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

THE MOUNTBATTEN SURETY COMPANY, INC.	:	November Term, 2005
Plaintiff	:	Case No. 01233
v.	:	
RICHARD MEROLA and **ALISON PHELPS—MEROLA**	:	Commerce Program
Defendants	:	Control No. 15113041

ORDER and ***MEMORANDUM*** **OPINION**

AND NOW, this 22nd day of December, 2015, upon consideration of the petition to strike or open judgment by confession filed by defendants Richard Merola and Allison Phelps—Merola, the response in opposition of plaintiff, The Mountbatten Surety Company, Inc., the respective *memoranda* of law and all matters of record, it is **ORDERED** that the petition is **DENIED**.

BY THE COURT,

Glazer, J.

***GLAZER*, J.**

BACKGROUND

Plaintiff, The Mountbatten Surety Company, Inc. ("Surety"), is or was a corporation based in Pennsylvania. Defendants, Richard A. Merola and Allison Phelps—Merola (the "Merolas"), are individuals with an address in the State of New York.

The Merolas owned a company named Reindeer Environmental, LLC ("Reindeer"), a New York company engaged in the removal and disposal of construction debris and waste. At all times relevant to this case, Reindeer required the posting of a performance bond to insure its work. The performance bond was provided by Surety which in turn required specific guarantees from Reindeer, as well as personal guarantees from its owners. On May 16, 2001, the Merolas and Surety executed a General Indemnity Agreement (the "GIA"), which contained a confession-of-judgment provision.[1] The GIA specifically stated:

> This General Indemnity Agreement [is] ... made ... by and between The Mountbatten Surety Company, Inc. ... their **successors and assigns** ... (Surety) ... and Indemnitors.
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> * * *
>
> 1. **This is a continuing Agreement which remains, unless canceled in accordance with the provisions hereof, in full force and effect as to all Indemnitors with respect to each and every Bond issued hereunder.**
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> * * *
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> 5. The Indemnitors hereby jointly and severally ... **promise ... to exonerate indemnify and save harmless Surety** ... from and against any and all liability ... damage and expense of whatsoever kind of nature ... which Surety may in good faith sustain ... **by reason of having executed any Bond or other instrument** or any

[1] General Indemnity Agreement between Surety and Indemnitors, article 24, Exhibit B to the petition to strike or open judgment by confession.

renewal, modification, continuation, substitution or extension thereof.

* * *

19. **Any of the Indemnitors other than the Principal [Reindeer] shall have the right at any time to request cancellation of the Agreement as to him by delivering written notice of such request to Surety at the Principal....**[2]

In 2002, Reindeer was contractually engaged in asbestos removal work on behalf of a school district in the State of New York. At that time, the Merolas no longer owned or controlled Reindeer. Although the Merolas had relinquished ownership and control of Reindeer, they did not request cancellation of their obligations under GIA, as required under the afore-mentioned article 19 thereof.

At some point in time in 2002, the new owners of Reindeer elected to prematurely end the contract with the school district, and the school district obtained completion of the required work by engaging a different company. Completion of the project resulted in un-anticipated additional costs. After incurring additional costs, the school district commenced a civil action in the State of New York against Surety. Through that action, the school district sought to recover from Surety the additional funds expended to complete the work begun by Reindeer. Surety settled this lawsuit with the school district and confessed judgment against the Merolas in the Court of Common Pleas, Philadelphia County. The Merolas filed their petition to strike or open the confessed judgment of Surety, and the petition is ripe for a decision.

DISCUSSION

In Pennsylvania,

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[2] Id. Preamble, articles 1, 5, 19 (emphasis supplied).

