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

RAIT PARTNERSHIP, L.P., Plaintiff,	:	JULY TERM 2008
v.	:	No. 4854
JACK BOYAJIAN and BOYAJIAN ASSET TRUST, Defendants.	:	COMMERCE PROGRAM
	:	Control No: 096133

ORDER

AND NOW, this 17th day of March, 2009, upon consideration of the Amended Petition to Strike and/or Open Confessed Judgment of Defendants Jack Boyajian and Boyajian Asset Trust, the response thereto, all matters of record and in accordance with the Opinion filed herewith, it hereby is **ORDERED** that said Petition is **DENIED**.

BY THE COURT,

_____
ARNOLD L. NEW, J.

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Defendants.	:	Control No: 096133

OPINION

Defendants Jack Boyajian and Boyajian Asset Trust (collectively, "defendants") have filed an Amended Petition to Strike and/or Open Confessed Judgment in response to plaintiff RAIT Partnership, L.P.'s ("RAIT") Complaint in Confession of Judgment against them. For the reasons set forth in this Opinion, said Petition is denied.

BACKGROUND

On or around September 15, 2006, RAIT entered into a Loan and Security Agreement with Highland 100 LLC ("Highland") pursuant to which RAIT loaned $3,800,000.00 to Highland. In accordance with the terms of the Loan and Security Agreement, Highland executed a Promissory Note (the "Note") in favor of RAIT for the principal amount of $3,800,000.00.

The Loan and Security Agreement was secured by a pledge of 28,220 shares of stock owned by Highland in a cooperative corporation known as River View Gardens Owners, Inc. (the "Co-op") and the appurtenant leases for 116 apartments in the Co-op. As part of the security for the Loan and Security Agreement, Highland also executed an Assignment of Rents and Leases, which gave RAIT the right to take over all of the

subleases held by Highland in the Co-op and permitted RAIT to collect rent directly from the subtenants in the event of a default.

On or about September 15, 2006, defendants Jack Boyajian and Boyajian Asset Trust executed a Guaranty of Non-Recourse Carveouts (the "Guaranty Agreement"), under which defendants agreed to jointly and severally "act as surety with respect to the recourse obligations of [Highland] set forth in…the Loan [and Security] Agreement."[1] In other words, defendants agreed to guaranty the loan in the event that a non-recourse carveout under the Loan and Security Agreement applied and the loan became "fully recourse."

Pursuant to the terms of the Note, Highland was to make payments, including interest, each month from November 1, 2006 to September 15, 2007. The interest on the Note was set to accrue on any unpaid principal balance at a rate of the greater of either (1) eight and one half percent per annum or (2) the percent per annum equal to the LIBOR rate plus 350 basis points.[2] Highland had three options to extend the maturity date of the loan, each for six months, provided that it paid RAIT an extension fee equal to one-half of one percent of the outstanding balance of the loan and it increased the amount on deposit in a debt service reserve.[3] Highland exercised its first option, which extended the maturity date of the loan to March 15, 2008. Highland then attempted to exercise its second option, but failed to meet the conditions precedent for doing so, namely the payment of the extension fee and increasing the debt service reserve. Thus, the principal balance of the loan became due on March 15, 2008. Highland failed to make payment by then and thus defaulted under the Loan and Security Agreement and the Note.

[1] Guaranty Agreement, at ¶ 1.
[2] Note, at ¶ 1; Loan and Security Agreement, at ¶ 1(b).
[3] Loan and Security Agreement, at ¶ 1(g).

Because Highland defaulted on the loan, RAIT sent a letter on June 30, 2008 to the subtenants of the 116 apartments in the Co-op notifying them that they should start paying their rent directly to RAIT. Highland subsequently wrote to the subtenants and directed them to instead make their rent payments to the Co-op, notwithstanding RAIT's June 30, 2008 letter. The Loan and Security Agreement provided that Highland's obligations under that Agreement and the Note became "fully recourse" if, *inter alia*, "Borrower or any affiliate of Borrower shall interfere with Lender's efforts to exercise its remedies…."[4] RAIT contends that by sending out the letter to the subtenants, Highland materially interfered with RAIT's rights under the loan documents. As a result, RAIT asserts that Highland's obligations under the loan documents became "fully recourse" and thus, the obligations became guaranteed by defendants under the Guaranty Agreement. RAIT asserts that defendants have failed to pay RAIT "as surety with respect to the recourse obligations of [Highland]" and therefore are in default of their obligations under the Guaranty Agreement.

