IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DAP FINANCIAL MANAGEMENT COMPANY	: JANUARY TERM, 2000
v.	: No. 1566
SEBASTIAN R. CIOTTI	: Motion Control No. 020625

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MEMORANDUM OPINION

SHEPPARD, JR., J. ..... May 16, 2000

This Opinion is submitted in support of this court's contemporaneous Order denying the Petition to Strike Off or Open Confessed Judgment but modifying the judgment to reduce the amount of the attorney's commission.

Background

On July 5, 1990, Ciotti-Leff Partnership ("the Partnership") executed a promissory note ("Note") for $150,000 to Metrobank of Philadelphia N.A. ("Metrobank"). Stephen Leff ("Leff") and defendant, Sebastian Ciotti ("Ciotti"), who were general partners of the Partnership, signed the Note on behalf of the Partnership. The Note contained a clause authorizing confession of judgment against the Partnership for the unpaid principal balance of the Note, accrued interest, costs and a 10% attorney's commission after default on the Note. The interest rate on the Note was 1.5% above the "Wall Street Journal Prime Rate for Eastern Region." The Note authorized Metrobank to increase the rate to 24% after default.

On the same date, Ciotti executed a commercial guaranty ("Guaranty") of all of the Partnership's debts to Metrobank. The Guaranty contained a clause authorizing confession of judgment against Ciotti for the unpaid principal balance of the Guaranty, accrued interest, costs and a 10% attorney's commission after default under the Guaranty.

On October 5, 1992, the Partnership executed a modification to the Note setting an interest rate floor of 8.5% on the Note. Ciotti and Leff signed the modification.

On March 1, 1996, the Partnership defaulted on the Note. On August 14, 1998, plaintiff, DAP Financial Management Company ("DAP"), the successor to Metrobank, filed a Complaint and Confession of Judgment on the Note in Philadelphia County against Ciotti ("DAP v. Ciotti I") . The defendant in that action was "Sebastian R. Ciotti." The Complaint erroneously gave the default date as March 1, 1990.[1]

[1]This presented a temporal impossibility in that the alleged default (3/1/90) would pre-date the execution of the Note (7/5/90).

On December 28, 1998, DAP filed a Complaint and Confession of Judgment on the Note in Montgomery County against Leff ("DAP v. Leff"). The defendant in that action was "Stephen K. Leff T/A Ciotti-Leff Partnership."

On February 23, 1999, the Honorable Pamela Dembe granted Ciotti's Petition to Open the Confessed Judgment in DAP v. Ciotti I.

Judge Dembe's Order did not make clear the basis upon which the judgment was opened. In his petition, Ciotti had argued two grounds for striking off the judgment: failure to name all necessary parties and the temporal impossibility. (As noted, the temporal impossibility arose from a typographical error in the complaint. The complaint stated that the default occurred on March 1, **1990** -- several months before the Partnership executed the Note -- instead of March 1, **1996)**. Ciotti argued only one ground for opening the judgment: expiration of the six year statute of limitations based on a 1990 default date. Thus, in the DAP v. Ciotti I petition the only alleged meritorious defense was the statute of limitations defense.[2]

On January 12, 2000, DAP filed a praecipe to discontinue DAP v. Ciotti I.

In the meantime on December 22, 1999, DAP filed a Complaint and Confession of Judgment on the Guaranty in Philadelphia County against Ciotti ("DAP v. Ciotti II"). On February 12, 2000, Ciotti filed the instant Petition to Strike Off or Open the confessed judgment.[3]

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[2]Ciotti had also argued that DAP had failed to include an Affidavit of Non-Military Service, but Ciotti did not state whether this alleged failure was grounds for striking off or opening the confessed judgment. In any event, it appears that DAP did include the requisite affidavit in DAP v. Ciotti I.

[3]Oral argument pertinent to the Petition was conducted on April 25, 2000.

Discussion

I. Legal Standards

A petition to strike off a confessed judgment is a common law proceeding and acts as a demurrer to the record. Resolution Trust Corp. v. Copely Qu-Wayne Associates, 546 Pa. 98, 683 A.2d 269, 273 (1996). The court may grant a petition to strike off a judgment only if a fatal defect or irregularity appears on the record. Id. In considering the merits of the petition, the court is limited to the record of the confessed judgment as filed by the party in whose favor the warrant was executed -- i.e., DAP's January 2000 complaint and the documents embodying the confession of judgment (included in Ciotti's Petition, Exhibit D). Id. The court may not consider matters outside of that record. Id. If the truth of the factual averments contained in that record are in dispute, the remedy is by petition to open the judgment. Id.

