

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

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**FLEETWAY CAPITAL CORP.**

*Plaintiff*

**v.**

**ERJ LOGISTICS, LLC,  
KORDAN SINGLETARY and JASON JONES**

*Defendants*

: September Term, 2018  
: Case No. 03654  
:  
:  
: Commerce Program  
:  
: Control No. 18112987  
:

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*rk* **ORDER**

AND NOW, this 6 day of February, 2019, upon consideration of the petition to strike or open judgment entered by confession, the response in opposition, and the respective *memoranda-of-law*, it is **ORDERED** that the petition is **DENIED**.

**BY THE COURT,**

  
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**RAMY I. DJERASSI, J.**

Fleetway Capital Corp. -ORDRC



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**DOCKETED**

**FEB - 6 2019**

**R. POSTELL  
CCMMERCE PROGRAM**

## OPINION

Plaintiff Fleetway Capital Corp (“Lessor”), leases equipment to various companies. Defendant ERJ Logistics, LLC (“Lessee”), needs equipment in the pursuit of its business. Individual defendant Kordan Singletary (“Singletary”), has power to contractually bind Lessee. On April 12, 2017, Lessor and Lessee entered into a Master Lease Agreement (the “Lease”), whereby Lessee agreed to lease a freightliner and a trailer from Lessor.<sup>1</sup> The Lease contains a warrant-of-attorney empowering Lessor to confess judgment upon a default committed by Lessee.<sup>2</sup> Also on April 12, 2017, Singletary executed a personal guaranty containing a warrant-of-attorney for the benefit of Lessor.<sup>3</sup> On the same day, another individual defendant, Jason Jones, (“Jones”), executed a separate personal guaranty containing a warrant-of-attorney for the benefit of Lessor.<sup>4</sup>

On March 29, 2018, following a default committed by Lessee, Lessor filed an action in Delaware to recover the leased equipment. In the course of that action, defendant Jones, a guarantor in the instant action, asserted his Fifth Amendment rights and refused to disclose to the Delaware Court the whereabouts of the leased equipment.<sup>5</sup>

On September 27, 2018, Lessor entered judgment by confession against Lessee, Singletary, and Jones, in the amount of \$26,995.07.<sup>6</sup> The affidavit of default of Lessor, which was filed alongside the complaint, avers that Lessee, Singletary, and Jones, are in default as a result of Lessee’s failure to make all remaining monthly payments under the

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<sup>1</sup> Lease, Exhibit A to the complaint.

<sup>2</sup> Id., ¶ 6.

<sup>3</sup> Guaranty of Singletary, Exhibit B to the complaint, ¶ 4.

<sup>4</sup> Guaranty of Jones, Exhibit C to the complaint, ¶ 4.

<sup>5</sup> Petition to open, ¶¶ 41-45; admission of Lessor in its response in opposition, ¶¶ 41-45.

<sup>6</sup> Complaint-in-confession-of-judgment, pp. 4-5.

term of the Lease, as of September 18, 2018.<sup>7</sup> On November 20, 2018, individual defendant Singletary filed the instant petition to strike or open the judgment, and for a stay of execution.

#### THE PETITION TO STRIKE

A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.... When deciding if there are fatal defects on the face of the record ... a court may only look at what was in the record when the judgment was entered.<sup>8</sup>

Singletary asserts that the judgment should be stricken because the venue provision in the Lease and Guaranty authorized Lender to initiate confession-of-judgment proceedings not in Philadelphia County, but either in the Court of Common Pleas of Montgomery County, or in the United States District Court for the Eastern District of Pennsylvania.<sup>9</sup> Singletary makes this assertion on grounds that the language in the venue provision is ambiguous: according to Singletary, the venue provision is broken into two sentences “which [instead] should be read as one longer sentence.”<sup>10</sup>

The venue provisions in question state as follows:

**GUARANTOR AGREES THAT ANY ACTIONS OR PROCEEDINGS TO WHICH LESSOR IS A PARTY ARISING ... FROM THIS LEASE [AND/OR THIS GUARANTY], SHALL BE LITIGATED, AT LESSOR’S OPTION, IN ANY STATE OR FEDERAL COURT HAVING SITUS WITHIN THE COMMONWEALTH OF PENNSYLVANIA, AND THAT SAID COURT SHALL HAVE JURISDICTION THEREOF. INCLUDING BUT NOT LIMITED TO THE EASTERN DISTRICT COURT [SIC] IN PHILADLPHIA [SIC] AND THE COURT OF COMMON PLEAS ON [SIC] MONTGOMERY COUNTY.<sup>11</sup>**

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<sup>7</sup> Affidavit of Default attached to the complaint, pp. 1-5.

