IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

PHILADELPHIA SCHOOL DISTRICT, d/b/a PHILADELPHIA BOARD OF EDUCATION d/b/a PHILA. BOARD OF EDUCATION d/b/a SCHOOL DISTRICT OF PHILADELPHIA	: JULY TERM, 2000 : No. 3520
v.	:
GM POWERS GROUP, INC./ CHOICE CONSTRUCTION, as a joint venture, and AEGIS SECURITY INSURANCE COMPANY	: :
	: Control No. 081495

O R D E R

AND NOW, this 12th day of July 2001, upon consideration of the Petition filed by GM Powers Group, Inc./Choice Construction, as a Joint Venture, and Aegis Security Insurance Company to Strike or Open the Confessed Judgment entered against them, the response in opposition of the School District of Philadelphia, and after oral argument, it is **ORDERED** that the Petition to Open the Confessed Judgment is **Granted** for the reasons set forth in the contemporaneously filed Opinion. The Confessed Judgment is **Opened**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr. J. ..... July 12, 2001

Introduction

GM Powers, Group, Inc. and Choice Construction, as a Joint Venture, ("GM/Choice"), together with their surety, Aegis Security Insurance Company ("Aegis"),[1] have filed a Petition to Open a Confessed Judgment filed by the School District of Philadelphia ("School District").

[1]For purposes of this Opinion, the petitioners/defendants shall be referred to "GM/Choice" and treated as a singular entity.

Because the initial filings suggested a need to flesh out several alleged meritorious defenses, GM/Choice's request for limited discovery was granted. The picture that emerges from the resulting discovery and memoranda is a bureaucratic nightmare: a school bathroom renovation project without time limits consistently imposed; resulting parental outrage; the termination of possibly the wrong contractor; rebidding the project and being confronted with bids nearly twice the original cost (after paying substantial sums to the dismissed contractor) to obtain a completion date for the renovations that the terminated contractors had indicated they were prepared to meet.

The critical inquiry here is whether GM/Choice has presented a meritorious defense and sufficient evidence that would require the issues to be submitted to a jury. For the reasons set forth, this court finds that GM/Choice has met this burden, and that the judgment should be opened.

I. Factual and Procedural Background

On April 26, 1999, GM/Choice was awarded a Contract for a construction project at the Hamilton Disston Elementary School, based on a low bid $385,000. This Contract for bathroom renovations at the school involved, inter alia, wall demolition and the erection of new walls, toilet partitions, toilet room accessories, tile and finish work. As required by the Contract, GM/Choice obtained payment and performance bonds. These bonds were issued by Aegis. The performance bond provided for a penal sum of $385,000. Petition, ¶¶1-7 & Ex. 4.

On May 11, 1999, the District issued a Notice to Proceed. The Contract provided that the work would be done in two phases and was to be completed within 180 days of receipt of the Notice to

Proceed.[2] GM/Choice alleges that it began work immediately, along with two other prime contractors: Allstates Construction Group ("Allstates"), the mechanical and plumbing contractor, and Jack Cohen Electric, the electric contractor. GM/Choice alleges that throughout the fall of 1999 and Spring 2000, it was hindered in completing its work by the failure of Allstates to complete timely the plumbing work. Petition, ¶ 8-10. On several occasions, GM/Choice complained to the School District about Allstates' lack of performance and informed representatives of the School District, Harry Bradley and Jack McKenna, that Allstates was falling behind in their schedules. Petition, ¶¶15, 20-21 & Ex. 10. Minutes from a Job Meeting in December 1999 presented under School District letterhead noted that GM/Choice had distributed a revised construction schedule showing a completion date for Phase I of the project at the end of January 2000.[3]

On March 13, 2000, Harry Bradley, the School District's project manager, sent a letter to GM/Choice advising that certain defective tile work would not be accepted. Petition, Ex. 8. GM\Choice alleges that it "promptly remedied this issue" as set forth in the affidavit of Leonard Brodsky, President of GM\Choice. Petition, ¶¶ 13-14 & Ex. 1 at ¶¶ 12-13. GM/Choice also presents a preliminary punch list, issued on June 5, 2000, which GM\Choice urges makes clear "that the work to be completed was minimal and properly characterized as 'punch list' work.'" Petition, ¶¶ 13-14.

GM/Choice asserts that despite frustrations with other contractors it completed as much work as possible. Indeed, it emphasizes that the District had paid it $190,914.38 for its work, which was nearly 50% of its original contract price. Petition, ¶16. As further support for its claim of performance,

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[2] Petition ¶8 & Ex. 5, Part 1, 1.01A.

[3] Petition, Ex. 7.

GM/Choice cites Contract Inquiries that were sent to the School District by Aegis, as surety. GM/Choice notes, for example, that the Inquiry dated July 13, 1999 indicated that GM/Choice had been paid $22,297.93. The District did not respond to questions concerning its satisfaction with the work or the expected date of completion. Petition ¶ 17 & Ex. 11. More significant is the January 12, 2000 Contract Status Inquiry issued by Aegis to the School District. The completed, signed form, dated April 24th, indicates that the Contractor had been paid $190,914.38 to date.[4]

On May 31, 2000, the School District asked all contractors to submit schedules outlining when their work would be completed. The parties disagree as to the petitioners' response. GM\Choice asserts that it submitted a schedule with a completion date of August 31, 2000, which the District rejected.[5] The School District in its Answer denied that GM/Choice submitted a proposed completion date of August 31. Instead, it maintains that GM/Choice proposed an October 20, 2000 completion date.[6] In any event, in a letter dated June 6, 2000, Harry Bradley on behalf of the School District informed GM/Choice that a completion date of October 20, 2000 was not acceptable.[7]

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[4] Petition ¶18 & Ex. 13. This document also indicates completion of 48% of the work but is potentially misleading. An affidavit of Hugh Eagleson, Bond Representative for Aegis, indicates that the percentage of work completed was estimated not by the school district but by the surety. See Petition, Ex. 2, Affidavit of Hugh Eagleson, ¶10.

