

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILADELPHIA FACTORS INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID GORDON AND PHYLLIS GORDON,	:	
	:	
Defendants.	:	NO. 98-3578

MEMORANDUM

Reed, J.

April 16, 1999

On September 22, 1998, this Court entered judgment by confession for plaintiff Philadelphia Factors Inc. (“Philadelphia Factors”) against the defendants David Gordon and Phyllis Gordon in the amount of \$534,343.45 plus interest from and after June 19, 1998 at the rate of eighteen percent per annum. Presently before the Court are the respective motion of David Gordon and petition of Phyllis Gordon to open or strike the judgment by confession (Documents 4 and 5) and all of the responses, reply and surreply documents. For the reasons that follow, the petition and motion will be denied.

I. BACKGROUND

On October 16, 1997, Zenith Paper Products Corporation, a company owned by David Gordon, entered into an agreement with Philadelphia Factors by which Philadelphia Factors would purchase certain accounts receivable of Zenith (“the accounts purchase agreement”).

Under the terms of the accounts purchase agreement, Zenith was obligated to repurchase any accounts that remained unpaid ninety days after purchase by Philadelphia Factors. On the same day, David Gordon signed a surety and waiver agreement which included a confession of judgment clause, whereby David Gordon guaranteed Zenith's obligations to Philadelphia Factors ("the surety agreement"). Philadelphia Factors contends that it requested that Phyllis Gordon, David Gordon's wife, also sign a similar surety agreement, but she did not sign such an agreement at that time.

After the accounts purchase agreement and surety agreement were entered into by Philadelphia Factors, Zenith, and David Gordon, Zenith began to have financial trouble in the spring of 1998, and Philadelphia Factors contends that Zenith defaulted on the accounts purchase agreement at that time. Philadelphia Factors claims that it informed David Gordon that it would no longer forward funding to Zenith because of Zenith's default and financial condition. David Gordon asked Philadelphia Factors for additional funding, and around May of 1998, Philadelphia Factors told David Gordon that it would not agree to provide additional funding to Zenith unless Phyllis Gordon also signed a surety agreement as originally requested.

At her husband's urging sometime in May of 1998, Phyllis Gordon signed a surety agreement similar to the one signed by David Gordon, entitled a "guarantee and waiver," which contained a similar confession of judgment provision. Phyllis Gordon claims she did not own an interest in Zenith, did not have knowledge of the company, and did not participate in the activities of Zenith. Phyllis contends that although she signed the document when her husband gave it to her, he only showed her the last page with the signature line and she did not know that the guarantee and waiver contained a confession of judgment provision. After Phyllis Gordon

signed the surety agreement, Philadelphia Factors claims that it provided more funds to Zenith. Phyllis Gordon contends that shortly after she signed the surety agreement, Philadelphia Factors decreased its purchase of accounts receivable from Zenith and by May or June of 1998 had ceased purchasing accounts altogether. Zenith eventually ceased operations.

On July 10, 1998, Philadelphia Factors filed a complaint in this Court seeking entry of judgment by confession. On September 22, 1998, this Court entered judgment by confession in the amount of \$534,343.45 plus interest from and after June 19, 1998, at the rate of eighteen percent per annum.

II. DISCUSSION

A. Applicable Standard and Choice of Law

The procedure for opening or striking a judgment by confession is governed by the standards set forth in Federal Rule of Procedure 60. See Resolution Trust Corporation v. Forest Grove, Inc., 33 F.3d 284, 288 (3d Cir. 1994). Rule 60(b) provides that “[o]n motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void; or (6) any other reason justifying relief from the operation of the judgment.” In order to be successful on their respective petition and motion to open or strike the judgment, the Gordons must each establish a meritorious defense. See Strick-Lease, Inc. v. Markell Leasing Corp., 103 F.R.D. 382, 384 (E.D. Pa. 1984) (looking to the standard in the Third Circuit under Rule 60(b) to open a default judgment that requires the default to be set aside if the defendant has alleged facts which, if established, would constitute a defense in determining whether to open or strike a confessed

judgment).

While Rule 60 governs the disposition of the pending petition and motion procedurally, this Court must determine what substantive law to apply in determining whether the Gordons have presented a meritorious defense and whether to open or strike the judgment.

