



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL A. ZIMMERMAN,
CONNIE JO ZIMMERMAN,
BBC PROPERTIES, INC., and
GOVERNORS CLUB
PROFESSIONAL CENTER,
LLC,

Defendants Below/Appellants,

v.

CUSTOMERS BANK, formerly
known as New Century Bank,

Plaintiff Below/Appellee.

No. 668,2013

Court Below – Superior Court of the
State of Delaware, in and for Kent
County C.A. No. K13J-00649 WLW

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	3
STATEMENT OF FACTS.....	4
ARGUMENT.....	10
I. THE SUPERIOR COURT PROPERLY GRANTED JUDGMENT BY CONFESSION IN FAVOR OF CUSTOMER’S BANK BECAUSE THE OUT-OF-STATE RESIDENCY REQUIREMENT SET FORTH IN 10 <i>DEL. C.</i> § 2306(C) IS INAPPLICABLE AND BEYOND THE NARROW SCOPE OF THE INITIAL PROCEEDING.....	10
A. Questions Presented.....	10
B. Scope of Review.....	10
C. Merits of Customer Bank’s Argument.....	10
1. The Borrowers Failed to Establish Out-of-State Residency at the Time the Confession of Judgment Provisions Were Signed.....	12
2. The Narrow Purpose of the Rule 58.1 Hearing is to Establish Whether the Waiver of Defendants’ Rights Was Voluntary, Knowing and Intelligent.....	16
II. CUSTOMERS BANK MET ITS BURDEN BY PRESENTING OVERWHELMING EVIDENCE THAT THE BORROWERS VOLUNTARILY, KNOWINGLY AND INTENTIONALLY WAIVED NOTICE AND CONSENTED TO ENTRY OF JUDGMENT BY CONFESSION.....	17

A.	Questions Presented.....	17
B.	Scope of Review.....	17
C.	Merits of Customer Bank’s Argument.....	17
	CONCLUSION.....	26

TABLE OF CITATIONS

CASES	Page(s)
<i>Artisans' Sav. Bank v. VIP Acquisitions Corp.</i> , 1982 Del. Super. LEXIS 904 (Mar. 22, 1982).....	14, 19-20
<i>County Bank v. Thompson</i> , 2013 Del. Super. LEXIS 612 (Dec. 5, 2013).....	14, 19
<i>D.H. Overmyer Co., Inc. v. Frick</i> , 405 U.S. 174, 187 (1972)	18
<i>G&G Restaurant, Inc. v. The New G&G Corp.</i> , 1991 Del. Super. LEXIS 69 (Mar. 4, 1991).....	17
<i>Goodwin v. Whitaker</i> , 2002 Del. Super. LEXIS 370 (Oct. 31, 2002).....	13
<i>Goodwin v. Whitaker</i> , 2002 Del. Super. LEXIS 479 (Dec. 2, 2002)	13
<i>Graham v. State Farm Hut. Auto. Ins. Co.</i> , 565 A.2d 908 (Del. 1989)	22
<i>Harrington Raceway, Inc. v. Vautrin</i> , 2001 Del. Super. LEXIS 555 (Aug. 31, 2001).....	18, 23
<i>Mazik v. Decision Making, Inc.</i> , 449 A.2d 202 (Del. 1982).....	15, 16, 18-19
<i>Pellaton v. The Bank of New York</i> , 592 A.2d 473 (Del. 1991).....	17-18, 22
<i>PNC Bank, Delaware v. Sills</i> , 2006 Del. Super. LEXIS 503 (Nov. 30, 2006).....	12-13
<i>RBS Citizens, N.A. v. Caldera Mgmt.</i> , 2009 U.S. Dist. LEXIS 85157 (D. Del. Sept. 15, 2009).....	22
<i>Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC</i> , 2014 Del. LEXIS 90 (Feb. 28, 2014).....	10

<i>Riverbend Cmty., LLC v. Green Stone Eng'g., LLC,</i> 55 A.3d 330 (Del. 2012).....	17
<i>United States of America v. Michael A. Zimmerman,</i> United States District Court for the District of Delaware, Criminal Action No.: 13-10.....	1
STATUTES AND COURT RULES	
10 DEL. C. 2306(c).....	10
10 Del. C. § 2306(j).....	14
Del. Supr. Ct. Civ. R. 58.1	3, 10, 12, 14, 15, 16, 18, 19
Civ. R. 58.1(g)(3)	15, 19
Rule 58.1(h)(3)(III).....	19

