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

THE MOUNTBATTEN SURETY COMPANY, INC.	:	October Term, 2001
Plaintiff,	:	
v.	:	No. 3341
LANDMARK CONSTRUCTION CORP.,	:	
PI CONSTRUCTION CORP., DOUG POURIER,	:	Commerce Program
WILLIAM CLARY, and KATHLEEN CLARY,	:	
Defendants.	:	Control No. 111357

OPINION

Defendants Landmark Construction Corp., PI Construction Corp., Doug Pourier, William Clary and Kathleen Clary ("Defendants") filed this Petition to Strike or Open Confessed Judgment to the Complaint in Confessed Judgment of The Mountbatten Surety Company, Inc. ("Mountbatten"). For the reasons discussed below, the petition to strike is denied in its entirety. However, the petition to open is granted in part and denied in part.

BACKGROUND

This case arises from Mountbatten's execution of performance and payment bonds on behalf of Defendants after they allegedly failed to complete work on certain construction contracts. Pursuant to the General Indemnity Agreement ("the Agreement") executed prior to the issuance of these bonds, Defendants agreed to indemnify Mountbatten against inter alia, liability, losses, and other costs arising from the payment of these bonds. Further, the Agreement provided Mountbatten with the power to confess judgment against Defendants until all debts owed to Mountbatten had been paid in full.

On August 15, 2001, Mountbatten filed a Complaint in Confession of Judgment against

Defendants in the amount of $379,744.00 for loss reserve under the bonds as of August 3, 2001. This first complaint was later withdrawn and discontinued on October 30, 2001. On October 23, 2001, Mountbatten confessed judgment against Defendants in the amount of $3,105,000 for actual losses and expenses under the bonds, for open bond claims and loss reserve under the bonds, and for costs and attorneys fees as of October 11, 2001. As of this date, Plaintiff incurred actual losses and expenses in the sum of $2,000,000, approximately $5,000 in legal fees and an additional $1,100,000 in open bond claims. On November 20, 2001, Defendants filed this Petition to Strike or Open Confessed Judgment and Stay Execution.

DISCUSSION

I. The Defendants' Petition to Strike the Confessed Judgment is Denied

Rule 2959 of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] provides that all grounds for relief whether to strike or open the judgment must be stated in a single petition. Our Supreme Court has held that "a petition to strike and a petition to open are two distinct forms of relief, each with separate remedies." Resolution Trust Corp. v. Copely Qu-Wayne Associates, 546 Pa. 98, 683 A.2d 269, 273 (1996). Accordingly, there are two different standards to apply to each form of relief.

A petition to strike off a confessed judgement is a common law proceeding and acts as a demurrer to the record. Resolution Trust, 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. Id. The court may not consider matters outside of the 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. Furthermore, cases where a challenge to the accuracy of the amounts allegedly due under an instrument should be resolved by a petition to open, "unless it is evident from the face of the instrument that the amount is grossly excessive or not authorized by the warrant to confess judgement." Germantown Savings Bank v. Talacki, 441 Pa.Super. 513, 525, 657 A.2d 1285, 1291 (1995).

Here, Defendants first argue that a fatal defect appears on the record in that Mountbatten's initial exercise of the confessed judgment provision of the Agreement on August 15, 2001, exhausts the warrant and precludes Mountbatten from confessing judgment a second time. This court disagrees.

Pa.R.C.P. 2953(a) addresses the issue of successive confessed judgments and states that "[w]here an instrument authorizes judgments to be confessed from time to time for separate sums as or after they become due, successive actions may be commenced and judgments entered for such sums." It is correct that courts in Pennsylvania have held that once a confessed judgment has been entered under a warrant of attorney, the warrant is exhausted. Scott Factors, Inc. v. Hartley, 228 A.2d 887, 889 (1967). Nevertheless, it is also correct that a warrant of attorney may be used more than once if parts of a debt are still outstanding and have yet to be confessed. B. Lipsitz Co. v. Walker, 522 A.2d 562, 566 (Pa. Super.1987), appeal granted 531 A.2d 426 (1987) ("severable portions of a debt can be sought to be collected with the use of a single warrant of attorney as each become due; provided, of course, the instrument is not used to collect the same portion of the debt already confessed.") (emphasis in original); but see Continental Bank v. Tuteur, 450 A.2d 32, 36 (Pa. Super.1982) (lender could not confess judgment twice for the same debt in two different counties even though loan agreement specifically authorized repeated confessions of judgment).