On August 1, 2008, RAIT filed a Complaint in Confession of Judgment against defendants in the amount of $5,036,073.98 based upon the authority granted under the Confession of Judgment/Warrant of Attorney provision contained in the Guaranty Agreement.[5] Presently before the Court is defendants' Petition to Strike and/or Open Confessed Judgment.

[4] Id., at ¶ 12(d)(H).
[5] RAIT simultaneously filed a Complaint in Confession of Judgment on the Note against Highland in a separate action captioned RAIT v. Highland, July Term 2008, No. 4858.

DISCUSSION

The Pennsylvania Supreme Court has stated that "a petition to strike and a petition to open are two distinct forms of relief, each with separate remedies."[6] Accordingly, each remedy will be addressed in turn.

I. Petition to Strike Judgment

A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record.[7] A petition to strike may only be granted when there is an apparent defect on the face of the record.[8] "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."[9] "The facts averred in the complaint are to be taken as true; if the factual averments are disputed, the remedy is by a proceeding to open the judgment and not by a motion to strike."[10] A court's order that strikes a judgment "annuls the original judgment and the parties are left as if no judgment had been entered."[11]

In support of their Petition to Strike, defendants contend that the Court lacks personal jurisdiction over them. Defendants attach an Affidavit by Jack Boyajian that states that he has no contacts with Pennsylvania and that neither he nor the Boyajian Asset Trust own property or conduct business in Pennsylvania.

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[6] Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 683 A.2d 269, 273 (Pa. 1996); see also Manor Bldg. Corp. v. Manor Complex Assocs., 645 A.2d 843, 845, n.2 (Pa. Super. 1994) (stating that a petition to strike and a petition to open are each "intended to relieve a different type of defect in the confession of judgment proceedings").
[7] Resolution Trust Corp., 683 A.2d at 273.
[8] Id.
[9] Id.
[10] Manor Bldg. Corp., 645 A.2d at 846.
[11] Resolution Trust Corp., 683 A.2d at 273.

Defendants' argument is without merit because defendants expressly consented to jurisdiction in Pennsylvania when they executed the Guaranty Agreement. Specifically, Paragraph 14(b) of Guaranty Agreement provides:

> Jurisdiction; Court Proceedings. Guarantor [Jack Boyajian, in his individual capacity and as trustee of Boyajian Asset Trust], to the fullest extent permitted by law, hereby knowingly, intentionally and voluntarily, with and upon the advice of competent counsel, (i) submits to personal, nonexclusive jurisdiction in the Commonwealth of Pennsylvania with respect to any suit, action or proceeding by any person arising from, relating to or in connection with the Loan Documents or the Loan, (ii) agrees that any such suit, action or proceeding may be brought in any state or federal court of competent jurisdiction sitting in Philadelphia, Pennsylvania, (iii) submits to the jurisdiction of such courts…

Since defendants clearly agreed to submit to jurisdiction in Pennsylvania, defendants' argument that the Court lacks personal jurisdiction over them fails. Accordingly, the Petition to Strike is denied.