[5] Petition ¶22 & Ex. 1, Brodsky Affidavit, ¶18.

[6] School District's 9/27/2000 Answer ¶ 22. In fact, the petitioners' own documentation on this point raises factual issues since in support of their petition they attach a June 6 letter from Harry Bradley rejecting an October 20 completion date as unacceptable. While petitioners emphasize that this letter did not state that they were in default, they did not explain the discrepancies in completion dates in their original petition. Petition ¶ 23 & Ex. 14. However, as is subsequently discussed, discovery produced a fax sent on June 8 setting forth a completion date in late August.

[7] Petition, Ex. 14.

Moreover and important to the instant analysis, the School District contends that this June 6th letter from its Project Manager (Bradley) constituted the School District's written notice of default to GM/Choice. Complaint, ¶ 10.

Later on June 12, 2000, Theodore Skierski, Interim Director of the District's design office, sent a letter stating that GM\Choice had been notified on May 31, 2000 that "your work on the Disston School Toilet Modernization Project was materially behind schedule and that much of the work was rejected as not in accordance with the requirements of the contract documents." Petition, Ex. 15. It noted that GM\Choice had been given a week to prepare a program to "recover the scheduled slippage and to initiate steps to correct the defective work," but had failed to submit a "satisfactory response plan to complete the work under the contract in a timely manner." Id. The June 12th letter concludes:

> Insufficient steps have been taken by you to remedy the above deficiencies, and the School District is now required to terminate the work to be performed under the contract awarded to you for cause and to arrange with others to complete the work as expeditiously as possible. You are further notified that all materials and equipment that have been purchased for the project and that are essential to its completion are the property of the School District, and you are to remove only the equipment and materials that are not essential for the completion of the work within five (5) days. Petition, Ex. 15

By letter dated June 23, 2000, Dawn Chism, Assistant General Counsel for the School District, notified GM/Choice and Aegis that the School District reserved the right to remedy and complete the construction project. Petition, ¶25 & Ex. 16.

On July 27, 2000, a confession of judgment was entered against GM/Choice and Aegis by the School District in the amount of $462,000. In confessing judgment, the School District asserted that it was forced to terminate GM/Choice because "GM/Choice was in default of its obligations pursuant to the construction contract as a result of, inter alia, failure to properly schedule and complete the work."

Complaint in Confession of Judgment ("Complaint") ¶10; School District's 9/27/2000 Memorandum at 6. GM/Choice and Aegis seek to either strike or open the judgment.

In its response to the Petition, the School District vigorously opposes either opening or striking the judgment. It argues that under the performance bond, "if the School District believed defendant GM/Choice to be in default on the Project, that the default and the amount of such default 'shall be final and conclusive on us [defendants GM/Choice and Aegis].'" School District's 9/27/2000 Memorandum at 2.

The School District maintains that the petitioners waived all rights concerning extensions of deadlines and the Performance Bond did not contain any language that would have permitted the surety to take over the project in case of default; in fact, the surety waived notice of any changes or extensions of times under the contract. School District's 9/27/2000 Memorandum at 2.

In explaining its decision to declare the petitioners in default and to replace GM/Choice with contractors (at a bid of $784,000., nearly double the original Contract amount), the School District mapped out its history of dissatisfaction:

- In the initial phases of its work in June 1999, GM/Choice wrongfully demolished part of a large multi-toilet room. School District's 9/27/2000 Answer ¶ 10; Memorandum at 5.

- In an effort to remedy this problem, GM/Choice constructed temporary wooden partitions "that later rendered the gang toilet room in an unsanitary, dirty and unhealthy condition, that was in large part responsible for public outcry concerning the toilet facilities at the Disston school in May of 2000." School District's 9/27 2000 Answer ¶ 10; Memorandum at 5.
- None of the contractors had completed the work under Phase I by December 1999; the School District therefore extended the deadlines. It had however received complaints about GM/Choice's performance and at a meeting in December 1999 directed it to repair defective tiling that it had installed. School District's 9/27/2000 Answer ¶ 11; Memorandum at 5.

- In March, 2000 the School District again informed GM/Choice of defective work that had to remedied. It acknowledged that once again a deadline had not been met. School District's 9/27/2000 Memorandum at 5.

- On May 31, 2000, the School District notified GM/Choice that it was behind schedule and much of its work was unacceptable; it directed GM/Choice to submit schedules for completion of the work. School District's 9/27/2000 Answer ¶ 22; Memorandum at 5.

- Around this time, GM/Choice submitted a schedule for completion of work by October 20, 2000. The School District explicitly denies that GM/Choice submitted a schedule with a projected completion date of August 31, 2000. School District's 9/27/2000 Answer ¶ 22.

- On June 6, 2000, the School District provided GM/Choice with notice of work that was unacceptable and would have to be replaced. The School District contends that this gave written notice to GM/Choice that it was in default under the Construction contract. Complaint ¶10; School District's 9/27/2000 Answer ¶23; Memorandum at 6.

- By letter dated June 12, 2000, the School District stated that it "terminated" the work of GM/Choice. School District's 9/27/2000 Answer ¶ 24; Memorandum at 6; Complaint ¶ 11.

- By letter dated June 12, 2000, the School District "tendered notice of default" to Aegis, as surety. School District's 9/27/2000 Answer ¶ 25.

- The School District subsequently accepted a bid of $784,000 from a different contractor to proceed with the renovations at the Disston School to be completed by August 23, 2000. That work was completed before the start of the 2000-2001 school year. School District's 9/27/2000 Answer ¶ 69; Memorandum at 7-8.

