

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

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MOUNTBATTEN SURETY CO., INC.,	:	May Term, 2000
Plaintiff	:	
	:	No. 1967
v.	:	
	:	Commerce Program
USA CON-FORCE WATERPROOFING CO., et al.	:	
Defendants	:	Control No. 63-00061463

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Herron, J.

**OPINION**

Defendants U.S.A. Con-Force Waterproofing Co. (“Con-Force”), Mohammad R. Khan (“Khan”) and Amina Perbeen (“Perbeen”) have filed a Petition to Open Confession of Judgment. For the reasons set forth in this Opinion, the Court has issued a contemporaneous order granting the Petition.

**FACTS**

On September 22, 1997, Defendants Con-Force, Khan and Perbeen executed a General Indemnity Agreement (“Indemnity Agreement”) in favor of Mountbatten Surety Company, Inc. (“Mountbatten”). Under the Indemnity Agreement, the Defendants agreed to indemnify Mountbatten against liabilities arising from executing any bond in favor of the Defendants or from the failure of the Defendants to comply with the terms of the Indemnity Agreement. The Indemnity Agreement also includes a confession of judgment provision allowing Mountbatten to confess judgment against the Defendants.

Mountbatten executed and delivered a performance and payment bond (“Bond”) on February 12, 1998 on behalf of Con-Force in connection with a construction contract (“Contract”) between Con-Force and the New York City School Construction Authority (“Authority”). However, on December 11, 1998, the agent for the Authority notified Con-Force that the Contract was being terminated because of Con-Force’s failure to perform the work required under the Contract. As a result of Con-Force’s failure, Mountbatten paid bond claims (“Bond Claims”) totaling \$1,260,759.00.

On April 18, 2000, Mountbatten sent a letter to the Defendants demanding that they pay Mountbatten \$1,322,000.00<sup>1</sup> as indemnification, as required under the Indemnity Agreement. Mountbatten has yet to receive any payments from the Defendants.

On May 12, Mountbatten filed a Complaint in Confession of Judgment (“Complaint”) against the Defendants in the amount of \$1,260,759.00, plus attorneys’ fees and costs. Because the costs of collecting the amount may increase, Mountbatten “reserves and preserves its right to confess judgment for any additional losses, expenses and reserves which are incurred under the Bond.”

The Defendants filed a Petition to Open Confession of Judgment (“Petition”) on June 26. The Petition asserts that Mountbatten is not entitled to indemnification because the Defendants were never notified of the claims settled by Mountbatten. Mountbatten filed a Response on July 27.

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<sup>1</sup> Mountbatten asserts that, in addition to the bond expenses, the Indemnity Agreement permits it to recover for the cost of any suit, including attorneys’ fees.

## DISCUSSION

A court is required to open judgment when the petitioner acts promptly,<sup>2</sup> alleges a meritorious defense and presents evidence that is sufficient to require submission of the issue to a jury. Dollar Bank v. Northwood Cheese Co., Inc., 431 Pa. Super. 541, 546, 637 A.2d 309, 311 (1994). While the petitioner's meritorious defense evidence must be "clear, direct, precise and believable," Germantown Sav. Bank v. Talacki, 441 Pa. Super. 513, 520, 657 A.2d 1285, 1289 (1995), the Court is to treat the matter as a motion by the responding party for a directed verdict, including "viewing all the evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense while rejecting adverse allegations of the party obtaining the judgment." Dollar Bank, 431 Pa. Super. at 547, 637 A.2d at 311. In reviewing the petitioner's evidence, a court is permitted to examine matters other than those filed by the party in favor of whom the warrant has been given, including testimony, depositions, admission and other evidence. Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 546 Pa. 98, 106, 683 A.2d 269, 273 (1996).

Con-Force claims that Mountbatten never notified the Defendants, as required by Paragraph 10 of the Indemnity Agreement, before paying the Bond Claims. According to Paragraph 10, Mountbatten has the right to decide whether any claim against either Mountbatten or the Defendants is to be settled, with Mountbatten's decision being "final and binding upon the [Defendants], unless the [Defendants] shall request [Mountbatten] to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall immediately deposit with [Mountbatten] cash or collateral security

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<sup>2</sup> Because the Response does not raise the issue of the Defendants' promptness, the issue is not discussed in this Opinion.

...” Because Mountbatten paid the Bond Claims without notifying the Defendants, they did not have the opportunity to defend against them if they so chose.<sup>3</sup>

In response, Mountbatten claims that the Defendants were aware of the Bond Claims, Response at ¶ 8, although no basis is given for this assertion and Mountbatten does not assert that the Defendants were aware of any plans for settlement. In spite of Mountbatten’s claim, Pennsylvania law requires that the Court review a petition to open in the light most favorable to the petitioner. Dollar Bank, 431 Pa. Super. at 547, 637 A.2d at 311. As a result, for the purposes of the Petition, the Court must conclude that Mountbatten gave the Defendants no notice of settling the Bond Claims.

In essence, the Defendants’s defense is that, (1) Mountbatten had an obligation to notify them of any settlement and (2) if they had received notice of the Bond Claims, they could have litigated any disputes and avoided responsibility for the claims now asserted by Mountbatten. Assuming that Mountbatten did not notify the Defendants of any settlements, the Defendants’ defense is meritorious: the fact that the Defendants had an option to litigate the Bond Claims implies that Mountbatten had an obligation to notify the Defendants of any claims against them. In addition, while the Defendants would have had to post security with Mountbatten, notification would have enabled the Defendants to defend against the Bond Claims and possibly to avoid liabilities of more than \$1 million.

The Petition also includes adequate evidence of the Defendants’ meritorious defense to open judgment: the Indemnity Agreement, including Paragraph 10, is attached to the Petition, and the Petition alleges that Mountbatten failed to comply with its provisions.

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<sup>3</sup> If the details included in the Petition are any indication, the Defendants have a substantial defense to offer against the Bond Claims.

**CONCLUSION**

Because the Petition satisfies all the requirements, the Court has issued an order granting the Petition and opening the judgment.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: August 9, 2000

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
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Defendants	:	Control No. 63-00061463

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ORDER

AND NOW, to wit, this 9th day of August, 2000, upon consideration of Defendants U.S.A. Con-Force Waterproofing Co.'s, Mohammad R. Khan's and Amina Perbeen's Petition to Open Judgment and any responses thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Petition is GRANTED.

BY THE COURT:

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JOHN W. HERRON, J.