

Circuit Court for Montgomery County  
Case No. 422406-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2092

September Term, 2016

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KEVIN GREEN, *et al.*

v.

PRESIDENTIAL BANK, FSB

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Meredith,  
Arthur,  
Eyler, James R.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Eyler, James R., J.

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Filed: February 14, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants, Kevin Green and 1733 27<sup>th</sup> St. SE, LLC; 1729 27<sup>th</sup> St. SE, LLC; 40 Chesapeake St. SE, LLC; 2204 Prout St. NE, LLC; 4001 4<sup>th</sup> St. SE, LLC; and 1504 18<sup>th</sup> St. SE, LLC (hereinafter collectively referred to as “the borrowers”), appeal from the denial of a motion to vacate a confessed judgment entered against them by the Circuit Court for Montgomery County in favor of appellee, Presidential Bank, FSB (“Presidential”). In their timely appeal, appellants present us with two issues for resolution, which we have rephrased and consolidated:<sup>1</sup>

Whether the circuit court erred in denying appellants’ motion to vacate the judgment confessed against them because the court lacked personal jurisdiction.

Perceiving no error in the denial of the motion to vacate the judgment, we shall affirm the judgment of the circuit court.

### **FACTS AND LEGAL PROCEEDINGS**

Mr. Green, a Virginia resident, is the sole owner of the six above-listed limited liability corporations (“LLCs”), which are organized in Washington, D.C. Each LLC has as its single asset the real property for which it is named, and each LLC was created for the purpose of owning the named property.

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<sup>1</sup> In their brief, appellants phrase the issues, as follows:

I. Whether “lack of personal jurisdiction” is a meritorious defense to confessed judgment under Maryland Rule 2-611.

II. Whether the Montgomery County circuit court properly exercised jurisdiction over the appellants when they did not have any minimum contacts to the state of Maryland.

Between 2006 and 2010, the LLCs entered into loan agreements with Presidential, which has its principal place of business in Bethesda, Montgomery County, Maryland. The underlying loans were secured by various deeds of trust, guaranties of payment, security agreements, notes, and financing statements signed by Mr. Green on behalf of the LLCs and held by Presidential. Mr. Green, individually, guaranteed payment of the loans to 1733 27<sup>th</sup> St. SE, LLC, 1729 27<sup>th</sup> St. SE, LLC, 40 Chesapeake St. SE, LLC, 2204 Prout St. NE, LLC, and 4001 4<sup>th</sup> St. SE, LLC.

The borrowers defaulted on the underlying loans in 2014. As a result of the defaults, Presidential, pursuant to written notice dated August 18, 2014, accelerated the maturity date of the loans to August 28, 2014. The borrowers did not pay the loans by the accelerated loan maturity date. In an attempt to cure the defaults, the borrowers and Presidential entered into a global loan modification agreement, in October 2014, pursuant to which the borrowers agreed, among other things, to bring each loan current by January 15, 2015.

The borrowers defaulted on the loans as modified, and on August 1, 2015, Presidential threatened to foreclose upon the real property held by the LLCs unless Mr. Green signed a forbearance agreement, individually, and on behalf of the LLCs. The forbearance agreement, signed by Mr. Green on August 14, 2015, *nunc pro tunc* to April 1, 2015, contained the following confessed judgment clause:

**10. CONFESSION OF JUDGMENT. UPON THE OCCURRENCE OF ANY FUTURE DEFAULT, THE INDEBTED PARTIES DO HEREBY DULY CONSTITUTE AND APPOINT ROBERT E. GREENBERG, ESQ., THOMAS F. MURPHY, ESQ., LINDSAY A. THOMPSON, ESQ., OR ANY OTHER ATTORNEY EMPLOYED BY FRIEDLANDER MISLER, PLLC, OR THE CLERK OF THE COURT, OR ANY OF THEM, AS THEIR TRUE AND LAWFUL**