The petitioners requested discovery. Because the Petition and the responses raised issues of fact, the request for limited discovery on such discrete defenses as default, waiver, estoppel and notice was granted.[8] The parties subsequently filed supplemental memoranda and presented oral arguments.

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[8]See Van Arkel & Moss Properties, Inc. v. Kendor, 276 Pa. Super. 547, 419 A.2d 593, *596 (1980)(where pleadings relating to a petition to open judgment present disputed issues of fact, the court erred in dismissing the petition without first affording an opportunity to prove the averments through depositions); Owens v. McCurdy, 304 Pa. Super. 510, 450 A.2d 1028, *1029 (1982)(when petition to open raises issues of fact, depositions should be ordered to resolve them); Kwasnik v. Hahn, 419 Pa. Super. 180, 615 A.2d 84, 90 (1992)(where issue of fact as to alleged meritorious defense is raised, court acted prematurely in denying petition to open).

C. Legal Analysis

1. Standard of Review.

Pa.R.C.P. 2959 outlines the procedure for striking off or opening judgments. A petition to strike a confession of judgment is granted when the face of the record reveals an apparent defect. Germantown Savings Bank v. Talacki, 441 Pa. Super. 513, 657 A.2d 1285, 1288 (1995). A petition to strike is analogous to a demurrer to the record; it is also a common law proceeding. Continental Bank v. Tuteur, 303 Pa. Super. 489, 450 A.2d 32, *34 (1982). Where confession of judgment is initiated by complaint, the "complaint and confession of judgment clause must be read together to determine whether there are defects on the face of the record." Crum v. Shaffer Co., 693 A.2d 984, *986 (Pa. Super. 1997).

In contrast, where the petitioner claims that the judgment is invalid for reasons beyond the record, he is seeking to open the judgment. Scott v. 1523 Walnut Corporation, 301 Pa. Super. 248, 447 A.2d 951, *952 (1982). An application to open a judgment is an equitable proceeding governed by equitable principles. Id. To open a confessed judgment, the petitioner must act promptly, set forth a meritorious defense and present enough evidence to create a jury issue. Liazis v. Kosta, Inc., 421 Pa. Super. 502, 618 A.2d 450, *452 (1992), app. denied, 536 Pa. 630, 637 A.2d 290 (1993). Pa.R.C.P. 2959(e) sets forth the standard for a meritorious defense: "If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment." In considering a petition to open, a court may consider the petition and answer as well as any testimony, depositions, admissions or other evidence. Van Arkel & Moss Properties, Inc., 276 Pa. Super. 547, 419 A.2d 593, 596 (1980). All evidence must be viewed in a light most favorable to the moving party, and contrary evidence by the non-movant must be rejected. Moreover, "the petitioner need not produce evidence proving that if the judgment is opened, the

petitioner will prevail." Liazis v. Kosta, 618 A.2d at **453.

The facts set forth in a complaint confessing judgment are presumed true; if these facts are disputed in a petition, the remedy should be opening rather than striking a judgment. Van Arkel & Moss Properties, Inc. v. Kendor, Ltd., 419 A.2d at 595 (petition to strike was properly denied where damages sought were within scope of warrant to confess judgment but petition to open should not have been denied where it alleged that petitioner was induced to enter lease by fraudulent misrepresentation of facts since additional depositions were necessary).

2. The Warrant of Attorney in the Performance Bond Incorporates the Default Provisions of the Construction Contract.

As a threshold matter, the School District argues that there is no condition precedent for confession of judgment under the warrant of attorney in the performance bond. School District's 4/25/2001 Memorandum at 5. It quotes the following language from the first paragraph of the Performance Bond as the unconditional warrant of attorney:

> Know All Men by these presents that we, GM Powers Group, Inc. and Choice Construction as a joint venture, Principal and Aegis Security Insurance Company, a corporation existing under and by virtue of the laws of the State of PA, Surety, are jointly and severally held and firmly bound unto the SCHOOL DISTRICT OF PHILADELPHIA in the sum of $385,000.00 lawful money of the United States of America, to be paid to the said School District, its successors or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents, and do authorize and empower any attorney, of any Court of Record to appear for us and each of us, our and each of our heirs, executors, administrators, successors and assigns and confess judgment in favor of said School District, its successors and assigns, together with an attorney's commission of 20% of the contract's value, beside costs of suit, with release of errors and waiver of all laws for stay of execution and exemption.

School District's 4/25/2001 Memorandum at 5; Petition, Ex.4.

In support of this argument, the School District cites Dollar Bank v. Northwood Cheese Co., 431 Pa. Super. 541, 637 A.2d 309 (1994), app. denied, 539 Pa. 692, 653 A.2d 1231 (1994) and Commonwealth v. Boetzelen, 338 Pa. Super. 237, 487 A.2d 943 (1985).[9] These cases are distinguishable, however, on several grounds. First, both involve bank loans rather than performance bonds for construction contracts. More significantly, the language of the guaranty and warrant of attorney in Dollar Bank and Boetzelen differs significantly from the language of the performance bond. In contrast to the documents in Dollar Bank and Boetzelen, the performance bond in this case conditions exercise of the warrant upon default of the construction contract. Petitioners emphasize, for instance, the following language in the performance bond which they maintain is an express condition for exercising the warrant of attorney:

> Whereas the above bound principal entered into a certain contract of even date herewith with the School District of Philadelphia, a copy of which contract is attached hereto, NOW THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall and do well and truly in all respects comply with all of the provisions, terms, conditions and covenants contained and set forth in the aforesaid contract and in the specifications and plans that are expressly referred to in the aforesaid contract, and in the supplemental bulletins, if any were issued to supplement, add to, delete from or change the aforesaid contract and/or specifications and plans, and shall and do save, protect, guarantee and indemnify the School District of Philadelphia, of, from and against all loss, damage and expense by reason of Principal's failure for any cause whatsoever to comply with the aforesaid contract and with the specifications and plans that are expressly referred to in aforesaid contract, and with the supplemental bulletins, if any, then this Obligation to be void; otherwise to be and remain in full force virtue and effect.