Pa.R.C.P. 2959 governs a petition to open a confessed judgment. Id. The court should open a confessed judgment if the judgment debtor acts promptly in filing the petition, alleges a meritorious defense, and presents sufficient clear, direct, precise and believable evidence of that defense to require submission of the issue to a jury. Id.; Iron Worker's Savings & Loan Ass'n. v. IWS, Inc., 424 Pa.Super. 255, 622 A.2d 367, 370 (1993); Frankford Trust Co. v. Stainless Steel Services, 327 Pa.Super. 159, 475 A.2d 147, 149 (1984). When determining a petition to open the judgment the court may consider evidence outside the record filed by the party in whose favor the warrant was given, e.g., testimony, depositions, admissions and other evidence. Copely Qu-Wayne, 683 A.2d at 273.

II. The Petition To Strike Off Or Open The Confessed Judgment Must Be Denied.

A. The Order Opening the Confessed Judgment in DAP v Ciotti I Does Not Have Res Judicata Effect Here Because It Was Interlocutory and Nonappealable.

Ciotti argues that the opening of the judgment in DAP v. Ciotti I has a res judicata effect that precludes DAP from confessing judgment in DAP v. Ciotti II. He maintains that the opening of the confessed judgment in DAP v. Ciotti I finally decided the issue of whether Ciotti has a meritorious defense. But res judicata and collateral estoppel do not apply because the order opening the confessed judgment in DAP v. Ciotti I was interlocutory.

For res judicata or collateral estoppel to apply, the order relied upon must have been a been a final judgment on the merits. In re Jones & Laughlin Steel Corp., 328 Pa.Super. 442, 477 A.2d 527, 531 (1984). Nonappealable interlocutory orders are not final and, therefore, have no res judicata or collateral estoppel effect. Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867, 870 (1957)(holding that an order overruling preliminary objections is interlocutory and, therefore, has no res judicata effect); Taub v. Merriam, 251 Pa.Super. 572, 380 A.2d 1245, 1248 (1977). Because an order opening a confessed judgment is interlocutory and non-appealable, Joseph Palermo Development Corp. v. Bowers, 388 Pa.Super. 49, 564 A.2d 996, 997 (1989); Pa.R.A.P. 311(a)(1) and Note; Pa.R.A.P. 341(b), the order in DAP v. Ciotti I has no res judicata or collateral estoppel effect.

B. The Exercise of the Warrant of Attorney in the Note To Confess Judgment in DAP v. Ciotti I Did Not Exhaust the Warrant of Attorney in the Guaranty.

Ciotti urges that the Note and the Guaranty constituted one transaction and that, therefore, the Note and the Guaranty -- and of necessity the warrants that they contain -- merge. If the two warrants merge, the entry of the confessed judgment in DAP v. Ciotti I exhausted the merged warrant, precluding DAP from attempting to confess judgment against Ciotti here in DAP v. Ciotti II. But the law allows for the successive exercise of a confession of judgment clause in a note and a confession of judgment clause in a collateral guaranty of that note. Union Bank of Nanty-Glo v. Schnabel, 291 Pa. 228, 139 A. 862, 863 (1927).

This court recognizes that the entry of a judgment by confession exhausts the warrant of attorney and precludes a second confessed judgment by confession under the same warrant of attorney. Scott Factors, Inc. v. Hartley, 425 Pa. 290, 228 A.2d 887, 889 (1967). Thus, the confessed judgment in DAP v. Ciotti I would preclude a second confessed judgment on the Note in DAP v. Ciotti II. Id.[4] But the confessed judgment in DAP v. Ciotti II is not based on the warrant in the Note; it is based on the warrant in the Guaranty. Contrary to Ciotti's merger argument, the entry of a confessed judgment based upon a warrant of attorney contained in a note does not preclude the entry of a second confessed judgment based upon the warrant of attorney contained in a guaranty of the note. Union Bank, 139 A. at 863.

[4]Though one might read the confession of judgment clause in the Note as authorizing successive confessions of judgment without exhausting the warrant of attorney, such an effect of the clause would not be permissible. American Bowling Club v. Kanefsky, 370 Pa. 136, 87 A.2d 646, 647 (1952); Continental Bank v. Tuteur, 303 Pa.Super. 489, 450 A.2d 32, 35 (1982).