NATURE OF PROCEEDINGS

In connection with two commercial loans, plaintiff Customers Bank, formerly known as New Century Bank (“Customers Bank”), moved for entry of a confessed judgment in the Superior Court against each of the defendants Michael A. Zimmerman, Connie Jo Zimmerman, BBC Properties, Inc. and Governors Club Professional Center, LLC (collectively, the “Defendants”), jointly and severally, after Defendants defaulted on their obligations to Customers Bank under the notes, mortgages, forbearance agreement and guaranty that are the subject of this action and that entitle Customers Bank to the relief granted by the Superior Court in the form of a confessed judgment against Defendants.

The borrowers, Michael and Connie Jo Zimmerman on behalf of BBC Properties, Inc. (collectively, the “Borrowers” or the “Zimmermans”), are in default of the Notes, Mortgages and Forbearance Agreement while Governors Club Professional Center, LLC (“Governors Club”) is in default under the absolute and unconditional Guaranty arising from the (i) Borrowers failure to submit required financial reports and records to Customers Bank; (ii) the January 23, 2013 indictment of Michael Zimmerman 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 (the “Criminal Action”) which resulted in a material adverse change in the Borrowers financial condition that directly impacted

their ability to meet their obligations under the two commercial loans and (iii) failure of the Borrowers to inform Customers Bank of the Criminal Action. In addition, Governors Club is in default of the Guaranty as a result of its failure to satisfy the Borrowers' obligations to Customers Bank after the occurrence of the defaults.

As a result of these defaults, the remaining balance of the Notes has been accelerated and Defendants are indebted to Customers Bank pursuant to the Notes, Mortgages, the Forbearance Agreement and the Guaranty.

On June 21, 2013, Customers Bank filed a complaint and supporting affidavit seeking the entry of a confessed judgment against defendants Michael A. Zimmerman, Connie Jo Zimmerman, BBC Properties, Inc. and Governors Club.

On August 22, 2013, Defendants filed a response in opposition to the Bank's complaint seeking entry of confessed judgment. The response did not raise any specific facts or defenses to the complaint.

On September 27, 2013, a hearing was held to consider the entry of the confessed judgment and Defendants' response.

On November 22, 2013, the Court issued an Order entering judgment by confession against the Defendants and in favor of Customers Bank in the amounts of \$602,163.30 and \$1,558,792.95.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly held that the applicability of 10 *Del. C.* § 2306(c) and whether it precludes entry of judgment are arguments outside the narrow scope of the initial 58.1 confessed judgment hearing. The Superior Court, as required by Delaware Superior Court Civil Rule 58.1, properly held that the applicability of 10 *Del. C.* § 2306(c) is unrelated to the issue of waiver and is therefore irrelevant. Even if the Superior Court had decided whether 10 *Del. C.* § 2306(c) was applicable, the judgment should still be allowed because no evidence was presented at the Rule 58.1 hearing to support the application of the statute to this case.

2. Denied. The Superior Court thoroughly considered the argument and evidence presented by the parties and properly determined that Customers Bank met its burden in establishing a knowing, voluntary and intelligent waiver of notice and a hearing and entered confessed judgment in favor of Customers Bank.

STATEMENT OF FACTS

On February 24, 2006, Michael A. Zimmerman (“Mr. Zimmerman”) and Connie Jo Zimmerman (“Mrs. Zimmerman” and collectively with Mr. Zimmerman, the “Zimmernauts”) on behalf of BBC Properties, Inc. (the “Borrowers”) executed and delivered to Customers Bank’s predecessor, Eagle National Bank, a promissory note, business loan agreement and commercial guaranty in the principal amount of \$700,000.00 (the “First Loan”) in connection with a refinance the property located at 144 Kings Highway, S.W., Dover, Delaware (the “Dover Property”). B1-B14. The First Loan was secured by a mortgage granted in favor of Eagle National Bank on the Dover Property.

On or about January 5, 2007, Customers Bank made available to the Borrowers a business loan in the original principal amount of \$894,000.00 (the “Second Loan” and, collectively with the First Loan the “Commercial Loans”). The Second Loan is memorialized by, among other things, two Promissory Notes dated January 5, 2007 and January 24, 2008. B15-B18. The Borrowers also executed a Business Enterprise Affidavit, Disbursement Request and Authorization, a Disclosure for Confession of Judgment, a Business Loan Agreement and a Commercial Guaranty in connection with the Second Loan. B19-B32.