II. Petition to Open Judgment

In contrast to a petition to strike judgment, when determining a petition to open a confessed judgment, the court may look beyond the confession of judgment documents to testimony, depositions, admissions, and other evidence.[12] A court should open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury.[13] The evidence of a meritorious defense must be "clear, direct, precise and believable."[14]

In the case *sub judice*, defendants raise several arguments in support of their Petition to Open, which will be discussed in turn. After careful review, the Court finds

[12] Id.
[13] Crum v. F.L. Shaffer Co., 693 A.2d 984, 986 (Pa. Super 1997).
[14] Germantown Savings Bank v. Talacki, 657 A.2d 1285, 1289 (Pa. Super. 1995).

that defendants have not raised any meritorious defenses and therefore, their Petition to Open is denied.[15]

A. Defendants' Argument that RAIT Lacks Standing to Confess Judgment Fails.

First, defendants contend that RAIT lacks standing to enter judgment on the loan because RAIT assigned all of its rights in the loan to another company, RAIT CRE CDO I, Ltd. In support of their argument, defendants state that, along with the filing of the present Complaint, RAIT filed a complaint in New York (the "New York Complaint") regarding the same loan, which stated: "On December 29, 2006, [RAIT] assigned and transferred all of its right title and interest in the Loan…to RAIT CRE CDO I, Ltd."[16] Defendants contend that based solely upon this statement, RAIT has no interest in the loan and therefore lacks standing to bring this lawsuit.

Although the New York Complaint contains the above-quoted language, the very next paragraph in the New York Complaint states:

> Notwithstanding the foregoing, by written Servicing Agreement, dated as of November 7, 2006 among [RAIT], [RAIT CRE CDO I, Ltd.] and Wells Fargo Bank, [RAIT] maintains the right to enforce all of [RAIT CRE CDO I, Ltd.'s] rights under the loan documents, including, without limitation, bringing the instant lawsuit against [Highland].[17]

Further, RAIT's Complaint in the present action specifically refutes defendants' contention that RAIT assigned away *all* of its rights under the loan documents. Paragraph 31 of RAIT's Complaint states:

> The Loan and Security Agreement, Note, and Guaranty Agreement have been assigned to RAIT CRE CDO I, Ltd., for certain purposes, but plaintiff has retained the right to enforce the Loan and Security Agreement, Note, and Guaranty Agreement.

[15] The Court finds that the Petition to Open was timely filed.
[16] New York Complaint, at ¶ 15.
[17] Id. at ¶ 16.

Moreover, the Servicing Agreement between RAIT and RAIT CRE CDO I, Ltd. dated November 7, 2006, attached to RAIT's Answer to the Petition to Open, further supports RAIT's position that it retained the right to enforce the loan. Section 3.08 of the Servicing Agreement, entitled "Exercise of Remedies Upon Investment Defaults," states that RAIT "shall issue notices of default, declare events of default, declare due the entire outstanding principal balance, and otherwise take all reasonable actions consistent with Accepted Servicing Practices…in preparation for [RAIT] to realize upon the underlying Collateral."[18]

Based upon the foregoing, the Court concludes that defendants have not shown sufficient evidence that RAIT lacks standing to enforce the loan at issue. Accordingly, defendants' argument fails.

B. Defendants' Argument that RAIT Breached the Non-Recourse Provisions of the Loan Fails.

The Loan and Security Agreement provided that "Lender shall not enforce the liability and obligation of Borrower [Highland] to perform and observe the obligations contained in the Note, this Loan Agreement or the Loan Documents by any action or proceeding wherein a money judgment shall be sought against Borrower."[19] The exceptions to this non-recourse provision were enumerated in Paragraphs 12(c) and 12(d) of the Loan and Security Agreement. RAIT's position is that Paragraph 12(d)(H) of the Loan and Security Agreement applies in this case, which states: "the Debt shall be fully recourse to Borrower (and to Guarantor pursuant to the Carve-out Guaranty) in the event that…Borrower or any affiliate of Borrower shall interfere with Lender's efforts to

[18] Exhibit "A" to Response to Petition to Strike/Open.
[19] Loan and Security Agreement, at ¶ 12(a).

exercise its remedies…." RAIT alleges that when Highland sent its letter to the subtenants of the Co-op contradicting RAIT's earlier instruction regarding payment of rent, Highland materially interfered with RAIT's rights under Paragraph 12(d)(H), and in doing so, the loan became fully recourse thereby implicating defendants' guaranty. Defendants, however, contend that the confessed judgment should be opened because there is an issue of fact as to whether Highland violated the non-recourse exception under Paragraph 12(d)(H).