Like DAP v. Ciotti I and DAP v. Ciotti II, Union Bank involved successive suits on a note and a collateral guaranty. Id. at 864. The note contained a warrant of attorney to confess judgment against the maker and was signed only by the maker, a corporation. On the reverse side of the note was an assignment to the plaintiff Union Bank and a guaranty of payment. The guaranty was signed by the defendant guarantors and contained a warrant of attorney to confess judgment against the guarantors. When the maker defaulted on the note, the plaintiff entered a confessed judgment against the maker and the guarantors on the warrant contained in the note. The court struck off the judgment against the guarantors because the entry of judgment against the guarantors was beyond the warrant contained in the note. The plaintiff then entered a confessed judgment against the guarantors based on the warrant of attorney contained in the guaranty. The court denied the guarantors' petition to strike off the second judgment. The court held that the first confessed judgment involved only the warrant contained in the note, and that the warrant in the guaranty had been left unexecuted. Union Bank, 139 A. at 863.

Therefore, under Union Bank the warrants of attorney in a note and a guaranty do not merge. Id. The lender may exercise those warrants separately. Id. However, there are two potentially significant differences between Union Bank and DAP v. Ciotti II which call for discussion. Unlike Ciotti, the guarantors in Union Bank (1) were not liable on the note itself, and (2) were not subject to the confession of judgment clause in the note. Ciotti, as a partner, is principally liable on the Note itself, see Pa.R.C.P. 2132(b), and is, thus, subject to a confessed judgment on the Note.

These distinctions should not be ignored and could arguably provide bases for striking off the second confessed judgment against Ciotti. Warrants of attorney authorizing confession of judgment are unenforceable in a majority of jurisdictions. Further, although they are enforceable in Pennsylvania, they

must be strictly construed and exercised in strict accordance with their terms. Kline v. Marianne Germantown Corp., 438 Pa. 41, 263 A.2d 362, 364 (1970). Ciotti -- as a partner in the Partnership -- is jointly and severally liable[5] on the Note and is individually subject to the confession of judgment clause in the Note. Uniform Partnership Act, 15 Pa.C.S.A. §8321(c)(4) (a document containing a confession of judgment involving a partnership is valid if (1) signed by less than all of the partners if authorized by all partners, or (2) signed by all partners); Jamestown Company v. Conneaut Lake Dock & Dredge Co., 339 Pa. 26, 14 A.2d 325, 327-28 (1940) (holding that a partner is principally liable on a note signed by the partnership and is individually subject to a confession of judgment clause in the note provided that the signer of the note had express authority to bind the partner).[6] Having also guaranteed the Note, Ciotti effectively

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[5]This court notes that DAP used an incorrect caption in DAP v. Ciotti I. In suing on the Note, DAP had the option of suing the partnership as "Ciotti-Leff Partnership," in which case the judgment would have supported execution against partnership property only; or suing "Sebastian R. Ciotti T/A Ciotti-Leff Partnership," in which case judgment would have supported execution upon partnership property and Ciotti's individual property. Pa.R.C.P. 2128, 2132. DAP sued Ciotti as "Sebastian R. Ciotti" without naming the partnership. It is impossible to tell if this had any effect on Judge Dembe's order opening the judgment, but Ciotti did not raise the issue in his papers in that case. This court could find no precedent directing a result when the plaintiff enters confessed judgment against a partner in the partner's incorrect capacity. But it is submitted that even if that error were fatal, it would support striking off, rather than opening, the judgment, since the error appears on the face of the judgment. Since Ciotti never raised the issue, and Judge Dembe opened the judgment, the issue seems not to have arisen.

In this regard, it is noted that technical errors are generally not grounds for striking off or opening a judgment. In the context of confession of judgments, formal mistakes, such as where the right party is sued but under the wrong designation, "may be corrected by amendment where the cause of action is not changed, where the ends of justice require the allowance of such amendment and where the substantive rights of the defendant or of any third persons will not be prejudiced thereby". West Penn Sand & Gravel Co. v. Shippingport Sand Co., 367 Pa. 218, 80 A.2d 84, 86 (1951); Commonwealth v. Carlow, 687 A.2d 22, 25 (Pa.Cmwlth. 1996).

[6] It does not matter that the warrant in the Note authorizes confession of judgment against the "Borrower." The Note identifies the "Borrower" as Ciotti-Leff Partnership. The warrant does not explicitly authorize confession of judgment against the individual partners. Thus, even though

guaranteed his own debt.