The parties' arguments regarding what law should be applied are somewhat convoluted. Philadelphia Factors argues that Pennsylvania law should apply because determining whether the judgment by confession should be opened is a procedural question and under Pennsylvania choice of law rules, Pennsylvania law applies to procedural issues. In addition, Philadelphia Factors argues that the surety agreements explicitly indicate that Pennsylvania law should apply because the warrant of attorney provision provides that "the company does hereby authorize and empower the prothonotary, clerk of court or any attorney of any court of record of the commonwealth of Pennsylvania, or elsewhere, to appear for and to confess judgment against the company. . . ." The Gordons argue that Virginia substantive law¹ should apply because under Pennsylvania choice of law rules, a Pennsylvania court would honor the choice of law provision in the surety agreement which indicates that "[t]his guarantee and the rights and obligations of PFI and of the undersigned hereunder shall be governed and construed in accordance with the laws of the State of Virginia."

¹ Similarly, David Gordon argues that under New Jersey law, which he claims should also be applied because he is a resident of that state, the judgment of confession entered by this Court is void because under New Jersey law such clauses are void in instruments for the payment of money. Phyllis Gordon makes similar arguments regarding the applicability of this provision of New Jersey law based on her residence in New Jersey and that she signed the surety agreement in New Jersey. Even assuming that New Jersey substantive law would apply to the question of whether the Gordons' defenses are meritorious (which the Gordons do not contend), they can obtain no relief under this New Jersey statute which prohibits the entry of a judgment by confession under such circumstances because the surety agreements explicitly include a warrant of attorney for confession of judgment in the courts of the Commonwealth of Pennsylvania, in which there is no such prohibition on the entry of judgment by confession.

There is a distinction between attacks on the formal validity of a confessed judgment (the proper focus of a petition to strike) and attacks on the essential validity of a confessed judgment (the proper focus of a motion to open the judgment). The Gordons have lodged attacks on both the formal and essential validity of the judgment by confession entered by this Court. The choice of law provision in the surety agreements indicating that Virginia law should apply has no effect on what law applies to determining the formal validity of the judgment because this Court will apply federal law to procedural issues. See E.D. Pa.R.C.P. 56.1; AmQuip Corp. v. Pearson, 101 F.R.D. 332, 337 (E.D. Pa. 1984) (noting but not deciding the question of whether Rule 60(b) includes a special federal standard for formal validity of confessed judgments but observing that one might assume so from the presence of a local rule which imposed some restrictions).

This does not, however, solve the issue of what substantive law should apply to the attacks on the essential validity of the judgment by confession. In AmQuip Corp., 101 F.R.D. at 336, the court noted that “Pennsylvania’s substantive law, including its conflict of laws rule, governs any non-procedural attack” on a judgment by confession. Under Pennsylvania’s applicable choice of law rule, the parties’ choice of Virginia law will be honored if Virginia bears a reasonable relation to the transaction. See 13 Pa. Cons. Stat. Ann. § 1105 (Purdon Supp. 1983) (“Except as otherwise provided in this section, when a transaction bears a reasonable relation to this Commonwealth and also to another state or nation the parties may agree that the law either of this Commonwealth or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this Commonwealth.”)

The Gordons do not argue or even suggest how Virginia bears a reasonable relation to the

transaction, and although Philadelphia Factors presumably drafted the choice of law provision in the surety agreements, it now argues that Pennsylvania law should apply. There is no evidence in the record of any connection between the transaction or the parties to the state of Virginia; according to the complaint, Philadelphia Factors is a citizen of Pennsylvania with its place of business in Bryn Mawr, Pennsylvania, and the Gordons are citizens of New Jersey. (Complaint ¶¶ 1, 5). The accounts purchase agreement which underlies the surety agreements provides that Zenith then had its principle place of business in Philadelphia, Pennsylvania. The surety agreements were executed by David Gordon and Phyllis Gordon in Pennsylvania and New Jersey respectively. Therefore, this Court concludes that the parties' choice of Virginia law does not bear a reasonable relation to the transaction between the parties, and this Court concludes that either under 13 Pa. Cons. Stat. Ann. § 1105 or the general conflict of law rules of Pennsylvania governing contracts, Pennsylvania law shall apply.²