**ATTORNEY-IN-FACT IN THEIR NAME, PLACE AND STEAD, TO CONFESS JUDGMENT AGAINST THE INDEBTED PARTIES, JOINTLY AND SEVERALLY, IN FAVOR OF THE LENDER IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MD, IN THE AMOUNT OF THE UNPAID PRINCIPAL BALANCE OF THE NOTES TOGETHER WITH ANY ACCRUED AND UNPAID INTEREST, LATE CHARGES AND ATTORNEYS' FEES AND COSTS INCURRED BY THE LENDER, TOGETHER WITH ALL OTHER COSTS AND EXPENSES INCURRED OR ACCRUED AND UNPAID UNDER THIS AGREEMENT, TO CONSENT TO JURISDICTION AND TO ACKNOWLEDGE SERVICE OF PROCESS NECESSARY IN SUCH A CONFESSION; AND HEREBY RATIFY AND CONFIRM THE ACTS OF SAID ATTORNEY-IN-FACT AS IF DONE BY THE INDEBTED PARTIES.**

In 2016, the borrowers again defaulted on the loans, after which Presidential exercised its right to accelerate the maturity date of the loans and demanded that the borrowers pay all amounts owed. The borrowers did not pay. On June 17, 2016, Presidential filed a complaint for entry of judgment by confession, pursuant to Maryland Rule 2-611, in the circuit court. By written order entered on June 27, 2016, the circuit court entered a confessed judgment in the total amount of \$3,314,295.63, plus interest, against Mr. Green and the LLCs, jointly and severally.

On September 19, 2016, the borrowers filed a motion to vacate the confessed judgment, arguing primarily that judgments by confession are disfavored in Maryland, and the circuit court lacked personal jurisdiction over them because neither Mr. Green nor any of the LLCs had sufficient ties to Montgomery County or to Maryland.<sup>2</sup> The borrowers denied that the forbearance agreement's confession of judgment clause, agreeing to

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<sup>2</sup> As mentioned, the LLCs are organized in Washington, D.C., the real property held by the LLCs is located in Washington, D.C., and Mr. Green is a resident of Virginia.

confession of judgment and jurisdiction in Montgomery County, was “enough to create personal jurisdiction over the defendants.”

Presidential opposed the motion, arguing that “[o]nce a party contractually consents to the jurisdiction of a court no other basis for personal jurisdiction is required.” In addition, Presidential argued that the borrowers had failed to meet their burden of producing evidence to persuade the court of the existence of “substantial grounds for an actual controversy on the merits of the case.”

On November 10, 2016, the circuit court heard argument on the borrowers’ motion to vacate the confessed judgment. The circuit court ruled:

All right. Well, I’m permitted to vacate a confessed judgment if, as the rule says, there’s a substantial and sufficient basis for an actual controversy as to the merits of the action. And in that regard, the defendant has to advance a potentially meritorious defense in order to reopen the case.

So first I look at the issue that counsel has just been talking about, and that is the jurisdictional issue. And while the defendants are located in the District of Columbia, in the forbearance agreement they did consent to this Court’s jurisdiction. And I don’t read the cases are requiring [sic] that some other basis for jurisdiction must exist, when at arm’s length the parties agreed on a particular location. If that were the case, it’d be no sense to even permit anyone to do that. So it’s not unusual in business situations, for the convenience of one of the parties, for those who are involved with the contract to at arm’s length negotiate that one of the terms will be that if there is a dispute, a particular forum is to be utilized, and that’s what happened here. So on that basis alone, I think that their motion to vacate confessed judgment should be denied.

But beyond that, I must say I searched in vain for the allegation of a potentially meritorious defense. And there was some language about, you know, a potentially meritorious defense, but it didn’t say what it was. I never heard, never read in any of the documents that were submitted, what this meritorious defense to the note might be. So for those two reasons, I’m going to deny the motion to vacate confessed judgment.

The borrowers filed their timely notice of appeal on December 5, 2016.<sup>3</sup>

### DISCUSSION

As this Court explained in *Garliss v. Key Fed. Sav. Bank*, 97 Md. App. 96, 103 (1993):

Rule 2–611(a) contains the procedure for confessing judgment. Confession of judgment is not a judicial act, but rather the *pro forma* entry of a judgment by the clerk of the circuit court. *EMI Excavation, Inc. v.*

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<sup>3</sup> Although the circuit court orally denied the borrowers’ motion to vacate the confessed judgment, there is no written order in the record, which would comprise the final judgment from which the borrowers appeal. “One of the procedural steps for entry of final judgment—the ‘separate document requirement’—requires the circuit court to memorialize the judgment in a separate document that is signed by either the court clerk or the judge and entered on the docket.” *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 65-66 (2017); Maryland Rule 2–601(a) and (b).