In light of the Pennsylvania courts' antipathy toward confessed judgment clauses, this court could adopt a rule that the exercise of the warrant of attorney in a note against a principal obligor of the note exhausts the warrant of attorney in the obligor's separate guaranty of that note. First, this court would have to conclude that an obligor's guaranty of his own obligation is mere surplusage, and therefore a nullity.[7] Second, if the guaranty is a nullity, this court could hold that the warrant of attorney contained in the guaranty is also a nullity. Thus, there would be only one warrant, and DAP exhausted that warrant in DAP v. Ciotti I. This appears to be a novel issue. This court could find no federal or state case in Pennsylvania or appellate level state case in Delaware, Maryland or New Jersey which addresses this issue.[8]

Footnote 6 continued -- Ciotti is individually obligated as a partner, one might argue that the warrant must be rea judgment by confession against the partnership only, and not against the individual partners. Though this argument seems to follow the spirit of strict construction of confession of judgment clauses, see Kline v. Marianne Germantown Corp., 438 Pa. 41, 263 A.2d 362, 364 (1970), our Supreme Court has reversed the striking off of a confession of judgment on a note against the partners where the maker of the note was the partnership and the warrant of attorney authorized confession of judgment only against the "maker." Resolution Trust Corp. v. Copley Qu-Wayne Associates, 546 Pa. 98, 683 A.2d 269, 272 n. 4, 277 (1996).

[7] In one case, our Supreme Court granted a petition for allowance of appeal on this first issue, framed as:

> Whether a personal guaranty, signed by a general partner and pledged pursuant to a loan transaction regarding the partnership, is surplusage or a nullity, where the general partner who signed the guaranty is also a signatory to a note given by the partnership in connection with the loan transaction.

La Margate, Inc. v. Spitz, 548 Pa. 479; 698 A.2d 62 (1997), appeal dismissed, 705 A.2d 1300 (1998). The appeal was dismissed without opinion. There are no published trial court or Superior Court opinions in the case. Further, it is not clear whether the case involved a confessed judgment.

[8]Two relevant ALR articles, citing mostly Pennsylvania cases, do not address the issue of a partner guaranteeing a debt of the partnership. See, Enforceability of Warrant of Attorney to Confess

However, this court submits that there are strong reasons for not creating such a rule. First, Ciotti's guaranty is broader than the Note. The Note is a promise to repay a single loan. Ciotti's guaranty is a promise to repay the loan evidenced by the Note and any other loans that DAP should make to the Partnership. Of course, the court could tailor this rule so that the warrant in the Guaranty would be exhausted only as to the obligation based on the Note. The warrant would continue for other obligations. This aspect of the rule would be in line with a Superior Court holding that the entry of a confessed judgment on a severable portion of a debt -- e.g., an installment -- does not exhaust the warrant on remaining portion of the debt. B. Lipsitz Co. v. Walker, 361 Pa.Super. 238, 522 A.2d 562, 567, appeal granted, 515 Pa. 617, 531 A.2d 426 (1987).

Second, Union Bank directs that warrants of attorney contained in a note and in a guaranty of the note do not merge. There does not appear to be any precedent that makes an exception to this holding for a partner who guarantees his partnership's debt.

Third, a single person may be the guarantor of a note of which he is the maker. A guarantor has suretyship status. Philadelphia Bond & Mortgage Co. v. Highland Crest Homes, 235 Pa.Super. 252, 340 A.2d 476, 479 (1975); Restatement of Surety 3d § 1, cmt. c. See also 13 Pa.C.S.A. § 3419, cmt 3. A person may be a surety to an instrument even if he signed the instrument as co-maker agreeing to be jointly and severally liable. First Fed. Savings & Loan Ass'n of Pittston v. Reggie, 376

Footnote 8 continued -- Judgment Against Assignee, Guarantor, or Other Party Obligating Himself for Performance of Primary Contract, 5 ALR3d 426; Successive Judgments By Confession on Cognovit Note or Similar Instrument, 80 ALR2d 1380.

Pa.Super. 346, 546 A.2d 62, 65 (1988); Philadelphia Bond & Mortgage Co., 340 A.2d at 480.[9] If the law recognizes two separate enforceable obligations by one person for the one debt, then the lender ought to be entitled to exercise the otherwise proper warrants of attorney contained in the documents evidencing those obligations.

In summary then, this court holds that the warrants of attorney in the Note and in the Guaranty do not merge. Accordingly, the confessed judgment on the Note in DAP v. Ciotti I does not act to preclude the confessed judgment on the Guaranty here.