<sup>8</sup> Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267–68 (Pa. Super. 2015).

<sup>9</sup> Petition to strike, ¶ 19.

<sup>10</sup> Id., ¶¶ 20-23.

<sup>11</sup> Lease, ¶ 34, Exhibit A to the complaint; Guaranty of Singletary, ¶ 10, Exhibit B to the Complaint (emphasis added).

Preliminarily, Pennsylvania courts—

have allowed reformation of mistaken contract provisions in cases of scriveners' errors where the parties' writing mistakenly failed to record their agreed-upon intentions.... [A] mutual mistake occurs when the written instrument fails to ... set forth the true agreement among the parties.... In such situations, the court may reform the contract document so that its language conforms to what the parties intended.<sup>12</sup>

A quick reading of the venue provision shows that its bolded section lacks a verb and a subject, and is not a free-standing sentence but a sentence fragment.<sup>13</sup> However, such a fragment can be easily repaired if the Court “pull[s] the fragment into a nearby sentence.”<sup>14</sup> In this case, the fragment can be easily pulled into the preceding sentence by deleting the period between the adjacent words “**THEREOF**” and “**INCLUDING**,” and by replacing the deleted period with a comma. As a result, the revised venue provision will read as follows:

GUARANTOR AGREES THAT ANY ACTIONS OR PROCEEDINGS TO WHICH LESSOR IS A PARTY ARISING ... FROM THIS LEASE [AND/OR THIS GUARANTY], SHALL BE LITIGATED, AT LESSOR’S OPTION, IN ANY STATE OR FEDERAL COURT HAVING SITUS WITHIN THE COMMONWEALTH OF PENNSYLVANIA, AND THAT SAID COURT SHALL HAVE JURISDICTION **THEREOF, INCLUDING** BUT NOT LIMITED TO THE [UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA] IN PHILADELPHIA AND THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY.

Once revised, the venue provision yields the true intent of the parties as manifested by the Lease –namely, that any action under that Lease may be litigated in

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<sup>12</sup> Murray v. Willistown Twp., 169 A.3d 84, 91 (Pa. Super. 2017).

<sup>13</sup> “A sentence fragment is a word group that pretends to be a sentence.” A sentence fragment is recognized by noticing whether it contains a subject and/or a verb. DIANA HACKER, *RULE FOR WRITERS*, 156-157 (5<sup>th</sup> ed. 2004).

<sup>14</sup> Id., 158. “The task of interpreting a contract is generally performed by a court rather than by a jury. The task of that goal is ... to ascertain the intent of the parties as manifested by the language of the written instrument.” Humberston v. Chevron, 75 A.3d 504, 510 (Pa. Super. 2013).

any State or Federal Court within Pennsylvania, **including** the U.S. District Court for the Eastern District of Pennsylvania and the Court of Common Pleas of Montgomery County. In this case, Lessor entered judgment by confession in the Court of Common Pleas of Philadelphia County in accordance with the intent of the parties, even though this intent could be fully ascertained only upon a revision of the pertinent text and the removal of several minor scrivener's errors. Based on the foregoing, this Court rejects Singletary's challenge based on improper venue because the intent of the parties is clearly manifested through a straightforward reading of the instrument.

In addition, the petition to strike challenges the validity of the confessed judgment by asserting that the warrants-of-attorney are not conspicuous. This challenge is easily refuted: if a confession clause "is as clearly labeled as any other clause, and is set in the same type ... [which is] readable," such a clause will not fail on grounds that it is un-conspicuous.<sup>15</sup>

#### THE PETITION TO OPEN

A judgment by confession will be opened if the petitioner acts promptly, alleges a meritorious defense, and presents sufficient evidence in support of the defense to require the submission of the issues to a jury.... In adjudicating the petition to ... open the confessed judgment, the trial court is charged with determining whether the petitioner presented sufficient evidence of a meritorious defense to require submission of that issue to a jury.<sup>16</sup>

According to Singletary, the judgment must be opened because the docket fails to show that he was served with the confession-of-judgment.<sup>17</sup> This argument is rejected because the Rules of Civil Procedure do not require service of a confessed judgment

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<sup>15</sup> Plum Tree, Inc. v. Seligson, 307 A.2d 298, 299 (Pa. Super. 1973).

