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

PHILADELPHIA COMMERCIAL DEVELOPMENT CORPORATION, Plaintiff,	:	May Term 2014
	:	No. 1413
v.	:	
IRVING FRYAR REALTY, INC. And IRVING FRYAR, SR., Defendants.	:	COMMERCE PROGRAM
	:	2611 EDA 2014

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OPINION

This appeal is relative to this court's order dated August 5, 2014 denying Defendant Petitioners Irving Fryar Realty, Inc. and Irving D. Fryar, Sr.'s ("Petitioners") Petition to Strike and/or Open Confessed Judgment. For the reasons discussed below, this court's order should be affirmed.

In 2006, Irving D. Fryar formed Irving Fryar Realty, Inc. to provide opportunities for minorities in the real estate field. On June 20, 2007, Irving Fryar Realty, Inc. borrowed sixty thousand dollars ($60,000.00) from Minority Ventures Partners, LTD ("MVP"). Also on the same date, Fryar, individually as the surety and in his corporate capacity as the principal, executed an Indemnity and Suretyship Agreement in connection with the Promissory Note. In 2007, Irving Fryar Realty, Inc. defaulted on the Promissory Note for failing to perform its obligations under the note. On May 13, 2013, Philadelphia Commercial Development Corporation ("PCDC"), a limited partner of MVP, filed a complaint confessing judgment against petitioners in the amount of $60,000 plus interest. Petitioners timely filed a petition to strike/open the confessed judgment alleging lack of standing and expiration of the statute of limitations. The court issued a rule to show cause why said petition should not be granted. On August 5, 2014, after oral argument, the court denied the petition. This timely appeal followed.

DISCUSSION

A party may move for relief from a final judgment, such as confessed judgment by petitioning the court to strike or open the judgment. A petition to strike a judgment operates as a demurrer to the record and may only be granted "only if a fatal defect or irregularity appears on the face of the record." The court is limited to reviewing the record as filed by the party in whose favor the warrant is given, the complaint and the documents which contain confession of judgment clauses. A court's order that strikes the judgment annuls the original judgment and the parties are left as if no judgment had been entered.[1]

A judgment by confession will be opened if the petitioner acts promptly, alleges a meritorious defense, and presents sufficient evidence in support of the defense to require the submission of the issues to a jury. A petition to open a confessed judgment looks beyond the confession of judgment documents and includes testimony, depositions, admissions, and other evidence. In adjudicating the petition to open, the trial court is charged with determining whether the petitioner presented sufficient evidence of a meritorious defense to require submission of that issue to a jury. A meritorious defense is one upon which relief could be afforded if proven at trial. [2]

In the case *sub judice*, petitioners argued that the judgment should be stricken because PCDC failed to sufficiently establish in the record how it had standing to file the complaint in confession of judgment against petitioners. A judgment by confession may be entered only in

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[1] *Resolution Trust Co. v. Copley Qu-Wayne Assocs.*, 546 Pa. 98, 105, 106, 683 A.2d 269, 273 (1996).

[2] *Ferrick v. Bianchini,* 69 A.3d 642, 647 (Pa. Super. 2013) (citations omitted).

the name of a holder or, unless expressly forbidden in the instrument, in favor of the assignee or other transferree.[3] The facts which entitle a real party in interest, other than the original payee of the instrument, to confess judgment thereon must appear of record, generally in the complaint for confession of judgment. [4] Here, the complaint in confession of judgment alleges as follows:

> 1. Plaintiff [PCDC] is Philadelphia Commercial Development Corporation ("Plaintiff"), a Pennsylvania non-profit corporation with a principal place of business at 2600 Centre Square West, 15th and Market Streets, Philadelphia, Pennsylvania 19102.
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> 2. Plaintiff [PCDC] is the sole limited partner of Minority Venture Partners, Ltd. ("MVP"), a Pennsylvania limited partnership, whose general partner was Curtis Jones.
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> 3. Subsequent to the formation of the partnership, Curtis Jones resigned as the sole general partner.
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> 4. In accordance with 15 Pa. C. S. 8573, Plaintiff [PCDC] brings this action as the limited partner of MVP charged with winding up the affairs of MVP in accordance with the aforesaid statute. [5]

The allegations set forth above demonstrate PCDC is the real party in interest and was authorized to confess judgment against petitioners. Title 15 Pa. C. S. § 8573, authorized PCDC as the sole limited partner to wind up the affairs of the MVP.[6] Moreover, notwithstanding the

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[3] Pa.R.C.P. 2954.