C. Excessiveness of the Attorney's Commissions Does Not Provide a Basis for Striking off the Confessed Judgment.

Ciotti contends that excessive charges for the attorney's commission warrant striking off the judgment. The confession of judgment clause in the Guaranty authorizes "an attorney's commission of ten percent (10%) of the unpaid principal balance and accrued interest for collection . . . ." Guaranty at page 2. It is clear from the record that DAP has not calculated the attorney's fees correctly. The confessed judgment is for principal and interest totaling $166,922.54. In the warrant of attorney, Ciotti clearly authorizes an attorney's commission of 10% of principal and interest, or $16,692.25. Counsel for DAP charged an attorney's commission of $19,734.65. Therefore, on its face the commission is excessive.[10]

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[9]The treatment of this issue in First Fed. Savings & Loan Ass'n and Philadelphia Bond & Mortgage Co. is brief. But a rule that a person may be both a maker and a surety of a note seems to be determinative of the issue granted allocatur in La Margate. See footnote 7, supra.

[10]In support of its argument that the higher commission is appropriate, DAP submits affidavits of its counsel, Lamm, and its Vice President, Hepburn. Since these affidavits were not part of the record that DAP filed in the confessed judgment, the court may not consider them in the determining whether to strike off the judgment. Copley Qu-Wayne, 683 A.2d at 273.

Although the commission is excessive, this court need not strike off the judgment on this ground. When judgment is confessed for an item clearly within the scope of the warrant, but excessive in amount, the court should not strike off the judgment. Dollar Bank v. Northwood Cheese Co., 431 Pa.Super. 541, 637 A.2d 309, 314 (1994). Only if the amount is "grossly excessive" should the court strike off the judgment. Id.

If DAP had included taxes, late charges, or insurance in the confessed judgment -- items clearly not within the warrant of attorney -- the court would be required to strike off the judgment. PNC Bank v. Bolus, 440 Pa.Super. 372, 655 A.2d 997, 998, 1000 (1995). However, the attorney's commission is an item clearly within the scope of the warrant of attorney. Since the court can determine the amount of attorney's commission from the record, the court may simply modify the judgment to include the proper commission without striking off or opening the judgment. Dollar Bank, 637 A.2d at 314.

This court notes that DAP is not necessarily entitled to the full 10% commission. Rather, the court may exercise its equitable powers to reduce the commission to less than 10%. PNC Bank, 655 A.2d at 1000. In PNC Bank, the bank entered a confessed judgment against the debtor that included a 10% attorney's commission of more than $70,000. The trial court denied the petition to strike off the confessed judgment, but "exercised its inherent equitable power to reduce the attorney's fee" to $10,000. PNC Bank, 655 A.2d at 1000. Though our Superior Court reversed the trial court on other grounds, the court stated:

> [W]e express our approval of this aspect the trial court's decision. To charge more than $70,000 as an attorney's fee for what in most cases amounts to filing a single document with the prothonotary is blatantly unreasonable. We do not specifically endorse the trial court's chosen amount as appropriate, nor offer guidelines for this or future cases, since the issue is not directly before us. We would merely encourage trial courts to

monitor the amounts charged in such circumstances, and to reduce clearly excessive fees.

PNC Bank, 655 A.2d at 1000 (citations and footnotes omitted).

Because our Superior Court has expressly encouraged trial courts to monitor attorneys' commissions in confessed judgments, the court could exercise its equitable powers to reduce the attorney's fees below $16,692.25, if the court finds that $16,692.25 is clearly excessive or blatantly unreasonable. PNC Bank, 655 A.2d at 1000; Dollar Bank, 637 A.2d at 314. Without a chance to litigate the issue of attorney's commissions the debtor has scant opportunity to question the amount assessed. "Confession of judgment is a powerful tool, because it effectively prevents the debtor from having his day in court. Such power must be exercised fairly and with exacting precision." PNC Bank, 655 A.2d at 1000. DAP's attempt to obtain additional fees beyond the warrant arguably constitutes an abuse of this powerful tool. Strict scrutiny of the fee resulting in a reduction of the fee could discourage other attorneys from abusing the power of confessed judgments to assess excessive attorney's fees. As noted, if the court finds that $19,734.65 is grossly excessive, the court can strike off the judgment. Dollar Bank, 637 A.2d at 314.

In Dollar Bank, our Superior Court held that a 15% commission was not excessive, but the opinion did not state the amount of the debt or the total commission charged. Dollar Bank, 637 A.2d at 314. The court based its determination on the express authorization in the warrant of attorney for a 15% commission, and the absence of a specific argument by the petitioner why the fee was excessive. Id. Here, Ciotti argues only that a fee in excess of 10% is excessive.