Petition, Ex. 4 (emphasis added) & 6/1/2001 N.T. at 22-23.

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[9] See School District's 5/25/2001 Memorandum at 5.

Significantly, this condition follows the warrant of attorney language cited and emphasized by the School District.

The document at issue in Dollar Bank, in contrast, was a warrant of attorney contained in a note and guaranty agreement from a bank. It did not reference any default requirements of another agreement.[10] Instead it provided for confession of judgment without precondition:

> The undersigned hereby irrevocably authorizes and empowers any prothonotary or attorney of any court of record within the United States of America or elsewhere to appear for the undersigned and, with or without complaint filed, confess judgment, or a series of judgments, against the undersigned in favor of the bank or any holder hereof, as of any term, for the unpaid balance hereof together with interest thereon, costs of suit and an

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[10]In Commonwealth v. Boetzelen, 487 A.2d at 944-46, the Superior court analyzed a warrant of attorney in the context of the guaranty agreement that contained it. The Boetzelen court noted that the guaranty agreement emphasized the bank's absolute unwillingness to make any loan without the guaranty which provided:

> "NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that to induce the said bank to extend credit to make advances to the Borrower in any amount or amounts not to exceed $46,788.48 and in consideration of the sum of ONE DOLLAR ($1.00) the receipt whereof is hereby acknowledged, the undersigned, as surety, hereby absolutely and unconditionally guarantees payment when due, and at all times thereafter of any and all existing and future indebtedness..."

Com. v. Boetzelen, 487 A.2d *944-45 (emphasis added).

In addition to this unconditional language of the guaranty, which contrasts so dramatically with the conditional language of the performance bond here, there was a warrant of attorney which did not require default for confession of judgment. Id.

The Pennsylvania Supreme Court in an early case suggested that an unconditional warrant of attorney should be analyzed in terms of the entire bond and underlying contract. Spiese v. Shee, 250 Pa. 399, 95 A. 555 (1915). The Spiese court concluded that judgment could be confessed in that case pursuant to the unconditional warrant, specifically emphasizing that "[n]othing in any other part of the bond or in the contract or agreement for faithful performance of which the obligation was given in any manner changes or modifies the absolute confession or judgment or places any restriction on the appellant in entering it." Spiese, 95 A. at 555. In the instant case, in contrast, the performance bond explicitly conditions the petitioners' liability upon failure to perform the contract.

> attorney's fee for collection of fifteen (15%) of the amount due or five hundred ($500) dollars, whichever is greater. The undersigned hereby forever waives and releases any and all errors which may intervene in any such proceedings, waives all right of appeal and stay of execution and waives all laws exempting real or personal property from execution. The undersigned shall not cause any bill in equity to be filed to interfere in any manner with the operation of such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof. Interest on any such judgment shall accrue at a rate equivalent to that provided for in this note. No single exercise of the foregoing power to confess judgment, or a series of judgments, shall be deemed to exhaust the power, whether or not such exercise shall be held by any court to be valid, voidable or void, but the power shall continue undiminished, and it may be exercised from time to time as often as the holder hereof shall elect until such time as the holder shall have received payment in full of the debt, interest and costs.

Dollar Bank, 637 A.2d at *312.

In construing this language, the Dollar Bank court outlined the general principles for interpreting a warrant of attorney. Where a warrant of attorney sets forth no conditions or restrictions of any kind for confessing judgment, then a judgment can be confessed for the full amount of the loan even without default. In such cases, however, execution would not be possible without default. Dollar Bank, 637 A.2d at *312. See also Industrial Valley Bank & Trust Co., v. Lawrence Voluck Assocs. Inc., 285 Pa. Super. 499, 428 A.2d 156, *159 (1981)(when a warrant of attorney to confess judgment is unconditional, judgment may be confessed at any time as security prior to the due date of the underlying obligation); Triangle Building Supplies and Lumber Co. v. Zerman, 242 Pa. Super. 315, 363 A.2d 1287, 1291 (1976)(where confession of judgment clause in a note does not require a default, it can be confessed at any time and motion to strike was properly denied).[11]

[11] It is important to note that just because a warrant of attorney is unconditional does not mean that a judgment confessed pursuant to one may not be opened. In Kwasnik v. Hahn, 419 Pa. Super. 180, 615 A.2d 84 (1992), the Superior Court concluded that where a judgment was confessed pursuant to an unconditional warrant of attorney, the confessed judgment could be opened after the plaintiffs secured a

Where, however, the warrant of attorney authorized entry of judgment by confession only after a default, a judgment entered prior to such default would be invalid. Dollar Bank, 637 A.2d at *312 (citations omitted). Moreover, a warrant to confess judgment must be explicit and will be strictly construed, with any ambiguities resolved against the party in whose favor the warrant is given." Id., 637 A.2d at *311.

In contrast to the unconditional warrant of attorney to confess judgment in Dollar Bank, the performance bond at issue here contains language specifically referencing the construction contract between GM/Choice and the School District. It thus implies that these two documents should be considered together. Moreover, the construction contract sets forth specific grounds for default.[12]

These default provisions in the construction contract are incorporated into the bond for at least two reasons. First, the bond at issue is a performance bond. Courts in Pennsylvania have typically analyzed performance bonds in terms of the underlying construction contract and the statute under which it was executed. In Downingtown Area School District v. International Fidelity Insurance Co., 671 A.2d 782 (Pa. Cmwlth. 1996), for instance, our Superior Court interpreted the conditions for liability under the performance bond at issue in terms of the underlying construction contract. Downingtown, 671 A.2d at *788. The performance bond in Downingtown is somewhat distinguishable since it explicitly "incorporated

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(Footnote 11 - continued)
writ to execute if the defendant acted promptly and set forth a meritorious defense. Significantly, in Kwansik the defense that the court considered meritorious is similar to GM/Choice's alleged waiver and estoppel defenses: the defendant in Kwansik alleged that the plaintiffs had granted him an indefinite period in which to tender delinquent payments. Kwasnik, 615 A.2d at *90.

