do not intend to forego these alternative defenses. Accordingly, nothing herein should be viewed as a waiver or attempt to waive the right to raise the same prior to any execution on the judgment below. Further, to the extent that this Court believes that such arguments must be addressed at this juncture, the appellants are willing to brief the same.

ARGUMENT I

A. QUESTION PRESENTED

Does Customers Bank's failure to comply with the requirement to provide the statutorily and procedurally mandated affidavit per 10 *Del. C.* § 2306(c) and Super. Ct. R. Civ. P. 58.1(a)(3) show cause why the decision appealed should be reversed? In addition, does Super. Ct. R. Civ. P. 58.1(a)(3) requires compliance with 10 *Del. C.* § 2306(c), which states: in the circumstance where the debtor is a non-resident of the State of Delaware at the time of execution of the document authorizing confession of judgment an affidavit executed by the debtor stating the sum of money for which judgment may be entered, authorization for entry of judgment in the Superior Court in and for a specific county, the debtor's contact with the state in the transaction, and the debtor's mailing address and residence where he or she would most likely receive mail *must* be filed with the Prothonotary. (emphasis added) The Defendants' preserved the issue of Customers Bank failure to comply with the above, as noted in the Trial Transcript at Appendix A-89, pages 35 (line 2-5); Defendants established that the Zimmermans were residents of the State of Florida at the time of execution of the Forebearance Agreement (Trial Transcript at A-101, lines 2-17); the attention of the Court below was directed to the statute at issue (Trial Transcript at A-99, lines 4-14); and in closing argument the Court's attention was drawn to the requirement of the affidavit as specified in the statute (Trial Transcript at A-107, line 12, to A-109, line 16).

B. SCOPE OF REVIEW

The Supreme Court will review *de novo* questions of law. *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 936 (Del. Supr. 1982); *Wife (J.F.V) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. Supr. 1979); *duPont v. duPont*, 216 A.2d 674, 680 (Del. Supr. 1966); *Nardo v. Nardo*, 209 A.2d 905, 917 (Del. Supr. 1965).

C. MERITS OF THE ARGUMENT

The Defendants pointed out, repeatedly, that the Plaintiff-creditor in the action below did not comply with the requirements as specified in 10 *Del. C.* § 2306(c) and Super. Ct. R. Civ. P. 58.1(a)(3). The language in the Delaware Code states, “A judgment by confession *shall not* be entered as a final judgment... until the Prothonotary gives written notice to the defendant-obligor... 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...”,⁶ (emphasis added) and, “In the case of a defendant-obligor who was at the time of executing the document authorizing the confession of judgment, a nonresident, the plaintiff *must also* file with the Prothonotary an affidavit executed by the defendant-obligor....”⁷ (emphasis added).

The Defendants provided proof that at the time the written obligations were executed, they were residents of the State of Florida.⁸ The Defendants noted that

⁶ 10 *Del. C.* § 2306(b).

⁷ 10 *Del. C.* §2306(c).

⁸ Trial Transcript at A-107, line 16-23 (referring to Defendant’s Defense Exhibit 2, affidavit of residency and copies of drivers licenses).

on the basis of Defendants' non-residency, that the aforementioned affidavit with statutory inclusions was necessary to perfect entry of judgment by confession, and pointed to the mandatory language of the statute that "A judgment by confession shall not be entered as final judgment effective in all respects unless the conditions below are fulfilled."⁹ The mandatory language of 10 *Del. C.* § 2306(b) was ignored in the Order appealed.

In *RBS Citizens, N.A. v. Caldera Mgmt. et al.*, 2009 WL 3011209 (D. Del. Sept. 16, 2009), the District Court decided a very similar case where husband and wife guaranteed a commercial loan with confession of judgment language. The District Court noted that the Plaintiff-creditor strictly complied with the controlling Delaware law, including filing the affidavit required under 10 *Del. C.* § 2306(c). Although the District Court declined to enter judgment against the defendant-creditor on the basis of lack of knowing and voluntary waiver of her rights, the District Court did carefully analyze strict compliance with the statute and procedure.

In the present matter, Plaintiff-creditor's failure to comply with procedural and statutory requirements was dismissed as outside the limited scope of the hearing.¹⁰ Defendants argue that the plain language of the controlling statute forbidding entry of final judgment on a judgment by confession in the event of

⁹ Trial Transcript at A-101, lines 4-13.

¹⁰ Order at 6.

non-compliance on the part of the Plaintiff-creditor bars entry of judgment against the Defendant-creditors, and is subject to a *de novo* review by this Honorable Court.

ARGUMENT II

A. QUESTION PRESENTED

Did Plaintiff-creditor meet the burden of proof imposed on the Plaintiff-creditor by Rules of Civil Procedure to prove the debtor effectively waived debtors' rights to notice and a hearing prior to the entry of judgment?¹¹ Defendants preserved the issue of Plaintiff-creditor's burden of proof, and the fact that no evidence other than signatures was presented in attempting to show the relevant factors of a knowing and voluntary waiver of Due Process rights.¹²

B. SCOPE OF REVIEW

Where the Court is the trier of fact, the standard and scope of review in the Supreme Court is limited to whether the factual findings by a trial judge are sufficiently supported by the record and are the product of an orderly and logical deductive process, and the reviewing court will make contradictory findings of fact only when the findings below are clearly wrong and the doing of justice requires reversal. *Levitt v. Bouvier*, 287 A.2d 671 (Del. Supr. 1972); *Lank v. Steiner*, 224 A.2d 242, 245 (Del. Supr. 1966); *Adams v. Jankouskas*, 452 A.2d 148, 151 (Del. Supr. 1982); *Smith v. Van Gorkom*, 488 A.2d 858, 871 (Del. Supr. 1985).

