



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 28, 2019

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Re: *Forge LLC v. Robert Pearson*, CL-2017-13912

Dear Counsel:

This matter is before the Court on Robert Pearson's ("Pearson") Motion to Vacate a Confessed Judgment entered in favor of Forge LLC ("Forge") on October 2, 2017. Pearson contests the confessed judgment as void *ab initio* because it confessed more than the amount provided for in the Note upon which it was based. The Court is called upon to decide three central issues:

OPINION LETTER

1. Whether the confessed judgment amount is erroneous?
2. If the amount confessed is erroneous, is the confessed judgment void *ab initio* for fraud or failure to state a claim?
3. If the amount confessed was erroneous, is the confessed judgment void *ab initio* for lack of jurisdiction?

After considering the pleadings and oral arguments presented by Counsel, the Court finds that the confessed judgment was erroneous. The Court finds that because the judgment was confessed in an amount larger than that provided for in the parties' agreement, the Court did not have jurisdiction to grant the confessed judgment, and therefore it is void *ab initio*.

I. BACKGROUND

The confessed judgment at issue in this case stems from a promissory note (the "Note") between Pearson and Forge, executed on July 11, 2016. The Note provided for a principal amount of \$75,739.91, an interest rate of 10% per year from July 11, 2016, a 5% late fee, and reasonable attorney's fees. It also appointed Stephen M. Turner, CPA ("Turner") as the attorney-in-fact for Pearson, and gave him the authority to confess judgment under the Note. On October 2, 2017, Turner, acting as attorney-in-fact, filed a Confession of Judgment in the Fairfax County Circuit Court in the amount of \$117,500.00 with interest and attorney's fees "thereon."

Pearson was personally served with the confessed judgment on October 11, 2017. On November 5, 2018, he filed the present Motion to Vacate the confessed judgment due to fraud, failure to state a claim, and lack of jurisdiction. The parties presented oral argument on the matter on December 21, 2018 and submitted supplemental briefs following the hearing. The issues before the Court are whether the confessed judgment amount is incorrect, and if it is incorrect, whether it is a void judgment.

I. STANDARD OF REVIEW

Confessed judgments and the requirements for setting aside confessed judgments are governed by the statutory scheme set out in Va. Code § 8.01-431 *et seq.*

Any person being indebted to another person, or any attorney-in-fact pursuant to a power of attorney, may at any time confess judgment in the clerk's office of any circuit court in this Commonwealth, whether a suit, motion or action be pending therefor or not, for only such principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court.

Va. Code § 8.01-432.

OPINION LETTER

Rule 1:1 of the Rules of the Supreme Court of Virginia generally requires that a judgment be challenged within twenty-one days of its entry, after which the Court issuing the judgment no longer has jurisdiction over the case and the judgment becomes final. “However, if the judgment is void, it may be attacked in any court at any time. A void judgment is one that has been procured by fraud or entered by a court that lacked either subject matter or personal jurisdiction.” *Key Bank & Tr. v. Myers*, 49 Va. Cir. 70 (1999) (citing *Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987)).

II. ARGUMENTS

A. Defendant's Argument

Pearson argues that the confessed judgment amount was incorrect. He notes that the amount confessed exceeds the principal amount in the Note by over \$40,000.00, and seeks interest upon interest plus a duplicate award of attorney’s fees. Because the sum so exceeds the principal agreed to in the Note, it was impossible for the Defendant to owe the amount stated in the confession.

Pearson claims that his Motion to Vacate is timely because the judgment was void *ab initio*, and thus may be successfully contested at any time. He states that the confessed judgment should be set aside as void because it violates Va. Code. §8.01-271.1, which requires pleadings to be well-grounded in fact. Pearson states that the amount confessed was not substantiated by the terms of the note, and thus was not well-grounded in fact. Additionally, because the amount confessed was so excessively larger than the principal amount agreed to in the Note as to constitute an intentional misrepresentation, Pearson argues that the confessed judgment was procured by fraud, and therefore the Court may set aside the judgment after the twenty-one days has lapsed.

At the hearing on the Motion to Vacate and in supplemental briefs, Pearson raised the argument that the judgment was void for lack of jurisdiction. He stated that because Va. Code § 8.01-432 mandates that a debtor may only confess that amount which a creditor is willing to accept, and that here that amount was evidenced in the Note as \$75,739.91 plus interest and fees, the amount confessed exceeded the jurisdictional limits of Va. Code § 8.01-432. He relies upon *Singh v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d 549 (2001) for the proposition that a confessed judgment occurring in the absence of jurisdiction is void *ab initio* and may be vacated at any time, not solely within twenty-one days of the entry of judgment. Because the confessed judgment here was void for lack of jurisdiction, Pearson argued that his Motion to Vacate was timely, and should be granted.