Customers Bank, formerly known as New Century Bank, is the assignee of Eagle National Bank's rights and interests in connection with the Commercial Loans pursuant to Assignments of the Notes and Mortgages. B33-B37.

The loan documents related to the Commercial Loans were executed by Michael A. Zimmerman and Connie Jo Zimmerman c/o BBC Properties, Inc. as the borrowers. The address for the Borrowers is listed as the address of the Dover Property, in Delaware. The business loan agreements for the Commercial Loans require that all notices provided under the loan documents be given in writing. B8, B28. Specifically, the business loan agreement provides in pertinent part as follows:

Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. **For notice purposes, Borrower agrees to keep Lender informed at all times of Borrower's current address.**

B8, B28 (emphasis added).

The notice section of the Commercial Guarantees executed by Mr. Zimmerman as President of BBC Properties, Inc. contain the same provision regarding the address of the Guarantors:

Any party may change its address for notices under this Guaranty by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes,

Guarantor agrees to keep Lender informed at all times of Guarantor's current address.

B13, B31.

The record is devoid of any evidence that the Zimmermans ever informed Customers Bank or its predecessors that they were Florida residents or that that they changed the notice address from the address of the Dover Property. The Zimmermans were served with all pleadings and other notices in Delaware and they never contended that such service was ineffective. B38-B41. Instead, Defendants first raised the issue at the September 27, 2014 confession of judgment hearing.

In connection with the Commercial Loans, a Disclosure for the Confession of Judgment was executed by each Borrower (the "Disclosure") expressly acknowledging that the Confession of Judgment provision was called to the Borrowers attention and that both Michael A. Zimmerman and Connie Jo Zimmerman consented to judgment by confession as provided for in the Commercial Loan documents. B21-B24. The Zimmermans also initialed paragraphs A, B and C of the Disclosure declaring that they understood the confession of judgment provision permitted Customers Bank to enter judgment against each individual without notice or opportunity for a hearing. B21-B24. The Zimmermans each initialed next to paragraph B and declared that the waiver of the rights was knowing, intelligent and voluntary. B21-B24.

The Zimmermans also executed a Business Enterprise Affidavit along with the Commercial Loan documents and Disclosure attesting that the funds dispersed would be utilized to provide additional development funds through the encumbering of the Governor's Club Professional Center. B15. In the Business Enterprise Affidavit, Mr. and Mrs. Zimmerman, as the only shareholders of BBC Properties, Inc. ("BBC"), further attested that they both exercise actual control over the managerial decisions of the business enterprise. B15.

As an inducement for the Bank to enter into the Second Loan, BBC executed a Commercial Guaranty under which it agreed to unconditionally guarantee the Borrowers' satisfaction of the indebtedness under the Second Loan. B30-B32.

On or about June 21, 2011, after the occurrence of prior events of default on the Commercial Loans, Customers Bank and the Borrowers entered into a Forbearance Agreement under which, inter alia, the terms of the Commercial Loans were modified (the "Forbearance Agreement"). A1.

Paragraph 22 of the Forbearance Agreement contains a bolded and capitalized confession of judgment provision, whereby, upon default, the Borrowers agreed to (1) waive their right to notice and a hearing with regarding to entry of judgment and (2) waive and release all relief from all appraisement, stay, exemption or appeal laws of any state now in force or hereafter enacted; and (3) release all errors in such proceedings. A14.

Paragraph 26 of the Forbearance Agreement provides that notices and communications in connection with the Forbearance Agreement shall be sent to the Borrowers at the Dover Property. A16. Notices and correspondence were also provided to Defendants' counsel as listed on the Forbearance Agreement. A16. No notice was provided to Customers Bank alleging that the Borrowers were Florida residents and no Florida address was ever designated for service of notices, either at the time the Forbearance Agreement was executed or at any time thereafter. A94, lines 11-19.

As an inducement for Customers Bank to enter into the Forbearance Agreement, Governors Club Professional Center, LLC ("Governors Club"), executed a Guaranty and Suretyship Agreement under which Governors Club agreed to unconditionally guarantee the Borrowers' payment and performance under the Commercial Loans (the "Guaranty"). A24. Michael A. Zimmerman is the Managing Member of Governor's Club, a Delaware limited liability company. Connie Jo Zimmerman is a member of Governor's Club and, along with Mr. Zimmerman, they are the sole members of this entity. A51.