² If, as here, the parties' choice of law is not honored because it does not bear a reasonable relation to the transaction, there is some dispute over whether under § 1105 a court should apply Pennsylvania law if it bears an "appropriate relation" to the transaction or if a court should consult the general choice of law rules of Pennsylvania to determine what substantive law should apply. See Rx Returns, Inc. v. PDI Enterprises, Inc., No. 97-1855, 1997 WL 330360, * 5 n. 5 (E.D. Pa.) (comparing Insurance Company of North American v. United States, 561 F. Supp. 106, 112 (E.D. Pa. 1983), which held that Pennsylvania had an "appropriate relation" to the transaction where the transaction between the parties from which the cause of action arose occurred in Pennsylvania, with Atlantic Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038, 1041-42 (E.D. Pa. 1994), which determined whether an "appropriate relationship" existed with Pennsylvania by referring to Pennsylvania's common law choice of law rules). It is unnecessary to resolve this issue here. It is clear that under either formulation, despite that fact that the Gordons resided in New Jersey and Phyllis Gordon presumably signed the surety agreement in New Jersey, because Philadelphia Factors and Zenith both conducted business in Pennsylvania, the underlying accounts purchase agreement was negotiated, executed and to be performed in Pennsylvania, and the surety agreements signed by both defendants were guarantees for obligations under an agreement to be performed in Pennsylvania, the scale tips in favor of applying Pennsylvania law. See Shannon v. Keystone Systems, Inc., 827 F. Supp. 341, 343 (E.D. Pa. 1993) (noting that under Pennsylvania's choice of law principles, the law of the forum with the most interest in the contract and most concerned with the outcome applies and considering the place of negotiation, contracting, and performance, the location of the subject matter of the contract, and the citizenship of the parties in making this determination); Atlantic Paper, 844 F. Supp. at 1042 (same).

B. Analysis of the Substantive Arguments of David Gordon

David Gordon presents five reasons why the judgment of confession should be opened or stricken. First, David Gordon argues that the judgment by confession is void because the surety agreement does not indicate the identity of the obligor. The surety agreement that David Gordon signed provides that:

[i]n order to induce Philadelphia Factors, Inc. (herein called “Factor” or “PFI”). . . to enter into the certain Accounts Purchase Agreement and Collection Factoring Agreement of even date with the Company (herein called “Obligor”) and due to the close business and financial relationship between Obligor and the undersigned, whereby it is in the direct interest and benefit of the undersigned, for good and valuable consideration received, the undersigned irrevocably and unconditionally guarantees, as surety, to the Factor prompt payment, performance and observance when due . . . of any and all Obligations (as such term is defined in the foregoing agreement) of the Obligor to the Factor.

It is true as David Gordon suggests that the surety agreement does not expressly indicate the full corporate name or identity of the obligor other than that it is “the Company.” Although the identity of the company is not defined in the surety, the above quoted paragraph refers to the accounts purchase agreement entered into on the same day between Philadelphia Factors and Zenith. The Court concludes that reading the surety agreement in light of the attendant circumstance of the accounts purchase agreement entered into between Zenith and Philadelphia Factors on the same day, which David Gordon does not dispute, it is clear that the obligor in the surety agreement was intended to refer to Zenith. See International Organization Master, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates and Pilots of America, Inc., 439 A.2d 621, 625 (Pa. 1981) (“When construing an ambiguous contract which by necessary implication refers to another document, the court may look to such document as additional evidence of surrounding circumstances in order to ascertain the intention of the

parties.”) In any event, the admittedly poor drafting in this portion of the surety agreement does not provide a meritorious defense for David Gordon to his obligation under the surety agreement, as he is clearly designated as the undersigned and agreed “as surety . . . of any and all Obligations . . . of the Obligor to the Factor.” See Paul Revere Protective Life Insurance Co. v. Weis, 535 F. Supp. 379, 386 (E.D. Pa. 1981) (applying Pennsylvania law and noting that “[i]n ascertaining the meaning of language in a guaranty contract, the same rules of construction apply as in the case of other contracts. . . . The court must determine and give effect to the intention of the parties as ascertained by a fair and reasonable interpretation of the terms used in the guaranty agreement, read in light of the attendant circumstances and purposes for which the guaranty agreement was made”).