> A motion to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. If the record is self-sustaining, the judgment will not be stricken....[3]
>
> A petition to open is an appeal to the court's equitable powers and is addressed to the sound discretion of the court....[4]
>
> Evidence of a meritorious defense necessary to open a judgment by confession must be such as would create an issue requiring submission to a jury.... In determining the existence or non-existence of a meritorious defense, a court must view the evidence presented in the light most favorable to the moving party, accepting as true all evidence and reasonable and proper inferences flowing therefrom.[5]
>
> The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses[6]

I. **The Merolas have failed to indicate any fatal flaw or defect in the record**.

The Merolas argue that the confessed judgment should be stricken for two reasons. First, Surety has allowed nearly ten years to elapse from the time it confessed judgment against the Merolas in November 2005, to the time it finally served them with notice, in August 2015. Second, Surety violated Pa. R.C.P. 2177 when it confessed judgment against the Merolas. The Merolas, note that under Pa. R.C.P. 2177, "[a]n action shall be prosecuted by ... a corporation or similar entity in its corporate name." The Merolas further assert that Surety violated Pa. R.C.P. 2177 when it entered

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[3] Fourtees Co. v. Sterling Equip. Corp., 242 Pa. Super. 199, 205; 363 A.2d 1229, 1232 (Pa. Super. 1976).
[4] Indus. Valley Bank & Trust Co. v. Lawrence Voluck Associates, Inc., 285 Pa. Super. 499, 503; 428 A.2d 156, 158 (Pa. Super. 1981).
[5] Hamilton Bank v. Rulnick, 327 Pa. Super. 133, 137-38; 475 A.2d 134, 136-37 (Pa. Super. 1984) (citing Pa.R.C.P. 2959(e)).
[6] Haggerty v. Fetner, 332 Pa. Super. 333, 339, 481 A.2d 641, 644 (Pa. Super. 1984).

judgment in its name even though it no longer existed. Therefore, the Merolas conclude that Surety's violation of Pa. R.C.P. 2177 requires this court to strike the judgment by confession. Both arguments are rejected because the Merolas have not identified any fatal defects on the face of the record which would require this court to strike judgment by confession.[7]

II. The petition to open the confessed judgment asserts no meritorious defenses.

The Merolas advance two arguments in their effort to open the confessed judgment. First, the Merolas assert that they no longer owed any interest in Reindeer at the time Reindeer breached the contract with the school district. According to the Merolas, Surety not only was aware that the Merolas no longer had an interest in Reindeer, but was also specifically asked by Reindeer's new owner, "**orally and in writing**," that the Merolas ought to be removed from any existing indemnity agreement.[8] The court is not convinced by the first argument because the GIA, which the Merolas executed as indemnitors to Surety, specifically gave them the "right at any time to request cancellation of the Agreement ... by delivering written notice of such request to Surety."[9] In this case, the Merolas have offered no evidence showing that they requested cancellation of the GIA by delivering to Surety a written notice. The

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[7] Even if Surety were no longer in existence and allegedly could not enter the instant judgment in its name, this court rejects the Merolas' argument for two reasons: first under Pa. R.C.P. 126, "the court at any stage may disregard any error or defect of procedure which does not affect the substantial rights of the parties'; and second, the GIA clearly states in its preamble that the agreement was made between the Merolas as indemnitors, and Surety, "**their successors and assigns**...." See General Indemnity Agreement between Surety and Indemnitors, Exhibit B, Preamble (emphasis supplied). As to the argument that nearly ten years have elapsed from entry of judgment to service of notice thereof, the court notes that the Merolas have not asserted violation of any statute of limitations. For these reasons, the portion of their petition seeking to strike the judgment is denied.

[8] *Memorandum* of law in support of the petition to strike or open judgment by confession of the Merola defendants, p. 11 (un-numbered) (emphasis supplied).

[9] General Indemnity Agreement between Surety and Indemnitors, Exhibit B, article 19.

Merolas have not sustained their burden of proof because they have failed to demonstrate that they employed the sole mechanism contemplated under the GIA to achieve a full release from their obligations as indemnitors of Surety. For this reason, the argument based on change of ownership is rejected.

