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. 4858
HIGHLAND 100 LLC, Defendant.	:	COMMERCE PROGRAM
	:	Control No: 096134

ORDER

AND NOW, this 17th day of March, 2009, upon consideration of the Amended Petition to Strike and/or Open Confessed Judgment of Defendant Highland 100 LLC, 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,

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ARNOLD L. NEW, J.

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v.	:	No. 4858
HIGHLAND 100 LLC, Defendant.	:	COMMERCE PROGRAM
	:	Control No: 096134

OPINION

Defendant Highland 100 LLC has 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 it. 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.

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.[1] 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.[2] 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.

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

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

remedies…."[3] 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, including the obligation to pay all amounts due under the Note, became "fully recourse."

Thereafter, on August 1, 2008, RAIT filed a Complaint in Confession of Judgment against defendant 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 Note.[4] Presently before the Court is defendant's Petition to Strike and/or Open Confessed Judgment.

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."[5] 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.[6] A petition to strike may only be granted when there is an apparent defect on the face of the record.[7] "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

[3] Id., at ¶ 12(d)(H).
[4] RAIT simultaneously filed a Complaint in Confession of Judgment against the guarantors of the loan in a separate action captioned RAIT v. Jack Boyajian and Boyajian Asset Trust, July Term 2008, No. 4854.
[5] 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").
[6] Resolution Trust Corp., 683 A.2d at 273.
[7] Id.

confession of judgment clauses."[8] "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."[9] A court's order that strikes a judgment "annuls the original judgment and the parties are left as if no judgment had been entered."[10]

Highland does not identify a single defect on the face of the record in support its Petition to Strike. 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.[11] 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.[12] The evidence of a meritorious defense must be "clear, direct, precise and believable."[13]

In the case *sub judice*, defendant raises several arguments in support of its Petition to Open, which will be discussed in turn. After careful review, the Court finds that defendant has not raised any meritorious defenses and therefore, its Petition to Open is denied.[14]

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

First, defendant contends 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

[8] Id.
[9] Manor Bldg. Corp., 645 A.2d at 846.
[10] Resolution Trust Corp., 683 A.2d at 273.
[11] Id.
[12] Crum v. F.L. Shaffer Co., 693 A.2d 984, 986 (Pa. Super 1997).
[13] Germantown Savings Bank v. Talacki, 657 A.2d 1285, 1289 (Pa. Super. 1995).
[14] The Court finds that the Petition to Open was timely filed.

I, Ltd. In support of its argument, defendant states 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."[15] Defendant contends 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].[16]

Further, RAIT's Complaint in the present action specifically refutes defendant's contention that RAIT assigned away *all* of its rights under the loan documents. Paragraph 25 of RAIT's Complaint states:

> The Loan and Security Agreement and Note 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 and Note.

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

[15] New York Complaint, at ¶ 15.
[16] Id. at ¶ 16.

outstanding principal balance, and otherwise take all reasonable actions consistent with Accepted Servicing Practices…in preparation for [RAIT] to realize upon the underlying Collateral."[17]

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

B. Defendant's 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."[18] 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 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. Highland, however, contends that the confessed judgment should be opened because there is an issue of fact as to whether it violated the non-recourse exception under Paragraph 12(d)(H).

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

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.[19] Thus, after Highland defaulted on the loan, RAIT was entitled to instruct the subtenants to pay their rent directly to RAIT. Highland does not dispute the fact that it 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 and Highland became obligated to pay all amounts due under the loan. Accordingly, defendant's argument fails.

C. Defendant Has Not Presented Any Evidence that It Complied with the Conditions Precedent for Exercising a Second Extension on the Loan.

Highland next argues that it 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.

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,

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

> [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. Highland has not presented any evidence that it paid the extension fee or increased the amount in the Debt Service Reserve. In fact, Highland does not even argue that it took either of these steps.[20] Since Highland has not only offered no evidence that it met the conditions precedent before exercising its second option to extend, but failed to even allege it met the conditions precedent, its argument fails.

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

Defendant fails to show how RAIT's alleged refusal to provide an accounting somehow excused its default on the loan. Indeed, defendant was still obligated to comply with the payment terms of the loan. Accordingly, the Court finds that defendant has not alleged a meritorious defense.

[20] 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.

E. The Attorneys' Fees Sought by RAIT are Consistent with the Agreements Signed by Defendant.

Defendant argues 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 Note clearly states that in the event of default, RAIT may confess judgment against defendant:

> …FOR ALL OR ANY PORTION OF THE UNPAID INDEBTEDNESS DUE UNDER THE LOAN, TOGETHER WITH UNPAID INTEREST AND ATTORNEYS' FEES BUT IN NO EVENT LESS THAN 20% OF THE UNPAID BALANCE OF SUCH INDEBTEDNESS, WITH COSTS OF SUIT…[21]

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 defendant makes only a perfunctory, unsupported argument without any evidence to show that the 20% fee is excessive, defendant's argument fails.[22]

F. Defendant Has Not Presented Evidence that RAIT Improperly Calculated Interest.

Defendant states that it "believes" that RAIT has overcharged or improperly calculated interest. Again, defendant has not offered sufficient evidence to support such a claim. As a result, defendant has not met its burden, and the Petition to Open is denied.[23]

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[21] Note, at ¶ 11(a).
[22] See RAIT Partnership, L.P. v. Wilson, 2008 Phila. Ct. Com. Pl. LEXIS 83, *13-14 (2008).
[23] Defendant's final argument, that RAIT breached its duty of good faith, is based upon defendant's earlier defenses, which the Court has found are not meritorious.

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.