Paragraph 20 of the Governors Club Guaranty contains a bolded and capitalized warrant of attorney provision that allows the Court to confess judgment without notice or the opportunity for prior hearing. A32-A33. The provision also states that Governors Club "waives and releases all errors, defects, and

imperfections whatsoever in the entering of judgment, and hereby agrees that no writ of error or objections or motion or rule to open or strike said judgment or appeal shall be made or taken thereto.” A33.

The Borrowers defaulted on the Commercial Loans and Governors Club defaulted under the Guaranty as a result of continued and uncured defaults arising from the failure to submit required reporting documents to the Bank, failing to inform and advise the Bank of the criminal investigation and criminal proceedings against Michael A. Zimmerman, the issuance of a federal indictment against Michael A. Zimmerman and the occurrence of a material adverse change as a result of the federal indictment. Governors Club is in default of the Guaranty as a result of its failure to satisfy the Zimmermans’ obligations to the Bank after the occurrence of the defaults.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED JUDGMENT BY CONFESSION IN FAVOR OF CUSTOMER'S BANK BECAUSE THE OUT-OF-STATE RESIDENCY REQUIREMENT SET FORTH IN 10 DEL. C. § 2306(C) IS INAPPLICABLE AND BEYOND THE NARROW SCOPE OF THE INITIAL PROCEEDING.

A. Questions Presented

Whether Customers Bank was required to issue an affidavit pursuant to 10 *Del. C.* § 2306(c) when Defendants neither provided notice of their alleged out-of-state status nor their out-of-state address? Whether consideration of the 10 *Del. C.* § 2306(c) affidavit is within the narrow scope of the initial Super. Ct. Civ. R. 58.1 hearing?

B. Scope of Review

This Court's review of conclusions of law is *de novo*. *Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC*, 2014 Del. LEXIS 90, *9 (Feb. 28, 2014).

C. Merits of Customer Bank's Argument

The Commercial Loan documents reflect that the Borrowers and Governor's Club were to receive notice at the Dover Property and, at the time of the closing of the loans, the Borrowers each acknowledged that their address was the same as the Dover Property. The Borrowers did not provide an alternative address or notification of out-of-state residency to Customers Bank or its predecessor as required under the express terms of the Commercial Loan documents. The Borrowers executed numerous documents listing the Dover

Property as their address. Customers Bank sent all notices and correspondence to the Dover Property address, where they were received by Defendants.

The express language of the Commercial Loan documents provides evidence of the parties' intent that all notices served upon the Dover Property address would be adequate and proper. Customers Bank sent notices via hand delivery or certified mail to the Dover Property address 1) on May 15, 2013 to inform Borrowers of the default on the Commercial Loans, 2) on June 24, 2013 serving the confession of judgment complaint and summons and 3) on November 4, 2013 to inform Borrowers of further default on the Commercial Loans. The letters hand delivered on May 15, 2013 were accepted. The executed return receipts for the certified mailings of the complaint and summons were returned to counsel for Customers Bank indicating service was accepted and effectuated on the Borrowers. B38. None of the first-class mailings or items sent by counsel for Customers Bank were unclaimed, returned undeliverable or subsequently rejected by the Borrowers. No written or verbal notice was provided to Customers Bank requesting a change of address or providing an out-of-state residence. A94, lines 11-19. Customers Bank did not receive any verbal or written notification from the Borrowers or BBC objecting to or attempting to revoke the confession of judgment provisions set forth in the Commercial Loan documents. A72, line 6 through A73, line 3.

On August 22, 2013, Defendants filed a response to the confessed judgment complaint filed by Customers Bank. A42. The Response did not provide any basis or argument for the opposition to the entry of judgment by confession and did not raise the Zimmermans' alleged out-of-state residency. It was not until the day of the Rule 58.1 hearing on the confessed judgment complaint that the Zimmermans first contended that they were Florida residents. This was done by argument from their counsel, not through any evidence. The Zimmermans did not appear at the hearing and the record is devoid of any evidence establishing that the Zimmermans resided in Florida at the time they executed the confession of judgment provisions.