This court submits that based on this record as a whole, a 10% attorney commission is not excessive and so orders attorney's fees in the amount of $16,692.25.

D. The Confessed Judgment Was for the Correct Principal Balance Due.

Ciotti also maintains that the confessed judgment was for an unliquidated amount and that, therefore, the judgment is fatally defective on its face. This argument is without merit. In DAP v. Ciotti I, DAP alleged that the principal balance due on the Note was $102,300. In DAP v. Ciotti II, DAP alleges a principal balance due of $94,800. Ciotti states that this difference shows that the debt is unliquidated and, without citing legal support, argues that a confessed judgment may not be entered on an unliquidated amount.

Because Ciotti asks the court to look outside of the record of the DAP v. Ciotti II confessed judgment, the court should consider this matter on a petition to open, rather than strike off the judgment. Copley Qu-Wayne, 683 A.2d at 273. Therefore, this court may consider the affidavits of Lamm and Hepburn. These affidavits show that the amount of principal is not "unliquidated." After DAP filed DAP v. Ciotti I, Ciotti's partner, Leff, paid $7500 on the loan. DAP applied this payment to the principal, reducing the principal balance due to $94,800.

Thus, the confessed judgment was for the correct principal balance.

E. Because the Interest Rate Calculation is Not Beyond the Warranty of Attorney, It Is Not Grounds for Striking Off the Confessed Judgment.

Ciotti argues that the court should strike off the judgment because the interest is incorrect. Again, Ciotti asks the court to consider the papers in DAP v. Ciotti I, which are outside of the record in the confessed judgment in this case. Therefore, this court should consider this argument on a petition to open basis, and consider the affidavit of Hepburn. Copley Qu-Wayne, 683 A.2d at 273. Ciotti argues that this discrepancy shows that DAP is uncertain of how much interest to charge.

In DAP v. Ciotti I, DAP calculated interest at 9.75% -- the Wall Street Journal Prime Rate plus 1.5%. In DAP v. Ciotti II, DAP calculated interest through May 1, 1997 at 9.75%. Hepburn aff. ¶4b and c. After May 1, 1997, DAP calculated interest at the 24% default rate. Hepburn aff. ¶4d. There is no error in the applied interest rate. Although the original default date was March 1, 1996, DAP did not apply the default interest rate until fourteen months later. Thus DAP charged less interest than it could have from March 1, 1996 to May 1, 1997. If DAP may charge 24% interest, certainly DAP may charge less than 24% interest.

In sum, the interest rate applied is appropriate.

F. There Is No Uncertainty In the Principal Amount Due That Would Provide Grounds for Striking Off the Confessed Judgment.

Ciotti argues that the differences in principal amount in DAP v. Ciotti I and DAP v. Ciotti II show that DAP is uncertain of the amount owed, and that this uncertainty is grounds for striking off the judgment. As discussed above, there is no uncertainty in the principal balance due. The figures differ in the two actions because Leff made a $7500 payment to DAP.

G. The Partnership Is Not an Indispensable Party.

Ciotti argues that the Partnership is an indispensable party to this action and that the court should strike off the confessed judgment because DAP failed to name the Partnership as a defendant. Ciotti cites a single case in support of this argument -- a case that deals neither with confessions of judgment nor partnerships. See Columbia Gas Transmission Corp. v. Diamond Fuel Co., 464 Pa. 377, 346 A.2d 788, 789 (1975) (holding that fee simple owner of servient tenement is indispensable party in suit over ownership of an easement through the servient tenement). The argument is without merit.

The partnership is not a party to the Guaranty, but is the obligor on the underlying debt. In an action confessing judgment against a guarantor based on a guaranty of an obligation, the plaintiff need not join the principal obligor. See Germantown Savings Bank v. Talacki, 441 Pa.Super. 513, 657 A.2d 1285 (1995). In Germantown Savings Bank, the plaintiff Bank loaned money to a limited partnership. There were four limited partners, and each personally guaranteed the debts of the partnership. When the partnership defaulted on the loan, the Bank entered a confessed judgment against two of the limited partners based on the warrants of attorney contained in their guaranties. The Bank did not sue the partnership or the other partners on the underlying obligation, or join them in the suit on the guaranties. Although the Superior Court's Opinion does not specifically address the propriety of not joining the partnership as a defendant, it implies that joinder of the partnership is not required. [11]

Similarly, Ciotti contends that the judgment should be opened because DAP did not join Leff as a party. Because Leff was not a party to the Guaranty, he is not an indispensable party.