Pursuant to the Assignment of Rents and Leases, RAIT had the right to notify the subtenants to pay all rents to RAIT upon the occurrence of a default.[20] Thus, after Highland defaulted on the loan, RAIT was entitled to instruct the subtenants to pay their rent directly to RAIT. Defendants do not dispute the fact that Highland sent a letter to the subtenants instructing them to pay their rent to the Co-op, which contradicted RAIT's earlier letter. Therefore, there are no disputed issues of fact with respect to this issue. The Court finds, as a matter of law, Highland's contrary instruction to the subtenants materially interfered with RAIT's right to exercise its remedies. Thus, the loan became fully recourse, which implicated defendants' obligations under the Guaranty Agreement. Accordingly, defendants' argument fails.

C. Defendants Have Not Presented Any Evidence that They Complied with the Conditions Precedent for Exercising a Second Extension on the Loan.

Defendants next argue that Highland exercised its option to extend the loan a second time and that RAIT breached the Loan and Security Agreement by failing to honor the extension. The Court finds that Highland failed to meet the conditions precedent for exercising a second extension on the loan.

[20] Assignment of Rents and Leases, at ¶ 6(c).

Under the Loan and Security Agreement, certain conditions needed to be met before Highland could exercise its option to extend the loan. Specifically, Paragraph 1(g) of the Loan and Security Agreement provides:

> Extension. [Highland] shall have three (3) options to extend the Maturity Date for six (6) months each (each, an "Extension Option"). Each Extension Option may be exercised by providing [RAIT] with not less than 30 days prior written notice of its election to exercise such Extension Option, and provided that prior to the exercise of such Extension Option…[Highland] pays to [RAIT] an extension fee equal to one-half of one percent (0.5%) of the outstanding balance of the Loan and…at [RAIT's] discretion, [Highland] increases the amount on deposit in the Debt Service Reserve.

Thus, the Loan and Security Agreement clearly required that Highland pay to RAIT an extension fee and, at RAIT's discretion, increase the amount in the Debt Service Reserve *before* Highland could exercise its option to extend. Defendants have not presented any evidence that Highland paid the extension fee or increased the amount in the Debt Service Reserve. In fact, defendants do not even argue that Highland took either of these steps.[21] Since defendants have not only offered no evidence that Highland met the conditions precedent before exercising its second option to extend, but failed to even allege Highland met the conditions precedent, defendants' argument fails.

D. Defendants' Argument that RAIT Failed to Provide an Accounting is Not Meritorious.

Pursuant to the Loan and Security Agreement, a Cash Management Account was established into which all rents were collected and deposited. RAIT was authorized to make disbursements from the Cash Management Account for various purposes, such as replenishing the Debt Service Reserve and the Co-op Reserve. Defendants allege that

[21] It is also significant that when Highland sent a letter to RAIT to exercise its first option to extend, Highland expressly referenced payment of the extension fee; however, Highland's subsequent letter to RAIT purporting to exercise its second option to extend says nothing about payment of the extension fee.

RAIT made withdrawals from the Cash Management Account without providing documentation or explanation to defendants, and that RAIT has refused defendants' request for an accounting.

Defendants fail to show how RAIT's alleged refusal to provide an accounting somehow excused Highland's default on the loan. Indeed, Highland was still obligated to comply with the payment terms of the loan. Accordingly, the Court finds that defendants have not alleged a meritorious defense.

E. Defendants' Argument that They Were Entitled to Notice Before RAIT Confessed Judgment is Not Meritorious.

Defendants next argue that they did not receive any notice or demand from RAIT that Highland defaulted and that defendants' obligation had become due or payable prior to the filing of the Complaint in the instant action.

