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

RAIT PARTNERSHIP, L.P., RAIT EMERALD POINTE, INC., and RAIT BUCKNER, LLC,	:	MAY TERM, 2007
	:	NO. 00005
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control No. 060455
E POINTE PROPERTIES, LTD., E POINTE PROPERTIES, INC., PARK HOLLOW APARTMENTS, LTD., EMERALD HOLLOW APARTMENTS, LTD., EMERALD HOLLOW PROPERTIES, INC., HAROLD R. DEMOSS III, JOHN W. MCCRARY, WILLIAM L. KARRINGTON, JAN G. DEMOSS, FRED N. HIMBURG, FRED B. HIMBURG, JEFFREY S. JOHNSON, and BUCKNER APARTMENT PARTNERS #1, LTD,	:	
Defendants.	:	

ORDER

AND NOW, this 26th day of September, 2007, upon consideration of defendants' Motion to Open/Strike Confessed Judgment, the response thereto, and all other matters of record, and in accord with the Opinion issue simultaneously, it is hereby **ORDERED** that the Motion is **GRANTED in part**, and the Confessed Judgment entered on May 7, 2007, is **MODIFIED** to reflect the proper Judgment amount of $3,450,000. The remainder of the motion is **DENIED**.

BY THE COURT:

_____

ABRAMSON, HOWLAND W., J.

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

RAIT PARTNERSHIP, L.P., RAIT EMERALD POINTE, INC., and RAIT BUCKNER, LLC,	:	MAY TERM, 2007
	:	NO. 00005
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control No. 060455
E POINTE PROPERTIES, LTD., E POINTE PROPERTIES, INC., PARK HOLLOW APARTMENTS, LTD., EMERALD HOLLOW APARTMENTS, LTD., EMERALD HOLLOW PROPERTIES, INC., HAROLD R. DEMOSS III, JOHN W. MCCRARY, WILLIAM L. KARRINGTON, JAN G. DEMOSS, FRED N. HIMBURG, FRED B. HIMBURG, JEFFREY S. JOHNSON, and BUCKNER APARTMENT PARTNERS #1, LTD,	:	
Defendants.	:	

OPINION

On May 7, 2007, plaintiff confessed judgment against all defendants for $3,857,128.01 (the "Judgment") pursuant to the terms of a written Forbearance Agreement between the parties. According to plaintiff's Complaint, the amount of the Judgment is the sum of the following:

$3,000,000.00	Representing the Investment amount due under the Agreement;
$ 354,024.36	Representing the Preferred Return of 17% of the Investment described in the Agreement; and
$ 503,103.65	Representing the Attorney's Commission of 15% of the confessed amounts as provided in the Agreement.

Defendants filed a Motion to Strike and/or Open the Judgment which is presently before the court.

> A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses . . . If the record is self-sustaining, the judgment will not be stricken. However, if the truth of the factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike.[1]

In support of their Motion to Strike, defendants claim that it is clear from the Complaint and the attached Forbearance Agreement that plaintiff confessed its Judgment for the wrong amount.

The Forbearance Agreement provides that, upon defendants' default, plaintiff may confess judgment for "the Investment together with an attorney's collection commission of fifteen percent (15%) of the aggregate amount of the foregoing sums, but in no event less than $10,000."[2] The Forbearance Agreement contains the following discussion of what constitutes the "Investment" referred to in the Confession of Judgment provisions:

> 5(a). Obligors acknowledge and agree that as of November 13, 2006, the outstanding principal amount of the Investment is $2,500,000; and the outstanding Participation Return (as defined in the EP Partnership Agreement) is $2,000,000, totaling an aggregate Investment of $4,500,000, plus any accrued and unpaid Preferred Return (as defined in the EP Partnership Agreement) and/or Additional Preferred Return (as defined in the EP Partnership Agreement) [the "Investment Balance"];
>
> * * *
>
> 6(a). EP Partnership and Guarantors agree to pay RAIT $1,500,000 of the Investment Balance on or before December 20, 2006 as a partial redemption of the Investment.
>
> * * *
>
> (b) In addition to the payment required under subsection (a) above, EP Partnership and Guarantors agree to pay to RAIT and [sic] $1,200,000 of the Investment Balance on or before January 4, 2007 as a partial redemption of the Investment.
>
> * * *

[1] Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 546 Pa. 98, 106, 683 A.2d 269, 273 (1996).