B. Plaintiff's Response

Forge maintains that the Motion to Vacate was untimely. Va. Code § 8.01-433 provides that a confessed judgment may only be contested within twenty-one days of entry. In this case, the judgment was entered on October 2, 2017, and Pearson was personally served with the

confessed judgment on October 11, 2017. Any motions to set aside or reduce the verdict should have been filed by November 1, 2017, yet Pearson waited for almost thirteen months and did not file this Motion to Vacate until November 5, 2018. Therefore, his motion was untimely and cannot invalidate the judgment.

Forge next argues that the confessed judgment is not void for failure to state a claim because it was entered in accordance with §8.01-431. Forge states that the typical pleading requirements do not apply to confessed judgments, and the judgment in question complied with all the formatting mandates of §8.01-431. Therefore, it did not fail to state a claim. Forge dismisses Pearson's argument that the judgment should be set aside due to fraud because the alleged fraud was intrinsic, and only extrinsic fraud allows the Court to set aside a final judgment after twenty-one days have passed. Thus, the judgment may not be set aside due to fraud.

In response to Pearson's jurisdictional arguments raised at the hearing and in supplemental briefs, Forge argues that the Court had jurisdiction to enter the confessed judgment. It states that the language of §8.01-432 does not support Pearson's interpretation of it. Rather, Forge argues that the code section is designed to protect the interests of creditors, and to prohibit debtors from confessing judgments in amounts smaller than those that are due. Forge goes on to argue that the judgment is voidable rather than void *ab initio*, because the problem with the judgement was caused by court error rather than lack of subject-matter jurisdiction, and thus it is still governed by the twenty-one day timeline. Lastly, due to the amount of time Pearson waited to file this motion, he is estopped from now taking action to question the judgment's validity.

III. ANALYSIS

A. The Confessed Judgment Amount was Erroneous

There is no dispute that the confessed judgment amount was erroneous because it was calculated incorrectly, and its value exceeded the amount agreed to in the Note. The Note between Pearson and Forge allowed for a principal amount of \$75,739.91, plus an interest rate of 10.0% percent per year, a 5% late fee, and up to 33.33% attorney's fees. The attorney-in-fact confessed judgment in the amount of \$117,500.00, with "interest thereon, and costs of the case, including attorney's fees." To get from the agreed principal amount of \$75,739.91 to the confessed judgment amount of \$117,500.00, attorney's fees and interest would necessarily be included in the confessed judgment. Indeed, the inclusion of attorney's fees and interest in the calculation of the confessed judgment is admitted by Forge in the first footnote of its Opposition to Pearson's Motion to Vacate. However, the Court finds that language of the confessed judgment mandates that interest and attorney's fees are not included within the \$117,500.00 amount, but will rather be added "thereon." Thus, the confessed judgment improperly decrees interest upon interest, and a double recovery of attorney's fees.

B. The Confession of Judgment was not Fraudulent

Here, the Court must consider whether extrinsic fraud existed, or in the alternative, whether the filing was not well-grounded in fact. Although the Opposition to the Motion to Vacate states that the amount of the confessed judgment is correct because it includes the attorney's fees, late fee, and interest, the confessed judgment itself states that such amounts will be included in addition to the amount confessed.

Pearson does not appear to have asserted fraud sufficient to require that the final judgment be vacated. Fraud necessitates a showing by clear and convincing evidence of (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to him. *Van Deusen v. Snead*, 247 Va. 324, 328 (1994). In this case, the misrepresented information (i.e. the incorrect amount of the confessed judgment), does not appear to have been procured with the intent to mislead, nor was it relied upon by the Defendant. In fact, the confessed judgment was personally served on the Defendant, not hidden from him in the hopes of misleading him. At that time, the Defendant did not need to rely on the representation made by the Plaintiff, because the Defendant could have done his own calculations and contested the confessed judgment amount within twenty-one days. The mere refusal to assert one's own rights does not constitute reliance.