The Rule 2-601(a) requirements for a separate document may, however, be waived by a failure to object on appeal if “‘final judgment was entered on the docket.’” *Forward v. McNeily*, 148 Md. App. 290, 305 (2002) (quoting *Taha v. Southern Management Corp.*, 367 Md. 564, 569 (2002)). In other words, “when there is a docket entry of the court’s ruling; the court’s failure to memorialize its ruling in a separate document was inadvertent; the parties have not objected to the fact that a separate document was not prepared; and remanding the case merely for the court to prepare and enter the document would accomplish nothing but delay, waiver is appropriate.” *Women First OB/GYN Assocs., LLC v. Harris*, 232 Md. App. 647, 682, *cert. denied sub nom. Women First Ob/Gyn v. Harris*, 456 Md. 73 (2017).

Here, final judgment was entered on the docket, by way of a November 10, 2016 docket entry, which states: “FINAL DISPOSITION (ALL ISSUES RESOLVED). . . COURT (GREENBERG, J.) DENIES DEFENDANT’S MOTION TO VACATE ENTRY OF CONFESSED JUDGMENT.” And, no party to the appeal has objected to the lack of a separate written document. Were we to hold that the requirement was not waived, we would remand to the circuit court, and the circuit court would simply file and enter the separate judgment, from which an appeal would be taken. This would be “a classic example of wheels spinning for no practical purpose.” *URS Corp.*, 452 Md. at 70. Therefore, we conclude that the waiver doctrine applies.

*Citizens Bank of Maryland*, 91 Md. App. 340, 604 A.2d 518, *cert. denied*, 327 Md. 523, 610 A.2d 796 (1992). Upon receiving the notice required by Rule 2-611(b),<sup>4]</sup> a defendant may move to open, modify or vacate a judgment by confession, offering evidence constituting a defense to the note upon which judgment was confessed. *Id.*

Pursuant to Md. Rule 2-611(e), a court must open, modify, or vacate the confessed judgment “if [it] finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action. . . .” “A trial court’s legal conclusions—including whether the evidentiary proffers of a defendant seeking to open, modify, or vacate a confessed judgment qualify as a meritorious defense—are reviewed under non-deferential appellate scrutiny.” *Pease v. Wachovia SBA Lending, Inc.*, 416 Md. 211, 220–21 (2010). *See also Nils, LLC v. Antezana*, 171 Md. App. 717, 727-28 (2006) (“On the issue of whether what is offered by a party seeking to open, modify, or vacate a confessed judgment qualifies as a meritorious defense, that is a question of law for the judge”).

On appeal, the borrowers argue that: lack of personal jurisdiction is a meritorious defense within the meaning of Rule 2-611(e); the clause in the forbearance agreement is insufficient to confer jurisdiction; and the borrowers’ contacts with Maryland are legally insufficient to support a finding of personal jurisdiction. Specifically, they claim that Mr. Green and the LLCs do not maintain sufficient minimum contacts with Montgomery County or the State of Maryland to confer jurisdiction under the long arm statute, Maryland Code, Courts and Judicial Proceedings Article, §6-103, because they “do not have any activities in the State of Maryland that can be deemed continuous and systematic,” nor

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<sup>4</sup> The notice requirement is now contained in Rule 2-611(c).

“perform any business or conduct any services in the State of Maryland.” In appellants’ view, absent proof of general or specific jurisdiction, the confession of judgment clause in the forbearance agreement does not subject them to the jurisdiction of the Maryland courts.

Presidential argues that the clause in the forbearance agreement is sufficient to confer jurisdiction and that, in any event, the borrowers’ “long history of transacting business in Maryland with a Maryland bank” is sufficient to confer jurisdiction.

Preliminarily, and recognizing that a question of personal jurisdiction is ordinarily “collateral to the merits,” *Bond v. Messerman*, 391 Md. 706, 718 (2006), we agree with the borrowers that an established lack of personal jurisdiction provides an “actual controversy as to the merits of the action,” as required by Rule 2-611(e). *See Cappel v. Riaso, LLC*, 197 Md. App. 347, 354 (2011). We conclude, however, that the circuit court did have personal jurisdiction over the borrowers by virtue of the forum selection clause in the forbearance agreement signed by Mr. Green, individually, and on behalf of the LLCs.