The Court finds that defendants' argument is without merit. Under the Guaranty Agreement, defendants expressly waived the right to demand or notice by RAIT that their obligation had become due and payable. Specifically, the Confession of Judgment provision in the Guaranty Agreement provides:

> GUARANTOR, BEING FULLY AWARE OF THE RIGHT TO NOTICE AND A HEARING CONCERNING THE VALIDITY OF ANY AND ALL CLAIMS THAT MAY BE ASSERTED AGAINST GUARANTOR BY LENDER BEFORE A JUDGMENT CAN BE ENTERED HEREUNDER OR BEFORE EXECUTION MAY BE LEVIED ON SUCH JUDGMENT AGAINST ANY AND ALL PROPERTY OF GUARANTOR, HEREBY KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVES THESE RIGHTS AND AGREES AND CONSENTS TO: (i) JUDGMENT BEING ENTERED BY CONFESSION IN ACCORDANCE WITH THE TERMS HEREOF, AND (ii) EXECUTION BEING LEVIED ON SUCH JUDGMENT AGAINST ANY AND ALL PROPERTY OF GUARANTOR, IN EACH CASE WITHOUT FIRST GIVING NOTICE AND THE OPPORTUNITY TO BE HEARD ON THE

> VALIDITY OF THE CLAIM OR CLAIMS UPON WHICH SUCH JUDGMENT IS ENTERED.[22]

Further, Paragraph 1 of the Guaranty Agreement states: "…Guarantor specifically agrees that it shall not be necessary or required that [RAIT] or any holder of the Note exercise any right, assert any claim or demand or enforce any remedy whatsoever against [Highland] or any other obligor (or any other person) before or as a condition to the obligations of Guarantor hereunder." In addition, Paragraph 4 of the Guaranty Agreement provides: "Guarantor hereby waives promptness, diligence, notice of acceptance and any other notice with respect to the Debt and this Guaranty…." Lastly, Paragraph 14(a) states: "Guarantor hereby expressly waives the right to receive any notice from [RAIT] with respect to any matter for which this Guaranty does not specifically and expressly provide for the giving of notice by [RAIT] to Guarantor." Thus, based upon the plain language contained within the Guaranty Agreement, defendants clearly waived the right to any notice from RAIT that their obligation had become due and payable.

F. The Attorneys' Fees Sought by RAIT are Consistent with the Agreements Signed by Defendants.

Defendants argue that the confessed judgment should be opened because the attorneys' fees of 20% are not authorized in the agreements by the parties and that the rate is grossly excessive. However, the warrant of attorney provision in the Guaranty Agreement clearly states that in the event of default, RAIT may confess judgment against defendants:

> …FOR ALL OR ANY PORTION OF THE UNPAID GUARANTEED OBLIGATIONS, TOGETHER WITH UNPAID INTEREST AND ATTORNEYS' FEES BUT IN NO EVENT

[22] Guaranty Agreement, at ¶ 13(b).

> LESS THAN 20% OF THE UNPAID GUARANTEED OBLIGATIONS, WITH COSTS OF SUIT…[23]

Therefore, it is clear that attorneys' fees in the amount of 20% were specifically authorized by the warrant of attorney. In light of the fact that the warrant of attorney plainly permits the fee which RAIT seeks, and since defendants make only a perfunctory, unsupported argument without any evidence to show that the 20% fee is excessive, defendants' argument fails.[24]

G. Defendants Have Not Presented Evidence that RAIT Improperly Calculated Interest.

Defendants state that they "believe" that RAIT has overcharged or improperly calculated interest. Again, defendants have not offered sufficient evidence to support such a claim. As a result, defendants have not met their burden, and the Petition to Open is denied.[25]

CONCLUSION

For the foregoing reasons, the Petition to Strike and/or Open the Judgment is denied.

BY THE COURT,

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ARNOLD L. NEW, J.

[23] Guaranty Agreement, at ¶ 13(a).
[24] See RAIT Partnership, L.P. v. Wilson, 2008 Phila. Ct. Com. Pl. LEXIS 83, *13-14 (2008).
[25] Defendants' final argument, that RAIT breached its duty of good faith, is based upon defendants' earlier defenses, which the Court has found are not meritorious.