[12] See, e.g., Petition, Ex. 4, Construction Contract (4/26/99) at signed page 1; Petition, Ex. 5, Construction Contract, ¶31(b).

by reference" the construction contract between the school district and the contractor.[13] The court agreed with the surety that the contract was incorporated into the bond to define the surety's obligation and could be used to determine when a default occurred that would trigger its obligation under the performance bond. Downingtown, 671 A.2d at 787-88. It then concluded that even where a performance bond does not explicitly provide that a school district may recover delay and liquidated damages, it may nonetheless recover these damages by virtue of the construction contract which provides for them.

In explaining this result, the Downingtown court emphasized the particular characteristics of "performance bonds" in construction projects as compared to "payment bonds" in terms of the statutes that required them. The Performance bond in Downingtown was obtained pursuant to the Bond Law, 8 P.S. §193(a)(1). While a payment bond in conformity with 8 P.S. §193(a)(2) protects those who supply labor and material to a construction project, "a performance bond is designed to protect the entity which awarded the contract by assuring faithful contract performance. To this end, a performance bond provides for one hundred percent of the contract amount, conditioned upon the performance of the contract in accordance with its plans, specifications and conditions." Downingtown, 671 A.2d at *786. The court also considered 8 P.S. §193(a)(1)[14] to interpret the scope of a performance bond and concluded that it covered obligations

[13]The surety bond in Downingtown is also distinguishable from the GM/Choice performance bond because the former gave the surety the authority to remedy any default by the contractor--authority which has not been contracted by Aegis. See, Downingtown, 676 A.2d at 786 n.6.

[14]The relevance of this analysis is suggested by the School District's acknowledgment that the GM/Choice bond was obtained pursuant to 8 P.S. §193.1(a)(1). School District's 4/25/2001 Memorandum at 2. Section 193.1(a)(1) superseded section 193 as to school districts. See 8 P.S.193.1(e) & (d) & n.2. These two sections nonetheless are quite similar in general effect. Section 193 applied to any public construction contract exceeding $5,000 that was awarded to a contractor, requiring the contractor to obtain a performance and payment bond. The performance bond that was required by section 193 was described as follows: "(1) A performance bond at one hundred percent of the contract amount, conditioned

incurred in the construction contract.

By extension, therefore, Downingtown and related cases suggest that this performance bond involving GM/Choice, Aegis and the School District should be interpreted in light of the construction contract. See generally City of Pittsburgh v. Parkview Construction Co., 344 Pa. 126, 23 A.2d 847, 848-49 (1942)(terms of construction contract are incorporated into performance bond but not payment bond). Compare Salvino Steel & Iron Works, Inc. v. Fletcher, 398 Pa. Super. 86, 580 A.2d 853 (1990), app. denied, 529 Pa. 62, 601 A.2d 806 (1992)(in interpreting payment bond which protects claimants who supplied labor or materials to general contractor, consider the language of the bond and statute under which it was granted rather than the contract between the contractor and materialmen).

Moreover, as the petitioners emphasized at oral argument,[15] the School District in crafting its Complaint in Confession of Judgment ostensibly concedes the necessity of showing default since it alleges in paragraphs 10 and 11 that it gave GM/Choice notice of default in a June 6, 2000 letter and that GM/Choice "failed to take corrective measures to remedy the default." Complaint at ¶¶10-11.

(Footnote 14 - continued)
upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such bond shall be solely for the protection of the contracting party which awarded the contract." 8 P.S. §193(a)(1). Section 193.1 applies to public contracts exceeding $10,000. The provision relating to performance bonds requires a contractor to furnish the following: "Any financial security, acceptable to and approved by the contracting party, including, but not limited to, Federal or Commonwealth chartered lending institutions irrevocable letters of credit and restrictions or escrow accounts in such lending institutions, equal to one hundred percent of the contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such financial security shall be solely for the protection of the contracting body which awarded the contract." 8 P.S. §193.1(a)(1). While section 193 required a "performance bond" and section 193.1 requires "any financial security" both sections are "conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract."

[15] See 6/1/2001 N.T. at 21-23.

Furthermore, in paragraph 16, the School District asserts that "the Performance Bond contains a warrant of attorney which authorizes the entry of judgment by confession against GM/Choice and Aegis for all losses caused by a default pursuant to the Construction Agreement up to the full amount of the bond plus an attorneys commission of 20% of the bonded sum." Complaint at ¶16 (emphasis added).

The School District nonetheless argues that under the performance bond and early precedent by the Pennsylvania Superior Court, Fidelity & Deposit Co. v. Call, 81 Pa. Super. 132, 1923 WL 3605 (1923), the fact of default and its amount were conclusively determined by an affidavit by Martin Bednarek, a member of the Board of Education of the Philadelphia School District. School District's 10/25/2000 Memorandum at 2. The School District stresses that the performance bond at issue in this case contained nearly the same language as the bond in Fidelity & Deposit. The instant bond thus provided:

> WE FURTHER AGREE that if, in the opinion of the said School District, any default shall happen on the part of said Principal we will pay all loss occasioned thereby, and that the ascertained amount thereof, which shall be determined by The Board of Education of Said School District, and of the truth of which oath or affirmation shall be thereto made by the President of the said Board or by any member thereof, shall be final and conclusive upon us, and that execution may forthwith issue against us for the amount of said default.