<sup>16</sup> Ferrick v. Bianchini, 69 A.3d 642, 647 (Pa. Super. 2013).

<sup>17</sup> Petition to open, ¶ 23.

upon a defendant; instead, the Rules merely require that the Prothonotary notify a defendant of the entry of a judgment.<sup>18</sup> In addition, the Rules require that a defendant be served with a notice related to the manner of execution, under Pa. R.C.P. 2958.1—2958.3. In this case, the docket shows that Lessee and Singletary received notice by the Prothonotary pursuant to Pa. R.C.P. 236, and received a Notice of Execution Served with Writ of Execution, under Pa. R.C.P. 2958.3.

Singletary's petition also asserts that the judgment must be opened because the amounts claimed by Lessor are incorrect. To open a confessed judgment, "[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses."<sup>19</sup> In this case, Singletary has produced no evidence showing that Lessor claimed an incorrect amount, and has failed to meet his burden of proof. For this reason, the instant defense rejected.

Finally, Singletary asserts that as long as the action *in replevin* remains viable in a Delaware Court, Lessor may not confess judgment under the Lease because "the *replevin* action is still open and has a direct bearing on [the amount in] this confession of judgment."<sup>20</sup> This last defense is also rejected. Preliminarily, the Pennsylvania Rules of Civil Procedure instruct that a party seeking possession of its property may obtain possession or obtain the value of the property, but not both. Specifically, the Rules states that—

[i]f judgment is entered for a **party not in possession**, that party may obtain possession of the property by a writ of possession, **or in the alternative** may obtain the value of the property by execution on the judgment or by recovery

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<sup>18</sup> Pa. R.C.P. 236(a).

<sup>19</sup> *Haggerty v. Fetner*, 481 A.2d 641, 644 (Pa. Super. 1984).

<sup>20</sup> Petition to open, ¶¶ 42-45.

upon the bond.<sup>21</sup>

However, this general Rule is tempered by at least one exception where recovery of property is impracticable or impossible. In such cases, Pennsylvania Courts permit recovery of the value of the property notwithstanding the existence of a judgment *in replevin*. In Com. ex rel. Anderson v. Fidelity & Deposit Co. of Maryland, (“Anderson”), the trial court awarded judgment *in replevin* to Anderson.<sup>22</sup> Subsequently, Anderson filed another action to recover the value of the property and was awarded money damages notwithstanding the existence of a judgment *in replevin*.<sup>23</sup> Defendant Fidelity & Deposit Co. (“Fidelity”) appealed the award of money damages arguing that a party out of possession of the property may recover money damages only if recovery proves to be impracticable.<sup>24</sup> The Pennsylvania Superior Court agreed with Fidelity, reversed the trial court’s Order granting money damages, and remanded below for further proceedings. The Superior Court held that a party out of possession of the property “may recover money damages ... **only** if recovering the property proves an impracticable remedy.”<sup>25</sup>

In this case, the parties admit that one of the defendants in the Delaware action asserted his Fifth Amendment rights and refused to disclose the whereabouts of the

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<sup>21</sup> Pa. R.C.P. 3171(b).

<sup>22</sup> Com. ex. Rel. Anderson v. Fidelity Deposit Co. of Maryland, 811 A.2d 1040, 1041 (Pa. Super. 2002).

<sup>23</sup> Id.

<sup>24</sup> Id., at 1042.

<sup>25</sup> Id., at 1043 (emphasis supplied). The Anderson Court relied on an earlier case wherein the Commonwealth Court of Pennsylvania had stated that—

[an] action *in replevin* is founded upon the wrongful taking and detention of property and seeks to recover property in the possession of another. **The value is recovered in lieu of the property only in case delivery of the specific property cannot be obtained.** Id., (quoting Valley Gypsum v. Pennsylvania State Police, 581 A.2d 707, 710 (Pa. Cmwlth. 1990).

equipment. The refusal makes recovery of the equipment impracticable if not impossible, and for this reason Lessor may seek to recover the present value of the leased equipment, notwithstanding the pending proceedings *in replevin* in the State of Delaware. Obviously, it is incumbent upon Lessee, Singletary and Jones to contest Lessor in Delaware, should Lessor seek to recover the property in that *replevin* action after obtaining judgment in Pennsylvania in the instant action-in-confession-of-judgment.

**BY THE COURT,**



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***RAMY I. DJERASSI, J.***