Second, the Merolas assert that under the doctrine of *res judicata*, Surety must be precluded from confessing judgment because courts in Canada and New York have already decided the merits upon the same issues presented herein.[10] The law on *res judicata* is well settled:

> To support a claim of res judicata the party ... must show a concurrence of four conditions:
>
> (1) identity of the thing sued upon;
> (2) identity of the cause of action;
> (3) identity of persons and parties to the action; and,
> (4) identity of the quality or capacity of the parties suing or sued.
>
> **The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights.** [11]

In support of the argument based on *res judicata*, the Merolas have offered in evidence two separate court decisions: the first, emanating from the State of New York, is a decision contained within a court transcript titled "Court's Decision."[12] Review of this transcript shows the following statements made by the Honorable Justice James P.

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[10] In the New York and Canada actions, Surety sought recognition and enforcement of the instant confessed judgment entered in Pennsylvania.

[11] Callery v. Mun. Auth. of Blythe Twp., 432 Pa. 307, 312; 243 A.2d 385, 387 (Pa. 1968) (emphasis supplied).

[12] The Mountbatten Surety, Inc. v. Richard Merola and Allison Merola, Index No. : 2007—1967 RJI No. : 33—07—1123, The Supreme Court of the State of New York, County of Onondaga, Exhibit J to the petition to strike or open judgment by confession.

Murphy, justice of the Supreme Court of New York. The transcript states:

> I am vacating my prior judgment because I don't believe that basic due process, as contemplated by the Pennsylvania statute and as also interpreted by this Court ... were followed.
>
> ***
>
> The issue is whether or not [the Merolas] had an **opportunity** under the Pennsylvania statute **to receive ... notice a certain way, which the statute in Pennsylvania has determined is a necessary cog in their way of serving people** ... so they get appropriate notice **that has not been followed, and therefore, is the basis of my vacating the judgment**.
>
> ***
>
> **This is obviously a procedural finding, not a finding of any sort of the merits**."[13]

The second Order, emanating from the Superior Court of Canada, states the following:

> [4] The laws of ... Pennsylvania recognize the practice according to which a debtor agrees under a contractual agreement to the creditor can file a confession of judgment respecting the debtor on amounts owing him. ***
>
> [6] Once judgment has been handed down, the creditor who wishes to enforce it must send the debtor a **notice** under [Pa. R.C.P.] 2958.1. ***
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> [29] **In the instant case, the [Quebec] Court is of the opinion that the service to the [Merolas] of notice under [Pa. R.C.P.] 2958.1 is irregular and does not comply with the specific provisions of [Pa. R.C.P.] 403 concerning serving notice by mail.** ***
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> FOR THESE REASONS, THE COURT—
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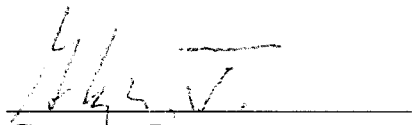
> [42] **DISMISSES [Surety's] application for the recognition and enforcement of the judgment**

[13] Id., (emphasis supplied).

rendered on November 17, 2005 by the Court of Common Pleas for Philadelphia County.[14]

The New York and Canada decisions clearly and unambiguously show that relief to Surety was denied only on procedural grounds: nothing in those decisions remotely suggests that they were rendered on the merits of either case. In other words, the New York and Canada courts did not decide the "ultimate and controlling issues" necessary for a successful invocation of the doctrine of *res judicata*. The Merolas have not sustained their burden of proof and have not asserted any meritorious defenses that would justify opening the confessed judgment. For this reason, the petition to strike or open judgment by confession is denied in its entirety.

BY THE COURT,



***GLAZER*, J.**

[14] The Mountbatten Surety Company, Inc. v. Richard Merola and Allison Phelps-Merola, No. 500—17—078121—137, Judgment, Superior Court of Canada, province of Quebec, District of Montreal, Exhibit K to the petition to strike or open judgment by confession.