Second, David Gordon argues that the “Complaint in Confession of Judgment fails to specify or calculate the amount of liquidated liability of the undisclosed ‘Obligor’ for which judgment has been entered against the Defendant.” (D. Gordon’s Mem. at 2). Philadelphia Factors argues that the complaint contains a breakdown of the amounts upon which the judgment by confession was entered. The complaint indicates that the total owed by Zenith to Philadelphia Factors included \$399,128.02 as principal, \$109,286.69 in discount fees, and \$25,420.74 in attorneys’ fees (calculated at 5% of the total pursuant to the surety agreement). The terms of the surety agreement signed by David Gordon permit judgment to be confessed “for such liabilities or obligations as Factor shall determine the company owe Factor.” David Gordon presents no evidence or argument as to how these amounts are erroneous or what is the correct calculation of Zenith’s liability. This showing is insufficient to provide David Gordon procedurally or substantively with a meritorious defense to the judgment by confession.

In the third argument by David Gordon, he contends that Philadelphia Factors did not produce evidence to support the award of attorney’s fees included in the judgment by confession. As noted above, the amount of attorney’s fees to which Philadelphia Factors is entitled is explicitly indicated in the surety agreement as 5% of the total liability. Further, David Gordon presents no evidence or argument specifically indicating that this calculation of attorney’s fees is excessive. See Dollar Bank, Federal Savings Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. Ct. 1994) (rejecting an obligor’s argument that the judgment by confession should be opened to determine the reasonableness of the counsel fees included therein because they provided no evidence that the amount of fees was excessive). Thus, the judgment by confession here will not be opened or stricken on this ground.

David Gordon’s fourth argument focuses on the choice of law provision in the surety agreement, which provides that “[t]his guarantee and the rights and obligations of [Philadelphia Factors] and of the undersigned hereunder shall be governed and construed in accordance with the laws of the State of Virginia.” David Gordon argues that under Virginia law the judgment by confession entered by this Court is void because the order entered by this Court does not conform to the form set forth in Va. Code Ann. § 8.01-436 and because the surety agreement did not contain a notice provision required under Va. Code Ann. § 8.01-433.1.³ The argument attacking the form of the order entered by this Court addresses the formal validity of the judgment and thus, as discussed above, presents a procedural question that will be considered by this Court under the Federal Rules of Civil Procedure, not under Virginia law. The rules pertaining to

³ Phyllis Gordon makes similar arguments regarding the applicability of Virginia law and the non-conformity of the judgment to the Virginia statute. The Court’s reasoning and conclusions as to these arguments asserted by David Gordon applies equally to the arguments of Phyllis Gordon.

judgments in the Federal Rules of Civil Procedure do not require that the order entering judgment by confession adhere to such a form. Similarly, while Virginia law may require that the surety agreements contain a specific notice provision of the confession of judgment provision, to the extent it informs but does not bind the Court, there is no such requirement under Pennsylvania law. Hence, the non-conformity of the judgment by confession or the surety agreement to Virginia law is not a meritorious procedural or substantive defense enabling the David Gordon to open or strike the judgment.

In David Gordon's fifth argument, he contends that the surety agreement authorizes entry of judgment by confession against Zenith, not him as an individual. Philadelphia Factors argues that although one paragraph of the surety agreement refers to entry of judgment by confession against "the company," the remainder of the document indicates that the undersigned, David Gordon, is guaranteeing Zenith's liability under the accounts purchase agreement.

This argument by David Gordon is similar to one presented in AmQuip. The relevant paragraph of the lease in question in that case only mentioned the corporate lessee as a possible confessed judgment debtor, and the court held that judgment could not be confessed against the president personally even though another paragraph of the lease provided that he may bear a personal liability for a default. 101 F.R.D. at 338-39 (comparing Solebury National Bank of New Hope v. Cairns, 380 A.2d 1273 (Pa. Super. Ct. 1977) (holding that a creditor could not confess judgment personally against corporation president who signed guaranty) with First National Bank of Fryburg v. Kriebel, 457 A.2d 961 (Pa. Super. Ct. 1983) (refusing to open a confessed judgment where the party had signed the note as a guarantor and in his individual capacity as co-maker)).