Even if these actions did constitute fraud, it was intrinsic, rather than extrinsic fraud, as it did not seek to interfere with court proceedings or the adjudication process. Extrinsic fraud occurs outside the judicial process and "consists of conduct which prevents a fair submission of the controversy to the court." such as by "keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat; or being regularly employed, corruptly sells out his client's interest." *Pallet Recycling, LLC v. Case*, 70 Va. Cir. 125 (2006) (Citing *McClung v. Folks*, 126 Va. 259, 270 (1919)). Only extrinsic fraud allows the Court to set aside a verdict as void after twenty-one days have expired. *Id.* Because any potential fraud in this case was intrinsic, the Court will not vacate the final judgment based on the existence of fraud.

C. The Confessed Judgment was not Void for Failure to State a Claim

The confessed judgment was not void for the failure to state a claim, because confessed judgments are not subject to formal pleading requirements. Va. Code § 8.01-431 *et seq.* controls the requirements for confessed judgments. The confessed judgment in question meets the specific standards set forth in § 8.01-436 as to form and substance. Thus, the confessed judgment set forth a claim and is not subject to a demurrer.

D. The Confessed Judgment was Void for Lack of Jurisdiction

The Court did not have jurisdiction to accept the confessed judgment in the amount presented, and thus it is void *ab initio*. "Any person being indebted to another person . . . may at any time confess judgment in the clerk's office of any circuit court in this Commonwealth . . . for

only such principal and interest as his creditor may be willing to accept a judgment for . . .” § 8.01-432. “It is well-settled that the statutes authorizing a party to confess judgment on behalf of another require strict compliance. Moreover, powers of attorney have been strictly construed for over a century. ‘The authority granted by such an instrument is never considered to be greater than that warranted by its language, or indispensable to the effective operation of the authority granted. The authority given is not extended beyond the terms in which it is expressed.’” *Boothe v. First Virginia Cmtys. Bank*, 82 Va. Cir. 477 (Fairfax 2011) (J. Ney) (quoting *Jones v. Brandt*, 274 Va. 131, 137, 645 S.E.2d 312, 215 (2007)).

In the present case, the agreed terms of the Note declared that the creditor was willing to accept a principal debt amount of \$75,739.91, with an interest rate of 10% per year, a 5% late fee, and reasonable attorney’s fees. The Note did not provide authority to confess judgment for “interest upon interest,” or a double recovery of attorney’s fees. In other words, the plain language of the Note did not authorize Pearson to recover \$117,500.00, an additional award of attorney’s fees, and interest at the judgment rate on the interest that previously accrued. Such an award would violate the terms of the Note. However, on October 2, 2017, through the attorney-in-fact, the debtor confessed a judgment of \$117,500.00, with additional interest and attorney’s fees. It was impossible for Pearson to owe the amount stated in the confessed judgment. Since § 8.01-432 allows a debtor to confess only as much principal and interest as the creditor may accept a judgment for, the Court did not have jurisdiction to accept the confessed judgment for an amount that exceeded the parties’ agreement by more than \$40,000.

Because the judgment was entered outside of the Court’s jurisdiction, it is void *ab initio* and Pearson had the ability to move to eradicate it at any time.

An order is void *ab initio* if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court could “not lawfully adopt.” . . . The lack of jurisdiction to enter an order under any of these circumstances renders the order a complete nullity and it may be “impeached directly or collaterally by all persons, anywhere at any time, or in any manner.”

Singh v. Mooney, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001) (citations and footnotes omitted). Since the judgment was entered for an amount greater than Pearson was able to confess under the Note, the confessed judgment was lacking jurisdiction, and was therefore void.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the confessed judgment amount was erroneous. Because the amount confessed was larger than the amount agreed to in the Note, the Court did not have jurisdiction to accept the confessed judgment, and therefore it is void *ab initio*.

Sincerely,

[Redacted]
Daniel E. Ortiz
Circuit Court Judge

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FORGE LLC,)
)
)
Plaintiff,)
)
v.) CL-2017-13912
)
ROBERT PEARSON)
)
Defendant.)

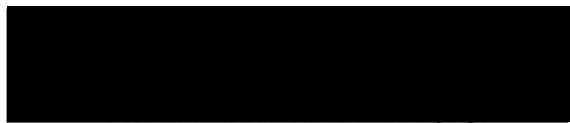
This cause came on to be heard on the 21st day of December, 2018 on the
Defendant's Motion to Vacate a Confessed Judgment.

Upon the matters presented to the Court at the hearing, as well as the
supplementary documents submitted by counsel, it is

ADJUDGED, ORDERED, and DECREED;

that the Defendant's Motion to Vacate a Confessed Judgment is granted, pursuant to the
reasons stated in the corresponding letter opinion.

Entered this 28th day of February, 2019.



JUDGE DANIEL E. ORTIZ