Petition, Ex. 4.

In analyzing the performance bond in Fidelity & Deposit, the Superior Court there observed:

> It will be observed that this provision of the bond establishes a method of determining the liability of the obligors to the school district. While it vests in the board of education the right to fix the amount due, it definitely prescribes how that amount shall be vouched for and evidenced. As the method adopted ousted the jurisdiction of the courts, it was a reasonable provision that the amount of the defendant's liability should be proved by evidence having the dignity of a deposition and not only that, but the deposition of a particular person. The parties very properly provided therefore that when a demand was made under the bond, the president or a member of the board should make an affidavit to the proof of the claim. This was not done. The plaintiff failed to produce the oath of the president or any member of the board of public education establishing the amount of the

> claim of the district for the defendant's alleged default. It was entirely competent for the parties to establish a mode of ascertainment of liability and to provide for the kind and quality of evidence requisite to make out a claim.

Fidelity & Deposit v. Call, 1923 WL 3605, *1 (emphasis added).

There are at least three reasons why this case is not dispositive. First, the quoted language sets forth the method of establishing the amount of liability and not whether a default has occurred. Moreover, the analysis in Fidelity & Deposit of the effect of the affidavit is arguably dicta since in that case the petitioners failed to attach an affidavit from a member of the school board and instead attached an affidavit by the secretary. Because of this failure to adhere to the precise language of the bond, the Superior Court ruled that the trial court erred in instructing the jury that the plaintiff was entitled to recover the amount demanded by the school district. Without the proper affidavit, the court concluded, the amount of default was unclear.[16]

Although there is language in Fidelity & Deposit suggesting that prescribed method for determining the amount of liability by affidavit "ousted the jurisdiction of the court" as to this issue, at oral argument even the School District conceded that such an interpretation was too extreme. 6/1/2001 N.T.

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[16]Fidelity & Deposit, 1923 WL at *1. The plaintiff in Fidelity & Deposit was a surety that issued a bond for school renovation work by the defendant contractor. The defendant contractor had signed an agreement to indemnify the surety for any loss sustained in connection with that bond. When the contractor defaulted in performing the school renovations, the surety paid the school district the amount the School District determined was necessary to pay another contractor to complete the work. This amount was verified with a affidavit by the secretary of the school board; the bond, however, required an affidavit from either the president or member of the school board.

The surety subsequently brought an action against the contractor to recover the money it had expended. The trial court instructed the jury that they should find in favor of the surety. The appellate court reversed, holding that because the school district had not presented the proper affidavit, the amount it asked the surety to pay was not authorized under the bond.

at 11.

Finally, there is a third, more common sense approach to the School District's argument that the bond gives the school district the sole discretion for determining a default and its amount. While the School District always had the authority to declare GM/Choice in default of the contract, the present record is unclear whether the School District gave the requisite notice of default.[17] There are also issues that should be submitted to a jury as to whether GM/Choice was, in fact, in default, as an analysis of their asserted defenses and supporting documentation suggests.

D. Analysis of Meritorious Defenses Raised by Petitioners.

In their petition to open the judgment that had been confessed against them by the School District, the Petitioners initially set forth 17 potential defenses. See Petitioners' 8/28/2000 Memorandum at 9-10. While a number of these seemed illusory or redundant, some seemed potentially meritorious if fleshed out with more facts. The parties therefore were given time for discovery. This subsequent discovery has raised issues of fact concerning defenses that merit submission to a jury. There are, for instance, disputed factual issues as to whether the School District repeatedly waived contractual deadlines. It is also unclear whether the School District provided the requisite notice of default prior to termination. Finally, there are serious issues concerning whether GM/Choice had actually defaulted on the contract.

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[17] In Fidelity & Deposit, the court noted that the plaintiff surety had presented particular evidence of default such as "a copy of the notice of default given by the superintendent of the buildings of the school district to the defendant" as well as notice to the contractor to discontinue work. Fidelity & Deposit, 1923 at *1. This documentation--rather than the affidavit--went to establishing default; similar documents are at issue in the present controversy between GM/Choice and the School District.

1. Estoppel or Waiver Argument.

The School District has acknowledged that there were two phases to the construction project at the Disston School. The first phase consisted of modernization of approximately 14 bathrooms and was to be completed by mid-August 1999. The second phase involved modernization of approximately 12 bathrooms and was to be completed by early December 1999.[18] GM/Choice and Aegis argue that the School District is estopped or has waived its right to terminate GM/Choice for failing to complete the work by the deadline 180 day period of performance set forth in the Contract.[19]

In support of their waiver argument, petitioners rely on McDermott v. Party City Corp., 11 F. Supp. 2d 612, 622 (E.D.Pa. 1998).[20] Aside from the obvious problems of relying on a lower federal court opinion, McDermott is neither a confession of judgment nor construction contract case, but a case involving post-trial motions on a breach of stock purchase agreement claim. The McDermott case does, however, apply the general principle that contractual provisions can be waived by a party's conduct "as long as the intent to waive may be reasonably inferred." McDermott, 11 F. Supp. 2d at 622 (citations omitted).

There are, however, Pennsylvania cases that support the petitioners' waiver argument. In Brinich v. Jencka, 2000 Pa. Super. 209, 757 A.2d 388, *399-400 (2000), app. denied, 771 A.2d 1276 (Pa. 2001), the Pennsylvania Superior Court recently concluded that a construction contract between private individuals and their general contractor may be modified orally even where the contract provides for no oral modification. Similarly, the Pennsylvania Supreme Court has emphasized that a construction contract can

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[18] See, e.g., School District's 4/25/2001 Memorandum at 10-11.

[19] Petitioners' 8/28/2000 Memorandum at 15-16. See Contract, ¶1.01.