However, the surety agreement that David Gordon signed is distinguishable from the lease before the court in AmQuip. The surety agreement that David Gordon signed provides in capital letters that:

THE UNDERSIGNED INDIVIDUALS ACKNOWLEDGE AND AGREE THAT THE ABOVE DOCUMENT CONTAINS PROVISIONS UNDER WHICH LENDER MAY ENTER JUDGMENT BY CONFESSION AGAINST THE UNDERSIGNED INDIVIDUALS BEING FULLY AWARE OF THEIR RIGHTS TO PRIOR NOTICE AND A HEARING ON THE VALIDITY OF ANY JUDGMENT OR OTHER CLAIMS THAT MAY BE ASSERTED AGAINST THE UNDERSIGNED INDIVIDUALS BY LENDER HEREUNDER BEFORE JUDGMENT IS ENTERED, THE UNDERSIGNED HEREBY FREELY, KNOWINGLY AND INTELLIGENTLY WAIVE THESE RIGHTS AND EXPRESSLY AGREE AND CONSENT TO THE LENDER'S ENTERING JUDGMENT AGAINST THEM BY CONFESSION PURSUANT TO THE TERMS THEREOF.

Thus, this Court concludes that although the surety agreement as a whole is not a paradigm of drafting, the above quoted passage clearly shows that the agreement provides for the entry of judgment by confession against David Gordon, as the undersigned.

C. Analysis of the Arguments of Phyllis Gordon

Phyllis Gordon also presents four arguments as to why the judgment by confession should be opened or stricken. First, she argues that after she signed the surety, Philadelphia Factors decreased the purchase of accounts receivable from Zenith in violation of the account purchase agreement between it and Zenith. Phyllis Gordon briefly makes this first argument in her petition to open or strike the judgment, but she does not further support it in her brief. The only evidence she presents to support her allegation that Philadelphia Factors breached the agreement is her deposition testimony. However, it is clear from her deposition testimony that Phyllis Gordon has

no first hand knowledge of whether Philadelphia Factors breached the agreement. She testified only that David Gordon told her that his paycheck bounced because Philadelphia Factors failed to put money in Zenith's account. (P. Gordon dep. at 54-61). Thus, this argument does not provide a meritorious defense to support her request to open or strike the judgment by confession.

Phyllis Gordon's second argument is that she did not waive her rights to due process by signing the surety agreement containing a confession of judgment provision because she was only shown the signature page and was not aware of the confession of judgment provision when she signed the surety. (P. Gordon dep. at 43-44). Further, Phyllis Gordon argues that she signed the surety agreement under duress because David Gordon told her that if she did not sign the surety agreement he would go out of business.⁴ (P. Gordon dep. at 64, 70).

Philadelphia Factors makes two arguments in response. First, it argues that Phyllis Gordon does not have a meritorious defense if she did not read the surety agreement and even if Phyllis Gordon only saw the last page of the surety, that page contained language that put her on notice of the confession of judgment provision. Second, Philadelphia Factors contends that Phyllis Gordon's claims of duress must fail because no one from Philadelphia Factors ever talked to Phyllis Gordon regarding the surety agreement, let alone mislead her or threaten her.

Even assuming the Phyllis Gordon only saw the signature page and did not read the full surety agreement, she cannot rely on these alleged facts as a meritorious defense to her obligations under the surety agreement, which she admits she signed. Phyllis Gordon has a

⁴ Phyllis Gordon makes a reference in her petition to open or strike the judgment that PFI forced her "under duress and false pretenses" to execute the surety agreement. However, she does not further argue a false pretenses claim in her brief or present evidence that Philadelphia Factors misled her in anyway to support her allegation that she signed the surety agreement under false pretenses.

college degree from the University of Bridgeport in fashion merchandising and retailing. (P. Gordon dep. at 6-7). See Harrison v. Fred S. James, P.A., Inc., 558 F. Supp. 438, 443 (E.D. Pa. 1983) (citing Yohe v. Yohe, 353 A.2d 417 (Pa. 1976) for the proposition that a person who can read cannot gain protection from the obligations of a contract by failing to read the agreement); Dollar Bank, Federal Savings Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. Ct. 1994) (holding that “[t]he failure to read a confession of judgment clause will not justify avoidance of it” particularly where the clause is clear and conspicuous); Standard Venetian Blind Co. v. American Empire Insurance Co., 469 A.2d 563, 566 (Pa. 1983) (“[I]n the absence of proof of fraud, failure to read [the contract] is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.”) (internal quotes omitted).