C. MERITS OF THE ARGUMENT

The scant evidence adduced at the hearing belies the Superior Court's finding of the Zimmermans' voluntary waiver.

¹¹ Super. Ct. R. Civ. P. 58.1(d)(5).

¹² Trial Transcript at A-110 thru A-113.

Although truly a totality-of-the-circumstances inquiry, Delaware courts routinely consider the following factors when assessing knowing and voluntary waiver: (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.” *RBS Citizens, N.A. v. Caldera Mgmt.*, 2009 WL 3011209 (D. Del. Sept. 16, 2009).

In keeping with this routine, the Superior Court analyzed these factors and entered judgment against the Defendants because:

1. “The Zimmermans were represented by attorneys [that] carefully negotiated the specific terms of the agreement.”¹³

2. The confession provision was “clear, conspicuous, and unambiguous, appearing in all capital letters and bold-face type.”¹⁴

3. “[N]early-identical provisions” were included in six other related loan documents signed by the Zimmermans.¹⁵

4. Ms. Zimmerman’s “high degree of business acumen, based on her experience in commercial real estate” -- namely her membership in the Governors

¹³ Order at 11.

¹⁴ Id. at 10.

¹⁵ Id.

Club LLC and her role as business manager of BBC - for “a number of years.”¹⁶

Ms. Zimmerman fundamentally disagrees with the Superior Court’s assertion that these facts render her waiver effective. Turning to the most damning fact first, no evidence was adduced as to what the Appellant did in her role as business manager. Moreover, had it been, Ms. Zimmerman’s involvement would have been established as solely limited to signing documents for the purpose of creating tenants by the entirety property with her husband. This activity would not provide Ms. Zimmerman with the requisite “level of business sophistication or experience with similar documents which would engender the understanding that signing the Guaranty would waive her constitutional rights to notice and a hearing prior to the entry of judgment.”¹⁷ Indeed, it can hardly be said that her work would place Ms. Zimmerman on notice of the legal implications accompanying execution of the confession.

The evidence actually demonstrates the contrary to be true. The Plaintiff’s sole witness, Mr. DeYoung, in response to cross-examination admitted he had no knowledge of Mrs. Zimmerman’s background and expertise.¹⁸ Mr. DeYoung further admitted he had never met Mrs. Zimmerman.¹⁹ This is hardly compelling evidence of the purported “high degree of business acumen” that the Superior Court relied in as justification for its conclusion.

¹⁶ Id. at 11.

¹⁷ Id.

¹⁸ Trial Transcript at A-89, line 23, thru A-91, line 18.

¹⁹ Id.

By the same token, Ms. Zimmerman's purported legal representation during the negotiations does not *de jure* establish knowing waiver. As a primary matter, no evidence was adduced that the attorney actually worked for Ms. Zimmerman personally.

Moreover, "it is, at best, disputed whether [the signer] . . . had the benefit of legal representation in the execution . . . Moreover, even if [the attorney] represented [the signer] . . . as [the attorney] claimed in the Opinion, the Opinion does not suggest that the constitutional waiver of her right to notice and a hearing was explained to [the signer] . . . Accordingly, there is no evidence that [the signer] received any meaningful assistance of counsel."²⁰ Put simply, the mere presence of an attorney working in some capacity with the Zimmerman entities does not establish that Ms. Zimmerman knowingly and effectively waived her rights via the confession.

The remaining claims are also for naught. Ms. Zimmerman's signature on "substantially similar guarantees in the past, which also contained confession of judgment clauses, does not on its own indicate that [she] . . . 'intentionally' relinquished or abandoned, in this case (or even on the prior occasions), her right to notice and a hearing prior to the entry of judgment."²¹ Moreover, the text of the waiver cannot establish Ms. Zimmerman's knowing waiver, especially given its "highly technical" nature that renders it "not amenable to easy understanding by

²⁰ *RBS Citizens, N.A.* at 10.

²¹ *Id.* at 9.

a layperson.”²²

And finally, Mr. DeYoung testified that check marks indicating whether or not the Zimmermans had been represented by counsel clearly indicated neither had been represented by counsel as to the confession of judgment clauses.²³

Defendants object to the entry of judgment by confession on the ground that absolutely no evidence was submitted by Plaintiff that Defendants “... understandingly waived notice and an opportunity to be heard prior to the entry of judgment....”²⁴

²² Id. at 12.

²³ Trial Transcript at A-85, lines 17-22.

²⁴ 10 *Del. C.* § 2306(g).

CONCLUSION

FOR THE FOREGOING REASONS, this Honorable Court should REVERSE entry of judgment by confession as to Michael A. and Connie Jo Zimmerman.

Respectfully Submitted,

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ATTACHMENTS

1. ORDER ON APPEAL

Customers Bank v. Michael A. Zimmerman et al., Superior Court of the State of Delaware in and for Kent County, Case No. K13J-00749.