Here, Mountbatten has not exhausted the warrant of attorney provided for in the Agreement. To begin with, the first entry of confessed judgment of August 15, 2001, was voluntarily discontinued by Mountbatten on October 29, 2001. Further, the amount entered in the first confession of judgment was for $379,744 and was entered solely for loss reserved under the bonds as of August 3, 2001. Pl's Mem. of Law at 19 (citation omitted). The present confessed judgment was entered in the amount of $3,105,000. Unlike the earlier judgment, this judgment was entered based on a separate and distinct debt for actual losses paid by Mountbatten after September 7, 2001, expenses under the bonds, loss reserve under the bonds, as well as costs associated with attorney's fees. Id. (referring to Exh. 2). Since these amounts constitute portions of Defendants' debts still outstanding, and are different from the first entry of confessed judgment, Mountbatten will not have exhausted its warrant of attorney until these debts are paid in full. Thus, the petition to strike based on this alleged fatal defect is denied.

The petition to strike is also denied because the record of the confessed judgment, as filed by Mountbatten, does not reflect any irregularities on its face. To begin with, pursuant to Pa.R.C.P. 2951-2957, Mountbatten has satisfactorily followed the technical filing and content requirements for confessed judgments. In addition to the Complaint, Mountbatten has properly attached copies of the Bonds, the Agreement, and all requisite Affidavits. Complaint, Exh. A, B. There is no apparent irregularity which appears on the record.

Further, although Defendants argue that the amount of $3,105,000 is grossly excessive or not authorized by the warrant, it is not evident from the face of the record of the confessed judgment. The Agreement attached to Mountbatten's Complaint reads that Defendants agreed, inter alia, to:

5. ...Indemnify and save harmless Surety... from and against any and all liability, loss,

> cost, damage and expense of whatsoever kind or nature (including, but not limited to, interest, court costs and counsel, attorneys, consulting, accounting and other professional and trade fees...)
>
> 6. If Surety or any reinsurer shall establish a reserve to cover any liability, claim asserted, suit, award or a judgment in connection with any Bond, or any loss, cost, expense or fee in connection therewith, the Indemnitors, immediately upon demand (the "Collateral Demand"), whether or not Surety shall have made any payment therefor and whether or not the collateral demanded may be in addition to other collateral security previously provided to Surety, shall provide Surety funds and/or other collateral security, which Surety in its sole discretion deems adequate... If the Indemnitors fail to provide Surety with sufficient collateral after a Collateral Demand, they shall be in default of this Agreement... Surety may obtain a judgment against each or any of the Indemnitors for the amount of the Collateral Demand plus the cost of obtaining the judgment, including its attorneys fees...

Complaint at Exh. A. The $3,105,000 represents the sum of $2 million in actual losses and expenses under the bonds, $1.1 million in loss reserve under the bonds, and $5,000 in costs and attorneys fees accrued as of October 11, 2001. Complaint ¶7, Exh. A, B. Since Mountbatten is expressly permitted to confess judgment for these charges, the confessed judgment is neither grossly excessive nor beyond the scope of the warrant. Therefore, Defendants' petition to strike the judgment is denied since there is no defect or irregularity on the face of the documents and the amounts do not appear clearly or grossly excessive.

II. The Defendants' Petition to Open the Judgment by Confession is Granted In Part

Pa.R.C.P. 2959 governs a petition to open a confessed judgment as well. Resolution Trust, 546 Pa. 98, 683 A. 2d. 269, 273 (1996). The court should open a confessed judgment if the petitioner acts promptly in filing the petition, alleges a meritorious defense and presents sufficient evidence of that defense to raise a jury question. 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 A2.d 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. Resolution Trust, 683 A.2d at 273. Moreover, "the petitioner need not produce evidence proving that if the judgment is opened, the petitioner will prevail." Liazis v. Kosta, Inc., 421 Pa.Super. 502, 618 A.2d 450, 453 (1992), app. denied, 536 Pa. 630, 637 A.2d 290 (1993). Instead, the court must view this evidence in the light most favorable to the defendant, accepting as true the petitioner's evidence and the reasonable inferences that flow from that evidence, while rejecting adverse allegations of the plaintiff. Dollar Bank v. Northwood Cheese Co., Inc., 431 Pa.Super. 541, 637 A.2d 309, 311 (1994). Here, Defendants acted promptly in filing this petition[1] and have alleged several defenses, which will be addressed in turn.

Defendants' first defense is that the Agreement is void because it was secured through the fraud of Mountbatten's agent. However, "to open a judgment because of fraud, the evidence must be more than conflicting. The proof of fraud must be clear and convincing" and "must be established by the preponderance of the evidence." Bucks County Bank & Trust Company v. DeGroot, 313 A.2d 357, 358 (Pa. Super. 1973) (citations omitted); Macy v. Oswald, 182 A.2d 94, 97 (Pa. Super. 1962). Furthermore, "[a]verments of fraud... shall be averred with particularity." Pa.R.C.P. 1019. Here, Defendants have failed to meet their burden of showing fraud. Defendants merely allege that Richard Barrick, an agent for Mountbatten, "falsely represented to Petitioning Defendants that they would receive more favorable treatment from plaintiff." Def's Mem. of Law at 9. Further, according to the

[1] Defendants filed this petition on November 20, 2001, which is within 30 days of service of the confessed judgment upon Defendants.