[4] *See* Pa.R.C.P. 2952(4) (a statement of assignment of the instrument shall be included in the complaint for confession of judgment).

[5] Plaintiff's complaint in confession of judgment.

[6] Except as otherwise provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, or a person approved by the limited partners or, if there is more than one class or group of limited partners, by each class or group of limited partners, in either case by a majority in interest of the limited partners in each class or group, may wind up the affairs of the limited partnership, but the court may wind up the affairs of the limited partnership upon application of any partner, his legal representative or assignee, and in connection therewith, may appoint a liquidating trustee. See section 139(b) (relating to tax clearance in judicial proceedings). 15 Pa. Cons. Stat. Ann. § 8573 (West)

allegations within the complaint, in response to the petition to open and/or strike the confession of judgment, PCDC attached Written Consents which clearly authorizes it to execute all documents to take all actions required to effectuate the complete winding up of the affairs and dissolution of MVP in accordance with the plan of liquidation. The complaint in confession of judgment filed by PCDC is a MVP asset and PCDC was authorized to execute all documents necessary to file the confession of judgment complaint.

Furthermore, the Promissory Note contemplated the possibility of assignment to a successor or assign by providing that "this Note shall be binding upon the undersigned and its sucessors and assigns and has been made and delivered in, and shall be governed by the laws of the Commonwealth of Pennsylvania ." The Promissory Note further makes clear that "MVP AND ANY SUBSEQUENT HOLDER OF THIS NOTE TO ENTER JUDGMENT AGAINST YOU FOR MONEY DAMAGES…" The same language is contained in the Indemnity and Suretyship Agreement. Based on the foregoing, the petition to strike based on standing was properly denied.

In addition to the motion to strike based on lack of standing, petitioner also filed a petition to open the judgment claiming PCDC's complaint for confession of judgment was time barred. Petitioners argued that the applicable statute of limitations was the limitations based on contract which is a four year statute of limitations. Although, the Indemnity and Surety Agreement is a contract, it is not subject to a four year statute of limitations. Instead, the Indemnity and Surety Agreement is an "instruments in writing under seal" and is subject to a twenty year limitations period. [7]

Title 42 Pa. C. S. § 5529 provides in relevant as follows:

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[7] The Promissory Note signed by Irving Fryar Realty, Inc. is not an "instrument in writing under seal". However, the Indemnity and Suretyship Agreement is an "instrument in writing under seal" signed by Irving Fryar Realty, Inc., the obligor, and Irving D. Fryar, Sr., the Surety.

(b) Instruments under seal.

(1) Notwithstanding section 5525 (7) (relating to four year limitation), an action upon an instrument in writing under seal must be commenced within 20 years.
(2) This subsection shall expire June 27, 2018.

The term instrument is not defined by the Judicial Code and therefore the term is given its ordinary meaning.[8] Black's law dictionary defines instrument as "a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory," or "in fact, any written or printed document that may have to be interpreted by the Courts."[9] Under this definition, the Indemnity and Surety Agreement is an instrument. In addition to satisfying the definition of an instrument, the Indemnity and Suretyship agreement were signed under seal. The Indemnity and Surety Agreement contains the following language immediately above the parties' signature blocks: "IN WITNESS WHEREOF, the PRINCIPAL and SURETY have caused this INDEMNITY AND SURETYSHIP to be duly executed and sealed as of this Twentieth day of June, 2007." As such the sealed instruments are governed by the twenty year statute of limitations and are not time barred.

Based on the foregoing, this court's August 5, 2014 order denying the petition to strike/open the confessed judgment should be affirmed.

Date: 10/10/14

BY THE COURT,

PAMELA PRYOR DEMBE, J.

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[8] Pa. C. S. A. §1903 (a).

[9] *Ospray Portfolio, LLC v. Izett,* 32 A.2d 793 (Pa. Super. 2011), citing *Black's law Dictionary* 813 (8th ed. 2004).