

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

BROKERAGE CONCEPTS, INC.,	:	August Term 2005
Plaintiff,	:	
v.	:	No. 4080
THE NELSON MEDICAL GROUP,	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	Control Number 100559
	:	

ORDER

AND NOW, this 28th day of November 2005, upon consideration of Defendant The Nelson Medical Group's Petition to Open Confessed Judgment, all responses in opposition, Memoranda and all matters of record, it hereby is **ORDERED** and **DECREED** that said Petition is **Denied**.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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MEMORANDUM OPINION

ABRAMSON, J.

Presently before the court is defendant The Nelson Medical Group's Petition to Open a Judgment by Confession entered in the amount of \$199,874.87 by plaintiff Brokerage Concepts, Inc. For the reasons set forth below, defendant's Petition is Denied.

BACKGROUND

On March 23, 2005, the Defendant made and executed in favor of the Plaintiff a Judgment Note wherein Defendant promised to pay Plaintiff the sum of ninety five twenty thousand dollars (\$95,000.00). The sum was to be paid in equal monthly installments beginning May 1, 2005 and ending May 1, 2008 in the amount of two thousand six hundred thirty eight and eighty nine cents (\$2,638.89). According to the Judgment Note, in the event of default as defined therein, if defendant fails to pay any installment due within ten (10) business days following written notice thereof the entire sum of one hundred forty six thousand sixteen and ninety seven cents (\$146,016.97) plus interest (6%) from March 19, 1999 without demand or notice would be due and owing.

The Judgment Note identifies seven events of default including but not limited to the failure to make payments of any installment within ten days and any proceeding in bankruptcy filed by or against defendant.

In addition to the Judgment Note, the defendant also executed a Stipulation of Settlement and a Settlement Agreement and Release which reference the Judgment Note.

Defendant made the first monthly payment for May 2005. On May 31, 2005, defendant filed a voluntary bankruptcy petition under Chapter 11. On June 9, 2005 plaintiff issued a ten day default notice to plaintiff. On July 27, 2005, the Honorable Judge Fox dismissed the bankruptcy.

On August 2, 2005, plaintiff issued another ten day default notice by letter to Dr. Nelson requesting payment in the amount of \$2,638.89. On August 4, 2005, defendant's counsel responded that the payments for June and July 2005 were excused at that time because of the bankruptcy. Defense counsel suggested that the next payment be credited to the month of August and that the two missed payments be added on at the end of the term. On August 5, 2005, plaintiff responded that the June and July 2005 were not excused and that the actual event of bankruptcy constituted a default. On August 12, 2005, defendant issued three checks made payable to plaintiff representing payment for the months of June, July and August, 2005. The checks were returned for insufficient funds.

DISCUSSION

To open the confessed judgment, defendant must act promptly, allege a meritorious defense and present sufficient evidence of that defense to require submission of the issues to the jury. PNC Bank, National Association v. Johnson, 2005 Phila. Ct.

Com. LEXIS 469 (2005)(Abramson)(citing Iron Worker's Sav. & Loan Ass'n v. IWS, Inc., 424 Pa. Super. 255, 261, 622 A.2d 367, 370 (1993)). The evidence needs to be clear, direct precise and believable. Id. Because defendant fails to provide such evidence, the court denies the motion to open the confessed judgment.

In the case at bar, defendant set forth three arguments for opening the judgment. Defendant argues: 1) plaintiff's own material breaches of the agreements at issue excused the Defendant's performance under the contract, 2) plaintiff breached the implied duty of good faith and fair dealing in the performance of the contract, thus excusing defendant's performance and 3) plaintiff violated the Bankruptcy Code's Automatic Stay provision. None of these warrants opening the judgment.

First defendant claims that plaintiff materially breached the agreements at issue by failing to provide notice of default as provided within the agreements, that plaintiff's interpretation of when the payments were due was incorrect and plaintiff's sudden demand of three past due payments was improper.

The record demonstrates that the alleged breaches by plaintiff were not material to the agreements and that defendant was not prejudiced by same. The record demonstrates that defendant received the default notices dated June 9, 2005 as well as the default notice dated August 2, 2005. In fact, defendant's counsel responded to the default notice. The record also demonstrates that plaintiff gave defendant an opportunity to cure the default by not confessing judgment as a result of the bankruptcy which constituted an event of default under the Judgment Note. Moreover, defendant attempted to cure the default with three checks which were returned for non sufficient funds.

As noted supra., the burden is on defendant to provide believable evidence that were he to raise this defense at trial it would be meritorious. Defendant however has failed to produce any evidence which would excuse his performance. See Hanyon v. Roth, 53 Pa. D. & C.4th 323, 329 (Pa. D. & C. 2001)(citing Cimina v. Bronich, 517 Pa. 378, 537 A.2d 1355 (1988)(If a breach is an immaterial failure of performance, and the contract was substantially performed, the contract remains effective).¹

Similarly, the court rejects defendant's claim that plaintiff violated the automatic stay provision imposed by the filing of the bankruptcy. As discussed supra., although a default notice was issued by plaintiff to defendant on June 9, 2005 after plaintiff filed for bankruptcy protection, the record is devoid of any evidence or authority to support such a contention. Indeed, under the terms of the Judgment Note, the filing of a voluntary petition of bankruptcy itself constituted an event of default. Rather, once the bankruptcy was discharged, plaintiff reissued a default notice and filed its complaint for confession of judgment.

CONCLUSION

For the foregoing reasons, defendant's petition to open the judgment by confession is denied. An order consistent with this opinion will follow.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

¹ Defendant also argues that plaintiff breached the implied duty of good faith and fair dealing in the performance of the contract. The court's analysis regarding plaintiff's alleged breach of contract also applies to the alleged breach of the implied duty of good faith and fair dealing. Hence the court finds it unnecessary to address this claim separately.