In most instances, “whether a Maryland court may exercise personal jurisdiction over a foreign defendant requires a two-step analysis”—whether the requirements under the long-arm statute have been satisfied, and whether the exercise of jurisdiction comports with due process. *Id.* at 721. It is well-established, however, that “[c]hallenges to personal jurisdiction may be waived by either expressed or implied consent.” *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660, 668 (D.Md.2009) (quoting *Heller Financial Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1290 (7<sup>th</sup> Cir.1989)). As such, “there are a variety of legal arrangements’ by which a litigant may give ‘expressed or implied consent to the personal jurisdiction of the court.’” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S.



462, 472 n. 14 (1985)). A valid forum selection clause is capable of conferring personal jurisdiction upon a defendant under principles of consent and waiver. *Structural Preservation Sys., LLC v. Andrews*, 931 F. Supp. 2d 667, 671 (D.Md.2013). See also *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (“[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court[.]”); *Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 282 n. 11 (4th Cir.2009) (“We note in passing that a valid forum selection clause. . . may act as a waiver to objections to personal jurisdiction.”); *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir.2006) (“Parties can consent to personal jurisdiction through forum-selection clauses in contractual agreements.”); *CoStar Realty Info., Inc. v. Meissner*, 604 F. Supp. 2d 757, 764 (D.Md.2009) (“A forum selection clause can be a consent to personal jurisdiction, or at least a waiver of any objection, when invoked by the plaintiff.”).

In *Dashiell v. Meeks*, 396 Md. 149, 167 (2006), the Court of Appeals explained that, absent fraud, duress, or mutual mistake, “a party who signs a contract is presumed to have read and understood its terms and . . . the party will be bound by them when that document is executed.” This includes forum-selection clauses. *Dynacorp Ltd. v. Armatel Ltd.*, 208 Md. App. 403, 477 (2011).<sup>5</sup>

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<sup>5</sup> Although Mr. Green contended, at oral argument, that the forum selection clause was not freely negotiated, he did not make that assertion before the circuit court or in his brief, and he submitted no evidence in support of that claim. Because the contention was not made below, it is not before us for appellate review. Rule 8-131(a); see also *Powell v. Maryland Dep’t of Health*, 455 Md. 520, 547-48 (2017).

The borrowers argue that *Cappel v. Riaso, LLC, supra*, stands for the proposition that, “absent proof of general or specific jurisdiction, a ‘Confession of Judgment’ clause will not subject the Appellants to the jurisdiction of the Maryland Courts.” They misread the analysis in that case.

In *Cappel*, the corporate defendant agreed to entry of confessed judgment in the event of default on the underlying loan and agreed to jurisdiction in any county in Virginia. 197 Md. App. at 351. Its limited partners signed personal guarantee agreements consenting to entry of confessed judgment in case of default and to appear “in any court of competent jurisdiction in the State of Virginia or any other State or Territory of the United States.” *Id.*

After the debtors defaulted and the Circuit Court for Montgomery County granted the lender judgment by confession, the debtors moved to vacate the confessed judgment on the ground that the court lacked personal jurisdiction over them because of their minimal connections to Maryland. *Id.* at 352. The circuit court denied the motion because the debtors owned real property in Montgomery County and transacted business there. *Id.* at 353.

This Court reversed on the ground that the mere ownership of unimproved property that was unrelated to the judgment did not provide sufficient ties to the State to confer jurisdiction. *Id.* at 364. We noted, in a footnote, that other jurisdictions have held that consent of jurisdiction in any state, as contained in the personal guarantee agreements, is “unenforceable as overbroad.” *Id.* at 364 n. 4. Because the lender did not argue that the clause provided an adequate basis for Maryland to exercise jurisdiction, we did not

consider the issue further and made no suggestion that a narrower forum selection clause would be unenforceable. *Id.*

We are satisfied that, by signing the forbearance agreement, which contained a forum selection clause for confession of judgment in paragraph 10, the borrowers consented to personal jurisdiction by the circuit court. In the forbearance agreement, the borrowers expressly acknowledged that each had the benefit of counsel prior to executing the agreement and that each executed the agreement with “full knowledge of the effect” of the agreement. We conclude that the borrowers are bound that the terms of the forbearance agreement, including the clause consenting to personal jurisdiction by the circuit court.

In light of our conclusions, there is no need to address whether the borrowers’ contacts with Maryland, independent of the clause in the forbearance agreement, were sufficient to confer personal jurisdiction.

**JUDGMENT OF THE CIRCUIT COURT FOR  
MONTGOMERY COUNTY AFFIRMED; COSTS  
ASSESSED TO APPELLANTS.**