1. The Borrowers Failed to Establish Out-of-State Residency at the Time the Confession of Judgment Provisions Were Signed

The Borrowers are estopped from arguing that they were non-residents of the State of Delaware at the time they executed the Commercial Loan documents or thereafter. Notices were sent to the address where the Borrowers contractually agreed to accept notice. In *PNC Bank, Delaware v. Sills*, 2006 Del. Super. LEXIS 503, *7-8 (Nov. 30, 2006), the Court found that service of notices on the business address where defendants agreed to accept service pursuant to the loan documents was proper pursuant to Superior Court Civil Rule 58.1 despite defendants' argument that they resided out of state. In *PNC Bank, Delaware v. Sills*, the Court opined as follows:

“The term ‘address,’ as it pertains to individuals, has a peculiar meaning in law because of the significance of notice. Notice and opportunity to be heard are required as due process before one can be deprived of property. Notice must be such that it is reasonably calculated to reach the interested parties to apprise them of the pendency of an action.”

PNC Bank, 2006 Del. Super. LEXIS 503 at *8 (citations omitted).

In this case, notice was sent to the Borrowers’ address listed in each of the Loan Documents. B38. The certified mailings were accepted by each of the Borrowers, including the Zimmermans. B38.

The purpose of 10 *Del. C.* § 2306(c) is to give non-resident debtors a protection not thought necessary for residents. *Goodwin v. Whitaker*, 2002 Del. Super. LEXIS 370, *6 (Oct. 31, 2002) *vacated*, *Goodwin v. Whitaker*, 2002 Del. Super. LEXIS 479 (Dec. 2, 2002)¹. It requires the creation of a record that sufficient contact exists with Delaware to confer jurisdiction over the non-resident. *Goodwin*, 2002 Del. Super. LEXIS 370 at *6. It is also based on a recognition that non-residents may enter into debt transactions which have little to do with Delaware or do so under circumstances where it may not reasonably occur to the

¹ *Goodwin v. Whitaker*, 2002 Del. Super. LEXIS 370 (Oct. 31, 2002) is cited to provide background on 10 *Del. C.* § 2306(c) as set forth in the dicta of the case. The *Goodwin* order was subsequently vacated by the Superior Court but judgment was ultimately entered in *Goodwin v. Whitaker*, 2002 Del. Super. LEXIS 479 (Dec. 2, 2002).

debtor that judgment might be confessed in a county in Delaware. *Id.* This provision is meant to assure in each case, by a sworn statement, that a non-resident is aware that judgment may be confessed in a county in Delaware and that the act is authorized by that non-resident. *Id.*

The residency requirement is tested at the time of execution, not at the time of the Rule 58.1 hearing. Rule 58.1 and 10 *Del. C.* § 2306(j) contemplate two separate hearings. The narrow purpose of the initial hearing is for the plaintiff to establish an effective waiver on the part of the defendant based on the totality of circumstances. *County Bank v. Thompson*, 2013 Del. Super. LEXIS 612, *8 (Dec. 5, 2013). Affirmative defenses other than an alleged lack of waiver may not be considered until after the entry of a judgment. *Artisans' Sav. Bank v. VIP Acquisitions Corp.*, 1982 Del. Super. LEXIS 904, *1-2 (Mar. 22, 1982). Prior to the entry of a judgment, a defendant has a right to be heard on the issue of whether he understandingly waived the right to notice and an opportunity to be heard. Thereafter, if judgment is entered, a defendant has a right to a second hearing to present defenses of which he had no knowledge at the time the instrument containing a warrant of attorney to confess judgment was executed, or which arose after the signing of the instrument. *Artisans' Sav. Bank*, 1982 Del. Super. LEXIS 904 at *1.

In this case, the Borrowers executed multiple Loan Documents that reflect that the notice address for Borrowers is the Dover Property. Multiple notices were sent to and received by the Borrowers at the Dover Property. When the Borrowers executed the Commercial Loan documents that reflected the Dover Property address as the notice address and regularly received notices at that address, Customers Bank reasonably relied on the Borrowers conduct that no other address was appropriate for the Borrowers or Governor's Club.

Under these facts, the Borrowers and Governor's Club are equitably estopped from asserting that a 10 *Del. C.* § 2306(c) affidavit was required because they were non-residents at the time they executed the Commercial Loans. The Commercial Loan documents executed by the Defendants each list the Dover Property as the notice address. Defendants regularly conduct business in the State of Delaware, were members of a Delaware limited liability company and a Delaware corporation that regularly conducted business in Delaware and participated in Delaware commercial real estate transactions. As a result, 10 *Del. C.* § 2306(c) is not applicable to this matter. See *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 203-204 (Del. 1982)(once defendant affixed his signature to the note he was estopped to deny the clear meaning of the language).