H. The Enforceability of the Warrant of Attorney in the Note Is Not at Issue.

Ciotti argues that if the Note and Guaranty do not merge, the warrant is unenforceable against Ciotti individually because he signed the Note in a representative capacity. This argument fails for two reasons.

[11]Even were the Partnership the guarantor, DAP would have had the option of suing either Ciotti alone, Leff alone, Ciotti and Leff together, or the Partnership alone. Pa.R.C.P. 2128.

First, this case is based on the warrant of attorney contained in the Guaranty rather than the Note. Though Ciotti signed the Note in his representative capacity, he signed the Guaranty as an individual.[12]

Second, even had Ciotti signed in his representative capacity, DAP would be entitled to sue him individually. Jamestown Banking Co. v. Conneaut Lake Dock & Dredge Co., 339 Pa. 26, 14 A.2d 325, 327-28 (1940). When a partnership duly authorizes confession of judgment against itself, the plaintiff may confess judgment against the partnership and individually against all partners. Id. at 328 (holding that instrument signed by two members of partnership on behalf of the partnership is sufficient to enable judgment by confession to be entered against each of the partners and such judgment is regular on its face even though subject to being opened by partner who did not authorize the confession of judgment). This rule arises from the joint and several liability of a general partner for the partnership's debt.

The judgment may be subject to opening -- rather than striking off -- by a partner who did not authorize the confession of judgment. Jamestown Banking Co., 14 A.2d at 328. But Ciotti does not dispute that he signed the Note. Therefore, Ciotti expressly authorized confession of judgment by signing the Note, and there is no issue of lack of authority.

Ciotti also contends that the warrant in the Guaranty is obscure. He argues that the court should strike off the judgment because Ciotti's signature in the Guaranty is on a different page from the warrant of attorney. In support of this argument, Ciotti cites L.B. Foster Co. v. Tri-W Construction Co.,

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[12] If Ciotti were not individually liable on the Note, his best argument -- merger/exhaustion -- would fail. The situation would then be identical to Union Bank, where the guarantors were not liable on the note.

409 Pa. 318, 186 A.2d 18 (1962) and Perry Square Realty v. Trame, Inc., 693 A.2d 1320 (Pa.Super. 1997). These cases illustrate the rule that an agreement may not incorporate a confession of judgment clause by reference, but instead must independently contain the judgment clause. Since the Guaranty contains its own warrant of attorney, Ciotti's argument must fail.

In L.B. Foster Co., the defendant signed two equipment rental agreements each consisting of a single sheet of paper. L.B. Foster Co., 186 A.2d at 19. The face sides of the agreements contained, among other things, descriptions of the equipment, an agreement to be bound by the "Terms & Conditions" contained on the reverse side and the defendant's signature. One of the terms & conditions on the reverse side of each agreement was a warrant of attorney authorizing confession of judgment. There was no signature on the reverse side. Relying on Frantz Tractor Co. v. Wyoming Valley Nursery, 384 Pa. 213, 120 A.2d 303 (1956) and Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A.2d 234 (1953), the court held that the trial court had properly stricken off the confessed judgment because the signatures did not bear a direct relation to the warrants. L.B. Foster Co., 186 A.2d at 19-20.

Its reliance on Frantz Tractor Co. demonstrates that the Foster court considered that a warranty of attorney contained in boilerplate language following the defendant's signature is outside of the agreement. In Frantz Tractor Co., 120 A.2d 304-305, our Supreme Court held that a defendant who signed the front side of an agreement, where the front page contained an agreement to bound by unspecified "terms and conditions" contained on the unsigned reverse side, was not bound by a warrant of attorney contained on the reverse side. See also Cutler Corp., 97 A.2d at 236 (holding that a reference on face pages of a contract to conditions on reverse side did not incorporate the warrant of attorney for confession of judgment contained on the reverse side).

