

FINANCIAL SERVICES LITIGATION

ALERT

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New Pennsylvania Superior Court Decision May Help Lenders Expedite Loan Recovery, But Also Frustrate Borrowers

By Jonathan W. Hugg

Commercial lenders and creditors in Pennsylvania may benefit from the Pennsylvania Superior Court's June 17, 2020 decision in *SDO Fund v. Donahue*.¹ The Court ruled that a commercial lender could confess judgment multiple times against a personal guarantor using the same warrant of attorney when the clause contained explicit language allowing the lender to re-use it.

This is a new interpretation of the law. Pennsylvania courts had previously ruled that, whatever the language of a warrant of attorney, a creditor could use it just once to confess judgment. The change in the law in the *SDO* case, which enforces express contractual terms permitting a commercial lender repeatedly to confess judgment, is a potentially powerful, pro-creditor tool to expedite recovery in the current distressed business environment. The *SDO* decision may also cause commercial borrowers to be more cognizant of the precise language of loan amendments and forbearance agreements, and to scrutinize them more carefully, since courts may have just signaled decreased tolerance for non-payment and default.

BACKGROUND

The history of the *SDO* case stretches back to the last economic crisis and reflects a scenario where a borrower receives numerous extensions and amendments from an accommodating lender, but then resorts to the courts to delay further the ultimate enforcement of a loan agreement.

Donahue was a commercial real estate developer. In July 2008 (as the market started to collapse), he signed a personal Guaranty for a \$5.4 million loan to finance the construction of an office building. The Guaranty authorized the bank to confess judgment if Donahue defaulted, and specifically stated that "no single exercise" of the confession of judgment clause, "or a series of judgments," would exhaust the warrant of attorney until the bank received payment in full.

In June 2011, Donahue signed a loan amendment and executed a Consent of Guarantor to the loan amendment. The Consent stated that Donahue ratified and confirmed the warrant of attorney clause in his 2008 Guaranty.

Unfortunately, in January 2012, the loan went into default and the bank confessed judgment against Donahue for \$5.6 million. In September 2012, Donahue signed a second loan amendment that contained a warrant of attorney authorizing multiple confessions of judgment against him until payment in full of the debt. Donahue also signed another Consent of Guarantor. In this second Consent, Donahue again ratified and confirmed the confession of judgment clause in his 2008 Guaranty – upon which the bank had already entered judgment. In October 2012, the bank discontinued the judgment.

Thereafter, Donahue signed numerous loan amendments, forbearance agreements, and two more Consent of Guarantor agreements ratifying and confirming the warrant of attorney in his 2008 Guaranty. Meanwhile, the bank assigned its rights to SDO. In August 2017, after the extended term of the loan

¹ *SDO Fund II D32, LLC v. Gerald T. Donahue*, 2020 PA Super 144 (decided June 17, 2020; precedential).

came and went without repayment, SDO confessed judgment against Donahue for more than \$5.6 million. Donahue filed a petition to strike or open SDO's judgment on the ground that the bank had already confessed judgment against him in January 2012 using the same warrant of attorney. The trial court denied Donahue's petition and he appealed to the Superior Court.

SUPERIOR COURT DECISION

The Superior Court recognized the long-standing general rule that a creditor cannot use a warrant of attorney to confess judgment on the same debt more than once. However, the Court then noted that a warrant of attorney is a contractual agreement and that a commercial borrower was free to waive its rights and authorize a lender to re-use the clause. Donahue's 2008 Guaranty explicitly permitted his lender to confess judgment against him as many times as necessary to collect the debt. Moreover, Donahue had repeatedly signed Consents of Guarantor and other loan documents that ratified and confirmed the warrant of attorney in his 2008 Guaranty. Therefore, the Court allowed the judgment to stand.

PRACTICAL TAKEAWAYS

The narrow lesson of the *SDO* case is that Pennsylvania courts may now be more likely to acquiesce to lenders and other creditors re-using warrants of attorney and confessing judgment multiple times using the same clause, if there is specific language authorizing this. The key for lenders may be to make clear in their loan agreements that this is the unequivocal intent of the parties. It may be prudent to require that the borrower execute a separate disclosure document spelling out that a lender may re-use a warrant of attorney.

More broadly, the *SDO* case may indicate a greater willingness by Pennsylvania courts to look past their historically strong disfavor of confessed judgments, which has sometimes limited the utility of confessed judgments for commercial debt collection. As the economy works its way through the current downturn, lenders may use this new precedent to remind courts that the law can view commercial borrowers as sophisticated parties with the discretion to make

whatever contracts suit their purposes. This may now include agreeing to allow a lender to confess judgment repeatedly against a borrower until the lender receives payment in full. ♦

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