2. The Narrow Purpose of the Rule 58.1 Hearing is to Establish Whether the Waiver of Defendants' Rights Was Voluntary, Knowing and Intelligent

The narrow purpose of the initial hearing conducted in accordance with Superior Court Rule 58.1 is for the plaintiff to establish an effective waiver on the part of the defendant, based on the totality of circumstances. Super. Ct. Civ. R. 58.1(g)(3); *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982). The Superior Court properly held that the residency requirements under 10 *Del. C.* § 2306(c) were wholly unrelated to the issue of waiver considered at the September 27, 2013 hearing. Add. 7. Defendants do not claim that they did not receive notice of the confessed judgment action or that they were unaware of the action. Defendants argue that the out-of-state residency requirement set forth in section 2306(c) precludes entry of judgment based upon a procedural defect that does not exist. Moreover, the residency requirement is beyond the scope of the initial proceeding under Rule 58.1 to determine if Defendants' waiver was effective.

II. CUSTOMERS BANK MET ITS BURDEN BY PRESENTING OVERWHELMING EVIDENCE THAT THE BORROWERS VOLUNTARILY, KNOWINGLY AND INTENTIONALLY WAIVED NOTICE AND CONSENTED TO ENTRY OF JUDGMENT BY CONFESSION

A. Questions Presented

Whether Customers Bank met its burden at the Superior Court hearing and established that Defendants voluntarily, knowingly and intentionally waived their right to notice and a hearing by signing numerous loan documents containing the bolded and capitalized confession of judgment provision?

B. Scope of Review

An appellate court reviews contract interpretation de novo. *Riverbend Cmty., LLC v. Green Stone Eng'g., LLC*, 55 A.3d 330 (Del. 2012).

C. Merits of Customers Bank's Argument

A confession of judgment is the written authority of the debtor and a direction to enter judgment against the debtor. *G&G Restaurant, Inc. v. The New G&G Corp.*, 1991 Del. Super. LEXIS 69, *14 (Mar. 4, 1991). It summarily cuts off all defenses and right of appeal. *G&G Restaurant*, 1991 Del. Super. LEXIS 69 at *14.

The execution and delivery of a note containing cognovit provisions, waiving the right to prejudgment notice and a hearing, is constitutional if the waiver is knowing, voluntary and intelligent. *Pellaton v. The Bank of New York*,

592 A.2d 473, 476 (Del. 1991) *citing D.H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 187 (1972). In order for a waiver to be knowing, voluntary and intelligent, it must be “an intentional relinquishment or abandonment of a known right or privilege. *Pellaton*, 592 A.2d at 476. The validity of a waiver depends on the totality of the circumstances. *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. Super. Ct. 1982). The court’s determination of the validity of a waiver under the totality of the circumstances is subjective. *Harrington Raceway, Inc. v. Vautrin*, 2001 Del. Super. LEXIS 555, *11 (Aug. 31, 2001).

Superior Court Civil Rule 58.1 protects a debtor’s constitutional rights in a confession of judgment proceeding by providing for an evidentiary hearing to determine whether the debtor effectively waived his due process rights. *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982). Rule 58.1 reads in pertinent part as follows:

that [a debtor] may appear in Court ... at which time he may object to the entry of judgment and a hearing will be scheduled by the Court. At said hearing the plaintiff will be required to prove that the debtor has effectively waived his rights to notice and a hearing prior to the entry of judgment.

Supr. Ct. Civ. R. 58.1

When a plaintiff seeks to confess judgment against a defendant, the defendant has the opportunity to contest the entry of the confessed judgment at an

initial hearing, at which the plaintiff has the burden of establishing that the defendant made a voluntary, knowing and intelligent waiver of its due process rights. Super. Ct. Civ. R. 58.1(g)(3). The narrow purpose of this hearing is for the plaintiff to establish an effective waiver on the part of the defendant based on the totality of circumstances. *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982). Prior to the first issuance of a writ of execution upon the judgment, the defendant has a second opportunity to appear before the Court in a second hearing at which the defendant may raise any appropriate defenses which are not deemed to have been waived. Super. Ct. Civ. R. 58.1(h)(3)(III). At this second hearing, the burden shifts to the defendant to prove these defenses by a preponderance of the evidence. *County Bank v. Thompson*, 2013 Del. Super. LEXIS 612, *9 (Dec. 5, 2013).