[20] See, e.g., Petitioners' 8/28/2001 Memorandum at 16.

be modified orally although it provides that it can be modified only by writing. This conclusion can be interpreted as constituting a waiver theory since "the requirement of a written authorization may also be considered a condition which has been waived." Universal Builders v. Moon Motor Lodge, 430 Pa. 550, 244 A.2d 10, *15 (1968). See generally Edelstein v. Carole House Apartments, 220 Pa. Super. 298, 286 A.2d 658, *663 (1971)(interpreting Universal Builders as upholding a waiver of contractual provision against oral modifications). Several courts have emphasized, however, that this kind of waiver must be "proved by clear, precise and convincing evidence," including conduct by the parties "that clearly shows the intent to waive the requirement that the amendments be made in writing." Somerset Community Hospital v. Allan Mitchell & Assocs., 454 Pa. Super. 188, 685 A.2d 141,146 (1996). These are fact questions for a jury to resolve. Id., 685 A.2d at 146-47.

GM/Choice and Aegis have presented the requisite issue of fact for a jury. They stress, for example, that the "district has failed to identify one document during the seven-month period after the original November completion date in which it expressed any concern whatsoever about the targeted date to finish the work." Petitioners' 8/28/2000 Memorandum at 15-16. In fact, prior to May 2000, the record is replete with instances in which the School District complained about the quality of petitioners' performance but failed to enforce the deadline for completion of the project. Minutes from a job meeting in December 2000, for instance, indicate without comment or protest by the School District that GM/Choice had proposed a revised completion date for phase I of the project at the end of January 2000.[21] Indeed, the School District has conceded that "[a]s the completion date of December 1999 for

[21]Petition, Ex. 7.

all work on the Project approached, the contractors had not completed the work under phase I of the Project. Consequently, the School District extended the time for completion of work on the Project." School District's 4/25/2001 Memorandum at 11 (emphasis added).

Another indication of the School District's waiver of construction deadlines at least until late May 2000 is its response to the Contract Inquiries that were sent to the School District by Aegis as surety. The response to the Inquiry dated July 13, 1999 set forth that GM/Choice had been paid $22,297.93 but provided no responses to questions concerning satisfaction with the work or expected date of completion.[22] More significantly, the January 12, 2000 Contract Status Inquiry that was signed and dated 4/24 indicates that the contractor had been paid $190,914.38 -- or nearly half its initial contract price.[23]

It appears that it was not until late May 2000 that the School District became concerned with imposing deadlines for the bathroom renovation in response to parental outrage over the delays. Martin Bednarek, a member of the School Board, testified in deposition that he called a meeting on May 23, 2000 to discuss the Disston school renovations in response to a parental complaint. After touring the school and listening to the parental outcry, he decided that "something had to be done."[24] A facilities meeting was held sometime thereafter, during which the members were informed that "the electrician and plumbing contractor, they were willing to step up to the plate and get this done by the time school opened. We were told that Choice was unable to meet this deadline."[25] This perception, however, has been challenged by GM/Choice

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[22] Petition, ¶17 & Ex. 11.

[23] Petition, ¶19 & Ex. 13.

[24] Petitioners' 4/6/2001 Memorandum, Ex. 16 (deposition of Martin Bednarek) at 27 & 12-13.

[25] Petitioners' 4/6/2001 Memorandum, Ex. 16 (deposition of Martin Bednarek) at 34.

in terms of both (1) the adequacy of the notice of default or imposition of strict deadlines and (2) whether they had in fact defaulted on the contract by failing to meet newly requested deadlines or other critical requirements.

2. Adequacy of the Notice of Default.

The Construction Contract for Toilet Room Modernization at the Disston School provides as follows for termination of the contractor upon 48 hours of written notice of default:

> It is further agreed that shall the Contractor, in the opinion of The Board of Education, be prosecuting the said work with an insufficient stock or material or insufficient number of skilled workmen for the prompt completion thereof within the specified time, or be improperly performing the said work, or shall neglect or abandon it before its completion or unreasonably delay the same, so that the terms of the contract are being violated or executed in an unworkmanlike manner or in bad faith, or shall neglect or refuse to renew or again perform such work as may be rejected by The Board of Education or otherwise default in the performance of this contract, then and in any such case the SCHOOL DISTRICT may notify the said Contractor in writing of such neglect or default; if such notification be without effect for 48 hours after the delivery thereof, then and in that case the SCHOOL DISTRICT may notify the Contractor to discontinue all work under this contract, and the SCHOOL DISTRICT shall thereupon have full authority and power immediately to do any or all of the following: to let a new contract or contracts for the completion of said work to such person or persons as it may select and for such price or prices as it may seem proper, to purchase such material, tools and machinery and to employ such workmen as in its opinion shall be required for the proper completion of the said work at the cost and expense of the Contractor or the said SCHOOL DISTRICT may hold said Contractor liable for any and all damages suffered, and in such event the performance bond and retained percentage or bond field thereof, and the material delivered and used in, on or about the said work shall then become the property of the SCHOOL DISTRICT for such use and/or application as it may deem proper.[26]

In its complaint in confession of judgment (paragraph 10), the School District contends that the following letter dated June 6, 2000 to GM/Choice satisfies the contractual requirement for written notice

[26] Petition, Ex. 4, Construction Contract, signed page (emphasis added).

of default for "failure to properly schedule and complete the work":

> Dear Mr. Brodsky:
> The schedule for the completion of the subject project, submitted today by Choice Construction Company with an October 20, 2000 Phase II end date is not acceptable. The School District needs to have this project completed by mid August 2000. Please discuss ways of improving the schedule with the other prime contractors and meet with us in Mr. Ted Skierski's office at 8:00 a.m. Thursday, June 8, 2000.
> Yours truly,
> Harry Bradley
> Project Manager[27]

On its face, it is unclear that this June 6th letter provides the requisite notice to GM/Choice that they are being terminated for failure to meet a deadline, especially when this letter is compared to other letters that the School District wrote to another Contractor on the job, Allstates.[28] The June 6th letter might reasonably be construed as setting up a subsequent "discussion" on June 8th for the formulation of a deadline for construction completion.