Affidavit of William Clark, the President of PI Construction Corp., "[a]s it turns out, the terms of the surety bonds and the indemnity agreement were in fact more onerous." Id. at Exh. A. However, these statements are anything but clear and convincing evidence of fraud. Not only do Defendants not describe with particularity what favorable terms they were told they would receive, but they also fail to explain with particularity why or even how the terms of the bonds and the Agreement were onerous. Therefore, the petition to open based on the defense of fraud is denied.

Defendants' second defense is that the judgment should be opened because the collateral security provision of the Agreement is a penalty and Mountbatten's request for the loss reserve sum of $1.1million constitutes unliquidated damages and should, therefore, be deemed void by this court. In support of this defense, Defendants direct this court to several cases which have held that clauses to a contract will not be enforced if they are deemed to be penalties. Calabro v. Dep't of Ageing, 689 A.2d 347, 350 (Pa. Commw. 1997) ("[c]lauses setting forth liquidated damages are enforced where they are reasonable, and fair attempts to fix just compensation for anticipated loss caused by breach of contracts. If a clause purporting to set forth damages does not actually do so, but rather constitutes a penalty, it is unenforceable.") (citations omitted); MidAtlantic Commercial Leasing Co. v. Tender Loving Care, 1990 WL 72861, at *3 (E.D. Pa 1990) ("[t]he contractually mandated amount is a penalty if the provision 'calls for payment of a sum on non-performance or on default that is disproportionate to the value of the performance promised or the injury that has actually occurred...'") (citations omitted); Holt's Cigar Co. v. 222 Liberty Associates, 591 A.2d 743, 747 (Pa. Super. 1991) (holding that when a contract allows for compensation for a breach of its terms, the recovery is limited to the loss actually sustained).

Here, Defendants present sufficient evidence to raise a jury question. Defendants argue that the collateral demand, the $1.1 million of the confessed judgment, is arbitrary and is for "unliquidated damages which have not been incurred and may never be incurred by [Mountbatten]." Def's Mem. of Law at 11. Further, Defendants assert that "[t]he collateral demand provision further does not require that the reserves set by plaintiff are reasonable or bear any relationship whatsoever to outstanding claims on the bond." Id. Since Mountbatten has yet to suffer actual loss as it has yet to pay out on claims relating to the bonds, Defendants contend that the $1.1 million is disproportionate to the actual injury and thus, serves as a penalty. Id. Viewing this evidence in the light most favorable to Defendants, this court concludes that Defendants have provided sufficient evidence of this defense such that the question of whether or not Mountbatten suffered an actual loss of $1.1 million can be considered by a jury. Given the equitable nature of these proceedings, therefore, the petition to open is granted as it relates to the alleged $1.1 million in open bond claims and reserves.

Defendants' remaining defense is that $3,105,000, the entire amount of the confessed judgment, is excessive and should be opened. Specifically, Defendants argue that they are unable to "segregate the judgment among open claims, attorneys fees, costs and other losses Mountbatten claims it may incur." Def's Mem. of Law at 13. However, Defendants do not meet their burden of providing this court with sufficient evidence to support this defense. Besides the argument related to the $1.1 million collateral demanded, nowhere in their brief do the Defendants provide evidence of why they think the remaining $2,005,000 is excessive. To the contrary, the record reflects that of the $3,105,000 confessed, $2 million represents Mountbatten's actual incurred losses and expenses under the bonds issued on behalf of the Defendants, and $5,000 represents Mountbatten's costs and

attorney's fees as of October 11, 2001. Complaint ¶¶13, 26. Although, as discussed above, Defendants provided a meritorious defense as it relates to the $1.1 million in loss reserves, here, Defendants have failed to provide sufficient evidence of their defense as to the $2,005,000 in actual losses. Therefore, this court denies the Defendants' petition to open the judgment of $2,005,000.

III. Defendants' Motion for a Stay of Execution is Granted With Respect to the Opened Judgment in the Amount of $1.1 million Only

For fear that Mountbatten intended to execute on the confessed judgment despite this pending petition, Defendants request that this court grant their motion for a stay of execution. For the reasons discussed above, Defendants' motion is denied with respect to Mountbatten's confessed judgment in the amount of $2,005,000 for actual losses incurred plus additional costs, attorney fees and interest. However, pursuant to Pa.R.C.P. 2959(e), Defendants' motion for a stay of execution is granted with respect to the opened judgment in the amount of $1.1 million.

CONCLUSION

For the reasons discussed above, the petition to strike is denied in its entirety. However, the petition to open the judgment is granted in part and denied in part. Finally, Defendants' request for a stay of execution is granted in part only as it relates to the $1.1 million in loss reserves.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: May 3, 2002