Despite the procedural safeguards that Supr. Ct. Civ. R. 58.1 provided to debtors, confession of judgment proceedings remain “summary in nature.” *Artisans’ Sav. Bank v. VIP Acquisitions Corp.*, 1982 Del. Super. LEXIS 904, *6-7 (Mar. 22, 1982). When a borrower knowingly and intelligently signs a judgment note or other instrument containing a confession of judgment, the borrower waives and bargains away the right to have any dispute which may arise on the note determined in advance of the entry of judgment through a full judicial proceeding. *Artisans’ Sav. Bank*, 1982 Del. Super. LEXIS 904 at *6-7. The availability of a

summary procedure is still a primary objective of a confession of judgment clause, and the parties are still held, within conscionable limits, to their bargain. *Id.*

At the initial hearing, the Superior Court properly held that Customers Bank met its burden in establishing a knowing, voluntary and intelligent waiver by the Zimmermans prior to the execution of the Forbearance Agreement. Add. 11. The Zimmermans each individually signed the Note and Mortgage for both the First and Second Loans. B3, B17, B19. They represented on the Business Enterprise Affidavit that they each exercised actual control over the managerial decisions of the business enterprise. B15. Connie Jo Zimmerman held the position of business manager of BBC. A91, lines 1-4. She was also one of two members of Governor's Club with Michael Zimmerman as the remaining member. A35.

The confession of judgment provision in the Notes signed by the Zimmermans in connection with the First and Second Loans were in bold and capitalized letters to draw special attention to the provisions. B1, B17, B19. On July 11, 2008, Michael and Connie Zimmerman each signed a separate Disclosure for Confession of Judgment and initialed next to sections A, B and C of the Disclosure stating that they understood that the Note contained a confession of judgment provision, that it permitted the lender to enter judgment against them without advance notice or a hearing and that a representative of the lender

specifically called the confession of judgment provision in the Note to their attention.

The confession of judgment provisions in the Forbearance Agreement and the Guaranty signed by Michael and Connie Zimmerman were both similarly bolded and in capital letters. A14-A15, A32-A33, A35. The Defendants executed documents prior to the Forbearance Agreement that included nearly identical confession of judgment provisions including the promissory notes executed in 2006, 2007 and 2008, the commercial guaranty executed in 2007. The confession of judgment provisions were self-explanatory and any time the words “confessed judgment” or “confess judgment” appear in the Forbearance Agreement, the words are in bold-faced, capitalized type.

The Disclosure executed by the Zimmermans, along with the promissory notes, the Forbearance Agreement and the Governor’s Club Guaranty reflect that the waiver of notice and a hearing was knowing, voluntarily and intelligent. Neither the signatures nor any provisions of the Commercial Loans have been withdrawn or revoked by Defendants. The Commercial Loans and the promises within were reinforced in the Forbearance Agreement. The parties must be held to the bargain agreed to pursuant to the Commercial Loans including the confessed judgment provisions.

The Defendants rely upon the *RBS Citizens, N.A. v. Caldera Mgmt.*, 2009 U.S. Dist. LEXIS 85157 (D. Del. Sept. 15, 2009) case for the premise that Connie Zimmerman did not understand the implications of the confession of judgment provisions. The Superior Court distinguished the facts of the *RBS* case from those at hand. Add. 9-10. Unlike the defendant in *RBS* who was a home care nurse and inactive in the business conducted by her husband, Connie Jo Zimmerman attested to exercising actual control over the managerial decisions of the business enterprise of Governors Club since at least 2007. B15. Mrs. Zimmerman is also one of two members of BBC and has been involved with her husband's commercial real estate business for many years. B15.

While the record is devoid of any evidence that Connie Jo Zimmerman did not read or understand the terms of the contracts that she signed, a party's failure to read a contract cannot justify its avoidance. *Pellaton v. Bank of New York*, 592 A.2d 473, 477 (Del. 1991). In the *Pellaton* case, the debtor signed two personal guaranties with warrants to confess judgment and alleged that he did not read the documents because he relied on the advice of his two attorneys. *Pellaton*, 592 A.2d at 476. A party to a contract cannot silently accept its benefits, and then object to its perceived disadvantages. *Id.* at 477 citing *Graham v. State Farm Hut. Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989).