To establish a claim for economic duress or business compulsion, as it is referred to under Pennsylvania law, Phyllis Gordon must establish that “there exists such pressure of circumstances which compels the injured party to involuntarily or against [her] will execute an agreement which results in economic loss, and the injured party does not have an immediate legal remedy.” National Auto Brokers Corp. v. Aleeda Development Corp., 364 A.2d 470 (Pa. Super. Ct. 1976); Harrison v. Fred S. James, P.A., Inc., 558 F. Supp. 438, 443 (E.D. Pa. 1983) (holding that “merely because one enters into an agreement which he would not enter if his financial circumstances were more secure, does not mean that a claim for duress exists as will void the contract”). Phyllis Gordon has produced no evidence that Philadelphia Factors ever acted in a forceful way with her so as to make her sign the surety agreement against her will; in fact, the record reveals that she never talked to anyone from Philadelphia Factors about the guaranty nor

was anyone present from Philadelphia Factors when she signed the surety agreement. (P. Gordon dep. at 41-43, 71-72, 75-76). The evidence before the Court indicates that David Gordon told his wife that if she did not sign the surety, he would go out of business, and then he only showed her the signature page of the surety. If from any source, Phyllis experienced pressure to sign the surety agreement from her husband, David Gordon, not Philadelphia Factors. Any claims she may have against him is not a ground on which to open the confessed judgment. See AmQuip, 101 F.R.D. at 338 (noting that the existence of a claim by the obligor against a third party does not alone relieve the obligor of his obligation to the lender).

Third, Phyllis Gordon argues that the judgment by confession is void because there was no consideration for her signing the surety. If Phyllis Gordon can establish that the surety agreement between her and Philadelphia Factors lacked consideration, this would be a meritorious defense for which the judgment by confession could be opened. See Forest Grove, 33 F.3d at 292 (“Failure of consideration is a meritorious defense for which a confessed judgment can be opened.”) “Consideration ‘confers a benefit upon the promisor, causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise.’” Channel Home Centers, Division of Grace Retail Corp. v. Grossman, 795 F.2d 291, 299 (3d Cir. 1986) (quoting Curry v. Estate of Thompson, 481 A.2d 658, 661 (1984)). It is clear that forbearing to sue on a well-founded or even a doubtful claim is sufficient consideration for a contract. See Pennsylvania State University v. University Orthopedics, Ltd., 706 A.2d 863, 873 (Pa. Super. Ct. 1998) (noting that “the surrender or compromise of a doubtful or disputed claim and forbearance to sue thereon is sufficient consideration”); cf. Forest Grove, 33 F.3d at 292 (affirming the district court’s determination that

the lender's promise to lend money to the defendant corporation which the individual defendants owned was sufficient consideration for a surety agreement).

Phyllis Gordon contends that at the time that she signed the surety agreement, Zenith had not yet defaulted, and she did not receive notice of the default until one week after she signed the surety. (P. Gordon dep. at 115, 116, 134). Philadelphia Factors responds and the defendants do not contradict that Zenith had defaulted on the agreement at the time Phyllis Gordon signed the surety agreement and David Gordon was requesting that Philadelphia Factors forward Zenith more money. (Pl.'s Surreply Ex. A, Starr Aff ¶ 10). Philadelphia Factors argues persuasively that its forbearance in not pursuing the default at that time and its agreement to forward funds to Zenith was consideration for Phyllis Gordon's signing the surety. (P. Gordon dep. at 68-69, 70-71; Starr Aff. ¶12).

Phyllis Gordon produced no evidence that Zenith was not in default at the time she signed the surety agreement to rebut Starr's statement in his affidavit to the contrary. Phyllis Gordon only points to her deposition testimony in which she testified that she had not received notice of Zenith's default at the time she signed the surety. (P. Gordon dep. at 115-116). Indeed, she testified in her deposition that she in fact did not know whether Zenith was in default at the time she signed the surety. (P. Gordon dep. at 134). In addition, Phyllis Gordon argues in the context of her claim of duress that she signed the surety agreement because David Gordon said that otherwise Zenith was going to go out of business; this position by Phyllis Gordon supports the inference and this Court finds that she signed the surety agreement to help her husband and in exchange for forbearance by Philadelphia Factors, which constitutes consideration for her signing the surety agreement. The Court concludes that Phyllis Gordon has not established a meritorious

defense to support her motion to open or strike the judgment on the grounds of lack of consideration.

