

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MEMO FINANCIAL SERVICES USA, INC,

Plaintiff,

Case No: 2015-146149-CK

v.

Hon. Wendy Potts

NAIMI PROPERTIES EAST, INC, et al,

Defendants.

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OPINION AND ORDER RE: DEFENDANTS' MOTION/PETITION TO SET  
ASIDE/STRIKE CONFESSED JUDGMENT

At a session of Court  
Held in Pontiac, Michigan

On

SEP 18 2015

Plaintiff MEMO Financial Services USA, NA is in the business of issuing money orders. Defendants Naimi Properties, East, Inc and Alaa Naimi operate a store where they sell MEMO's money orders subject to an August 2009 Money Order Trust Agreement. Alaa Naimi personally guaranteed Naimi Properties performance under the Trust Agreement. Defendants also signed a separate agreement with a clause titled "Confession of Judgment" that authorizes MEMO to confess a judgment if Naimi Properties defaults on its obligations under the Trust Agreement.

On March 18, 2015, MEMO notified Defendants that a \$1,008 money order Defendants issued could not be negotiated because Defendants had insufficient funds in their account. The notice stated that in addition to the rejected money order, Defendants owed MEMO debit and audit fees and an outstanding balance of \$52,949.08. On March 20, MEMO filed a plea for confession of judgment in this Court claiming that Naimi Properties is in default by failing to

make \$53,777.08 in payments from March 6 through March 12, 2015 and Alaa Naimi is liable as a guarantor. In addition to the unpaid balance, MEMO sought NSF and audit fees, interest, and \$16,230.63 in attorney fees. On March 23, 2015, the Court entered a confessed judgment of \$70,699.12 against Defendants jointly and severally.

Defendants now move the Court to set aside the confessed judgment on several grounds. The parties agree that the Court should interpret the Trust Agreement under Pennsylvania law, which allows a judgment debtor to challenge a confessed judgment either by asking the Court to strike it or to “open” it. *Germantown Sav Bank v Talacki*, 441 Pa Super 513, 519-20; 657 A2d 1285 (1995). The Court can strike a confessed judgment “where there is an apparent defect on the face of the record on which the judgment was entered.” *Germantown, supra*. The Court can “open” the confessed judgment “if the petitioner promptly presents evidence on a petition to open which in a jury trial would require that the issues be submitted to the jury.” *Id.*

Defendants first assert that entry of the confessed judgment denied them due process because they did not have an opportunity to appear and defend against it. However, Defendants waived their due process rights in the Trust Agreement by giving MEMO authority to confess a judgment. Defendants also assert that they did not voluntarily, knowingly, and intelligently waive their right to due process. However, Pennsylvania law upholds due process waivers in commercial transactions, such as the Trust Agreement here. See *Germantown, supra*. The fact that Defendants are now claiming ignorance of the provisions of the Trust Agreement is insufficient to show that they did not knowingly and voluntarily execute it. “It is well established that, in the absence of fraud, the failure to read a contract before signing it is ‘an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract.’” *Germantown, supra* at 1289, quoting *Standard Venetian Blind Co. v American Emp. Ins.*

*Co.*, 503 Pa 300, 469 A2d 563, 566 (1983). Thus, Defendants' due process arguments are without merit.

Defendants next assert that MEMO failed to comply with Pennsylvania's notice requirements for confession of judgment. Although Defendants cite Pennsylvania court rules for their argument, those rules are inapplicable here. Pennsylvania's substantive law applies to the interpretation of the agreement, but Michigan court rules and procedure govern filing a confession of judgment in a Michigan court. *Nat'l Equip Rental v Miller*, 73 Mich App 421, 425; 251 NW2d 611 (1977). There is no Michigan court rule setting requirements for filing a confessed judgment, and the only procedure for doing so is found in MCL 600.2906. That statute requires only that "[t]he authority for confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract or other evidence of the demand for which such judgment was confessed." MCL 600.2906(1). Contrary to Defendants' claim, MEMO complied with this provision by obtaining Defendants' consent to confession of judgment in an agreement separate from the Trust Agreement. Defendants also assert that the confessed judgment is defective because it did not contain a sum certain, however, they cite no authority for this alleged requirement. Because MEMO complied with Michigan procedure for filing a confession of judgment, Defendants' procedural argument fails.

Defendants next assert that MEMO failed to obtain personal jurisdiction over Defendants because "no attorney appeared on behalf of the Defendants" to confess judgment. Although Defendants' argument is less than clear, it appears to be premised on language in the agreement stating that the confession of judgment clause empowers "any attorney . . . to appear for and confess or enter judgment against Trustee . . ." However, Defendants fail to explain why this language implicates personal jurisdiction. There is no question that the Court has general

personal jurisdiction over Defendants because they live in and operate a business in Oakland County. MCL 600.701(2); MCL 600.711(3). Thus, Defendants fail to demonstrate that the Court lacks jurisdiction over them.

Defendants also dispute MEMO's request for attorney fees claiming that the fees are unreasonable. MEMO contends that the confession of judgment entitles it to attorney fees equal to 30% of the judgment. However, there is no support for this position in the confession of judgment, which states that MEMO is entitled to enter a confessed judgment that includes a "reasonable attorney's fees . . . not to exceed thirty percent (30%) . . ." Under this language, MEMO is entitled to a *reasonable* fee that cannot exceed 30% of the other amounts or sums due, not an automatic 30% fee. Thus, Defendants are correct that the attorney fees MEMO seeks in the confession of judgment must be reasonable.

However, Defendants' reliance on *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) is misplaced because Pennsylvania law governs the parties' agreement and the determination whether the fees are reasonable. MEMO bears the burden of proving its entitlement to attorney fees and their reasonableness. *Commonwealth DOT Bureau of Driver Licensing v Smith*, 145 Pa Commw 164, 168; 602 A2d 499 (1992). Parties may contract to require a breaching party to pay the nonbreaching party's attorney fees, but the Court has authority to consider whether the fees claimed are reasonable and to reduce the fees if appropriate. *McMullen v Kutz*, 603 Pa 602, 613-15; 985 A2d 769 (2009). In deciding whether the fees are reasonable, the Court considers:

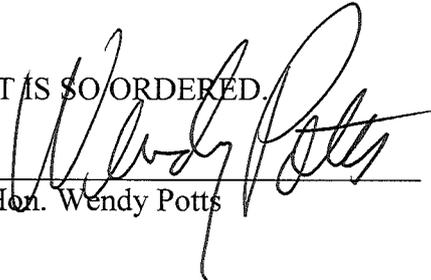
The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a

reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question. [*McMullen, supra* at 610]

Because MEMO's plea for confession of judgment does not include any evidence supporting the reasonableness of its attorney fees, the Court cannot determine if the fees in the confessed judgment are reasonable. Within 14 days, MEMO may file and serve evidence of the reasonableness of its attorney fees and the factors of *McMullen*. Within 7 days of service of MEMO's attorney fee evidence, Defendants may file specific objections to the fees. The Court will review the parties' submission, determine if MEMO's claimed fees are reasonable, and enter a revised judgment if necessary.

Dated: SEP 18 2015

IT IS SO ORDERED.

  
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Hon. Wendy Potts