The Court cannot protect business people who decide to sign contracts and promissory notes without reading them. *Harrington Raceway, Inc. v. Vautrin*, 2001 Del. Super. LEXIS 555, *12 (Aug. 31, 2001). In *Harrington Raceway*, the debtor claimed that the note containing the confession of judgment provision was executed under duress, was executed without the advice of legal counsel and that the debtor was not afforded any meaningful opportunity to read, review and understand the terms of the note. *Harrington Raceway*, 2001 Del. Super. LEXIS 555 at *10-11. Despite the debtor's claim that the note did not accurately memorialize his agreement, the court held that the debtor willingly signed the note, without even bothering to read it and, therefore, found it to be a knowing, intelligent and voluntary waiver. *Id.* at *11-12.

In the case at hand, Defendants were represented by counsel in connection with their execution of the Commercial Loans and the Forbearance Agreement. A17, A32. The name and address of Defendants' counsel is listed in the Forbearance Agreement for notice purposes. A17, A32. Customers Bank also established that the Forbearance Agreement was actively negotiated by counsel for the parties. A62, line 18 – A63, line 3.

The Borrowers executed a Promissory Note in 2006 that contained a conspicuous confession of judgment provision. B2. The Borrowers also executed a Promissory Notes in 2007 and 2008 with a bold and capitalized confession of

judgment provision to obtain additional loan proceeds. B17, B19. In connection with the 2008 Promissory Note, the Zimmermans each executed a separate Disclosure for Confession of Judgment. The Zimmermans each initialed the provisions in the Disclosure indicating that they understood that the (i) Note contained a confession of judgment provision that would permit entry of judgment without notice or opportunity for a hearing, (ii) the foregoing provision would permit the lender to execute on the judgment without notice or hearing and (iii) that a representative of the lender specifically called the confession of judgment provision in the Note to the Zimmermans' attention. B21-B24. In 2011, the Zimmermans executed a Forbearance Agreement with a similar bolded and capitalized confessed judgment provision. A32-A33, A35. None of the provisions of the Commercial Loans or the Forbearance Agreement were later withdrawn by Defendants.

On June 21, 2011, the Zimmermans executed a Guaranty in favor of Customers Bank, as the members of Governor's Club. A24. In a separate Disclosure for Confession of Judgment executed by the Zimmermans in 2011, the Zimmermans again acknowledged the confessed judgment provisions in the Guaranty. A35. Based upon the foregoing facts and argument, the decision of the Superior Court should be affirmed as the waiver of notice and opportunity for a hearing was knowing, voluntary and intentional by each of the Defendants and

they should be held to their promises.

In addition to the compelling evidence of Mrs. Zimmerman's knowing waiver, the evidence and argument also established that Mrs. Zimmerman was actively involved in the management of the Borrowers' businesses and was a sophisticated business person. Pursuant to the Forbearance Agreement and Acknowledgment, Mrs. Zimmerman was an officer of Governor's Club and, with Mr. Zimmerman, are the sole members of Governor's Club. A42. Mrs. Zimmerman also executed the Business Enterprise Affidavit in connection with the Commercial Loans declaring she exercised actual control over the managerial decisions of Governor's Club. B15. Mrs. Zimmerman also represented to Customers Bank that she was the business manager of BBC Properties when the loan originated in 2007. A90-A91. Mrs. Zimmerman was represented by counsel during the loan process. Mrs. Zimmerman's attorney received notices pursuant to the Loan Documents and actively negotiated the Forbearance Agreement.

Mrs. Zimmerman executed promissory notes in 2006, 2007 and 2008, two separate guaranties, as well as the Forbearance Agreement and Guaranty on behalf of Governors Club. B1-B3, B11-B14, B16-19, B30-32, A3. Each of these documents contained similar warrant of attorney provisions that were bolded and capitalized. B2, B13-14, B17, B19, B32. Mrs. Zimmerman also executed a separate Disclosure for Confession of Judgment and specifically initialed next to

the paragraphs stating that she understood the waiver provisions that had been called to her attention. B24. This record, and the absence of any evidence offered by Defendants to rebut the enforceability of the Commercial Loan documents as written, supported the Superior Court's decision and should be affirmed by this Court.

CONCLUSION

For all of the foregoing reasons, the Superior Court's judgment in favor of Customers Bank should be affirmed.

Dated: March 17, 2014

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