Finally, Phyllis Gordon argues that the judgment by confession is void against her because Philadelphia Factors discriminated against her based on marital status in violation of the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691. Phyllis Gordon argues that Philadelphia Factors was prohibited under the ECOA from requiring that she sign a surety agreement for the loan agreement as David Gordon’s spouse because David Gordon and Zenith were independently creditworthy. Phyllis Gordon testified in her deposition that she was present at the initial meeting between David Gordon and Philadelphia Factors when Philadelphia Factors first loaned money to Zenith, and that she was never asked to sign any documents or questioned about her financial assets. (P. Gordon dep. at 125-27). Philadelphia Factors counters that David Gordon and Zenith were not independently creditworthy and in fact, were in financial trouble by Phyllis Gordon’s own admission at the time she signed the surety.

The ECOA provides that “[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of . . . marital status.” 15 U.S.C. § 1691(a). Further guidance is provided in the regulation promulgated under this statute, which provides that “ a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.” 12 C.F.R. § 202.7(d)(1). “It is well established that the ECOA . . . and its implementing regulations . . . prohibit a creditor from requiring a spouse’s signature on a note when the applicant individually qualifies for the requested credit.” Riggs National Bank of

Washington, D.C. v. Lynch, 36 F.3d 370, 374 (4th Cir. 1994) (affirming a district court's finding that the lender did not require the spouse to be an additional guarantor until after it had learned that her husband did not individually own many of the assets he listed on the original loan application). If Phyllis Gordon can establish that Philadelphia Factors violated the ECOA by requiring her signature on the surety agreement, she would have meritorious defense which would entitle her to relief from the confession of judgment. See Silverman v. Eastrich Multiple Investor Fund, 51 F.3d 28, 33 (3d Cir. 1995). However, if Philadelphia Factors determined that Zenith and David Gordon were not independently creditworthy at the time that David Gordon asked for continued funding, it may have permissibly required Phyllis Gordon to sign the surety. See id.

Starr in his affidavit attests that after Zenith began experiencing financial difficulties and David Gordon sought further loans from Philadelphia Factors, Philadelphia Factors reviewed personal financial statements, including tax returns and credit reports, from David and Phyllis Gordon to determine whether it should make further loans to Zenith. (Starr Aff. ¶¶ 5-7). Starr attests that the financial statements were provided to Philadelphia Factors by Joseph Lipton, a representative of Zenith. (Starr Aff. ¶ 8).

Although Phyllis Gordon argues that she does not remember executing a personal financial statement to Philadelphia Factors (P. Gordon dep. at 112-113), she presents no evidence that Philadelphia Factors considered such information with a discriminatory animus toward her marital status or that Zenith and David Gordon were independently creditworthy at the time she signed the surety agreement. Indeed, Phyllis Gordon admits in her brief that Zenith was experiencing financial difficulty at the time she signed the surety agreement, which supports

Philadelphia Factors' position that Zenith and David Gordon were not independently creditworthy. (P. Gordon Mem. at 1). Thus, Phyllis Gordon has not met her burden, and the judgment by confession will not be opened or stricken on this ground.

III. CONCLUSION

Based on the foregoing, the motion and the petition will be denied.⁵ Because the Court has determined that due process has been provided to the parties and that oral argument is not necessary for the just, speedy, and inexpensive determination of this motion and petition required by Federal Rule of Civil Procedure 1, the request by David Gordon and Phyllis Gordon for oral argument is hereby denied pursuant to Local Rule of Civil Procedure 7.1(f).

⁵ Phyllis Gordon requests in her proposed form of order that this Court stay execution of the judgment of confession, although she does not further argue this point in her supporting briefs. Because I conclude that she is not entitled to have the judgment opened or stricken, the request will be denied.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILADELPHIA FACTORS INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID GORDON AND PHYLLIS GORDON,	:	
	:	
Defendants.	:	NO. 98-3578

ORDER

AND NOW, this 16th day of April, 1999, upon consideration of the motion and petition of David Gordon and Phyllis Gordon respectively to strike or open the judgment by confession entered by this Court on September 22, 1999 (Document Nos. 4 and 5), the memoranda in support thereof (Document No. 6), the responses of plaintiff Philadelphia Factors Inc. (Document Nos. 8 and 10), the reply of Phyllis Gordon (Document No. 13), and the surreply of plaintiff (Document No. 14), for the reasons set forth in the foregoing Memorandum, it is hereby **ORDERED** that the petition and motion are **DENIED**. **IT IS FURTHER ORDERED** that the request of Phyllis Gordon for a stay of proceedings is **DENIED**.

This is a final Order.

LOWELL A. REED, JR., J.