In Perry Square Realty v. Trame, Inc., 693 A.2d 1320, 1321 (Pa.Super. 1997), the tenant signed a lease agreement containing a warrant of attorney authorizing the plaintiff landlord to confess judgment against the tenant. The defendant guarantors signed a guaranty on the same page as, and directly underneath, the tenant's signature. The court held that the guarantors were not subject to the confession of judgment clause. Id. at 1322-1323. Though the court discussed the length of the agreement (17 pages) and discussed the fact that the warrant of attorney and the guarantor's signatures were contained on different pages, the court's holding simply followed an established line of cases holding that a guarantor or indemnitor is not bound by a confession of judgment clause contained in the underlying obligation. See Solebury National Bank of New Hope v. Cairns, 252 Pa.Super. 45, 380 A.2d 1273, 1277 (1977) (striking off a confessed judgment against a corporate president where the confession of judgment clause was contained in a corporate note, and the president's individual guarantee of the note was contained on the last page of the note below the signature line); Caplan v. Seidman, 203 Pa.Super. 170, 199 A.2d 483, 485 (1964) (holding that a confessed judgment was not enforceable against the signers of an indemnity agreement where the indemnity agreement appeared below the primary borrower's signature on a note and only the note contained the confession of judgment clause). (Compare Horner Sales Corp. v. Motor Sport, Inc., 377 Pa. 392, 105 A.2d 285 (1954), where our Supreme Court held that the confession of judgment against a maker and an indorser of a note was proper where the note and the indorsement each contained a confession of judgment clause).

L.B. Foster Co., Frantz Tractor Co., Cutler Corp., Perry Square Realty, Solebury National Bank, Caplan and Horner Sales Corp. illustrate the general rule that when the agreement at issue incorporates by reference material contained outside the agreement -- including collateral agreements, terms

& conditions or addenda -- the agreement does not incorporate a warrant of attorney contained within that outside material. Since Ciotti's Guaranty does not incorporate a warrant of attorney by reference to outside material, but rather contains an internal confession of judgment clause, the non-incorporation rule does not apply. Horner, 105 A.2d at 285.[13]

I. Any Question As to the Existence of the Cited Interest Index Does Not Warrant Opening the Judgment.

As a ground for opening the judgment, Ciotti alleges that the interest index contained in the Note does not exist, rendering the Note unenforceable. Ciotti cites no authority for his proposition. In support of the allegation that the index does not exist, Ciotti submits an affidavit of Eduardo Texidor -- an employee of Ciotti's counsel. Texidor avers in his affidavit that he spoke with a Dow Jones employee who told him that the index does not exist. That part of the affidavit paraphrasing the statement of the Dow Jones employee is hearsay and inadmissible as evidence.

Even were there a defect in the calculation of the interest, that defect would not provide a basis for opening the judgment because interest is clearly within the scope of the warrant of attorney. Colony Federal Savings & Loan Ass'n. v. Beaver Valley Engineering Supplies Co., 238 Pa.Super. 540, 361 A.2d 343, 347 (1976). If the interest is excessive, the court should modify the judgment and enter judgment for the proper amount. Id. at 347. See also Dollar Bank, 637 A.2d at 309. Only if the interest

[13]Perry Square Realty illustrates another rule that does not help Ciotti here: the warrant of attorney must authorize confession of judgment against the person against whom the plaintiff enters the confessed judgment. Because the warrant of attorney in the agreement in Perry Square Realty authorized confession of judgment against the tenant and not the guarantors, the confession of judgment against the guarantors was outside the scope of the warrant. Perry, 693 A.2d at 1322. Here the warrant of attorney in the Guaranty authorizes confession of judgment against Ciotti, and confession of judgment against him is within the scope of the warrant.

is "grossly excessive" should the court strike (rather than open) the judgment. Id. Ciotti does not allege that the interest charged was excessive, let alone grossly excessive.

Conclusion

In summary, then, there is no reason to strike off the judgment. Furthermore, petitioner has not alleged a meritorious defense and, as required, presented sufficient clear, direct, precise and credible evidence of that defense to require submission of the issue to a jury.

For the reasons stated, this court will enter a contemporaneous Order Denying the Petition to Strike/Open the Confessed Judgment. The Order will, however, reduce the attorney's commission to $16,692.25.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DAP FINANCIAL MANAGEMENT COMPANY	: JANUARY TERM, 2000
v.	: No. 1566
SEBASTIAN R. CIOTTI	: Motion Control No. 020625

O R D E R

AND NOW, this 16th day of May 2000, upon consideration of the defendant's Petition to Strike Off or Open Confessed Judgment and plaintiff's opposition to it, the respective memoranda of law, all other matters of record, and after oral argument and based upon the contemporaneous Memorandum Opinion in support of that Order, it is **ORDERED** that the Petition to Strike Off or Open Confessed Judgment is **Denied.**

It is further **ORDERED** that the Attorney's commission is reduced to the amount of $16,692.25.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.