[2] Complaint, Ex. A, ¶ 20.

> 8(a) Upon repayment of the Investment pursuant to section 6(b) hereof, the remaining balance of the Investment (in an amount not to exceed $1,800,000), if any, shall be converted to a loan (the "Loan") . . .[3]

After the Forbearance Agreement was executed, defendants made the first $1.5 million payment on the Investment, but subsequently defaulted on the second payment due.[4] As a result of that payment, the aggregate Investment was no longer the $4.5 million stated in the Agreement, but was instead $3 million. Upon default, plaintiff confessed judgment against defendants for $3,354,024.36, which included the $3 million and a Preferred Return amount of $354,024.36.

The Confession of Judgment provision of the Agreement permits plaintiff to confess judgment for the "Investment." The Agreement does not define the "Investment" to include the Preferred Return amount, so that amount is not recoverable by way of confessed judgment.

> A warrant of attorney to confess judgment must be strictly construed and conform strictly with its terms. It may not be extended by implication or inference beyond the limits expressed in the instrument. However, if the judgment is entered for items clearly within the warrant, but for an excessive amount, the court, rather than strike, will modify the judgment and cause a proper judgment to be entered, unless (1) the judgment was entered for a grossly excessive amount and, hence, was an improper use of the authority given in the warrant; or, (2) the judgment entered shows on its face that unauthorized items were included.[5]

Because the Judgment entered by plaintiff was for an excessive Investment amount, it may be modified.[6] A Judgment for the proper Investment amount of $3 million will be entered.

---

[3] *Id*. at ¶¶ 5, 6 and 8.

[4] Complaint, ¶¶ 22-23.

[5] Roche v. Rankin, 406 Pa. 92, 97, 176 A.2d 668, 671-2 (1962).

[6] Even if the Preferred Return amount is viewed as an unauthorized item included in the Judgment amount, its inclusion does not nullify the entire Judgment. Since the Preferred Return is calculated as 17% of the Investment amount due, it is in the nature of interest on the debt due.

> Interest may be an 'unauthorized' item under a given warrant, but because it is not an item separate and apart from the substantive debt, its improper inclusion has not resulted in nullification of the entire judgment. The unauthorized inclusion of interest in the judgment thus did not compel

The Agreement also permits plaintiff to recover an "attorney's collection commission" calculated as 15% of the amount due. Since the Judgment amount must be modified to exclude the Preferred Return, the attorney's commission must likewise be modified to exclude 15% of the Preferred Return. The Judgment is modified to reflect an attorney's commission of $450,000, which is 15% of the $3 million Investment amount.

In support of their Motion to Open, defendants argue that the attorney's collection commission of 15% "is unreasonable, disproportionate to the amount of services reasonably required for entry of such a judgment, and is contrary to law."[7] In an analogous case, the Superior Court found that:

> Here, it is clear that attorney's fees in the amount of fifteen percent were specifically authorized by the warrant of attorney. Appellants claim that the amount of attorney's fees is excessive, but they provide no citation to any evidence of record to this effect, and similarly do not make any argument as to why the fees are claimed to be excessive.[8]

In this case, defendants cite no evidence to show that the 15% commission is excessive, and they make only a perfunctory, unsupported argument to that effect. Since defendants have failed to sustain their burden, their Motion to Open must be denied.[9]

BY THE COURT:

_____

ABRAMSON, HOWLAND W., J.

---

invocation of the general rule requiring striking of the judgment where unauthorized items are included.

Colony Federal Sav. & Loan Asso. v. Beaver Valley Engineering Supplies Co., 238 Pa. Super. 540, 546, 361 A.2d 343, 346 (1976). Defendants agree that the Preferred Return "is nothing more than interest." Motion, ¶ 23.

[7] Motion, ¶ 21.

[8] Dollar Bank v. Northwood Cheese Co., 431 Pa. Super. 541, 552, 637 A.2d 309, 314 (1994).

[9] Their claim that the Agreement is usurious is likewise unavailing. The Investment does not appear to be a loan, so the law of usury does not apply. Even if it was a loan, the Preferred Return of 17% is not usurious in this commercial context.