Moreover, GM/Choice and Aegis have presented documentation in the form of a fax purportedly sent on June 8 to Harry Bradley of the School District setting forth a construction schedule with a proposed deadline of August 31, 2000.[29] Analysis of this documentation goes directly to the issue of whether

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[27] Petition, Ex. 14.

[28] See, e.g. Petitioners' 4/6/2001 Memorandum, Ex. 18. In this November 16, 1999 letter, Harry Bradley, as the School District's project manager, in no uncertain terms described how Allstates had failed to meet its deadlines. He warned: "Your company is in serious breach of its School District contract. We are considering declaring your company in default of its School District contract. We want your company to complete phase I plumbing and HVAC work no later than November 19, 1999."

[29] Petitioners' 4/6/2001 Memorandum, Ex. 6 (Brodsky deposition) at 35-37 (discussing fax to Bradley with August 31 construction completion date); Petitioners' 4/6/2001 Memorandum, Ex. 23 (fax to Harry Bradley from Len Brodsky dated 6/8/2000 presenting "new schedule to finish the second phase"). In his deposition testimony, Martin Bednarek suggested that the primary concern was that the bathroom renovations be completed before the beginning of the next school year. Petitioners' 5/9/2001

GM/Choice had defaulted on their construction contract.

3. Issues of Fact Concerning Default by GM/Choice.

Petitioners have presented critical documentation that GM/Choice through Len Brodsky had responded to the June 6th letter's request for an expedited work completion date by sending a fax to Harry Bradley setting forth a schedule with an August 31, 2000 completion date.[30] The School District in response maintains that Harry Bradley denies ever receiving this fax.[31] To support this claim, the School District references Mr. Bradley's deposition "attached hereto as Ex. F." The attached Ex. F, however, is deposition testimony by Martin Bednarek not Harry Bradley. Indeed, no deposition testimony whatever by Mr. Bradley is attached to the School District's 4/25/2001 memorandum. At the very least, therefore, there is a issue of material fact as to whether GM/Choice did respond to the School District's demand for an expedited completion date.

GM/Choice and Aegis also raise issues of fact concerning other "defaults" identified by the School District. The School District complains, for instance, that GM/Choice improperly demolished part of the large multi-toilet rooms in Phase I rather than Phase II of the project:

> Around June of 1999, during GM/Choice's initial work on Phase I of the Disston School Project, GM/Choice demolished part of one of the large multi-toilet rooms (referred to as the "gang toilets") on the first floor that was not to be demolished until Phase II of the project. The stop gap remedy selected by GM/Choice to attempt to correct this mistake

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(Footnote 29 - Continued)
Memorandum, Ex. 2 (Bednarek deposition) at 45 (suggesting that Choice had been terminated because "they could not get the job done by the beginning of the school year").

[30] Petitioners' 4/6/2001 Memorandum, Ex. 23.

[31] School District's 4/25/2001 Memorandum, n.2. Indeed, the School District seems to concede that the Bradley deposition testimony about this fax raises fact issues. 6/1/2001 N.T. at 15.

> was to construct temporary wooden partitions in the area of the gang toilet. However, it was the continued use of the temporary wooden partitions that later rendered the gang toilet room in an unusable, unsafe and unsanitary condition that was in large part responsible for public outcry concerning the toilet facilities at the Disston school in May of 2000.

School District's 4/25/2001 Memorandum at 11. See also School District's 9/27/2000 Answer ¶10.

GM/Choice and Aegis, however, have presented a change order to support their contention that the "wrong" toilet was demolished by order of the school principal and not due to any error by GM/Choice.[32] They have also presented testimony that the principal, Ms. Besden, and the School Board member, Martin Bednarek, were unaware that none of the three contractors working at the school had authority to supervise the others.[33] Instead, the construction contract merely required GM/Choice to cooperate with the other contractors:

> E.Cooperate with separate contractors so that work under those contracts may be carried out smoothly, without interfering with or delaying work under this contract.

Petition, Ex. 5, Contract, ¶1.1 E.

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[32] Petitioners' 5/9/2001 Memorandum at 4 & Ex. 1 ("Explanation" states: "Both the boys' and girls' toilet rooms were demolished on an erroneous directive by the principal").

[33] Petitioners' 5/9/2001 Memorandum, Ex. 2 (Bednarek deposition) at 26; Petitioners' 4/6/2001 Memorandum, Ex. 6 (Brodsky deposition) at 7-8(School district contracted separately with each contractor and GM/Choice had no general supervisory control); Petitioners' 4/6/2001 Memorandum, Ex. 7 (Bradley deposition) at 18 (testimony that on a multiple prime contract job general contractor does not supervise other contractors); Petitioners' 4/6/2001 Memorandum, Ex. 15 (Besden deposition) at 13-14 (principal stating that she assumed Choice was coordinating the project).

Conclusion

For these reasons, this court finds that petitioners have met their burden for opening the confessed judgment by presenting evidence in the form of deposition testimony and other documents sufficient to require that these issues be submitted to a jury. Pa.R.C.P. 2959(e); Germantown Savings Bank v. Talacki, 441 Pa. Super. 513, 657 A.2d 1285, 1288-89 (1995); Van Arkel & Moss Properties, Inc. v. Kendor Ltd., 276 Pa. Super. 547, 419 A.2d 593, *596 (1980). A contemporaneous Order opening the judgment will be entered.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.