

DOCKETED

DEC 15 2015

R. POSTELL
COMMERCE PROGRAM

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

MARCYE SHAYER

Plaintiff

v.

BARBARA FLEISHER

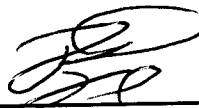
Defendant

: October Term, 2015
:
: Case No. 01402
:
: Commerce Program
:
:
: Control No. 115112385

ORDER and MEMORANDUM OPINION

AND NOW, this 14th day of December, 2015, upon consideration of defendant's petition to strike or open judgment by confession and for a stay of execution, plaintiff's response in opposition, and the respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED**.

BY THE COURT,



RAMY I DJERASSI, J.

Shayer Vs Fleisher-ORDRC



15100140200010

“A confessed judgment will be stricken only if a fatal defect or irregularity appears on the face of the record.”¹ In this case, defendant has not identified any fatal defect or irregularity in the record that would require this court to strike the judgment.

As to opening the confessed judgment, the Pennsylvania Rules of Civil Procedure instruct that—

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.... The test in evaluating the petitioner's evidence is whether there is a sufficiently disputed issue to go to the jury.²

Challenging the confession of judgment, defendant advances two arguments: first, the attorney's fees included in the confessed judgment, assessed at 5% of defendant's indebtedness, are excessive; and second, defendant tendered to plaintiff payment of the full principal on the two outstanding promissory notes for which she was personally responsible. Both defenses are meritless.

In Pennsylvania, courts have routinely allowed a plaintiff to collect “attorney's fees in the amount of **fifteen percent** [if] specifically authorized by the warrant of attorney.”³ In this case, the promissory notes attached to the warrant of attorney specifically authorize collection of attorney's fees at a rate of 5% of total indebtedness.⁴ This Court finds that attorney's fees calculated at 5% of the total indebtedness are reasonable, and rejects the argument that such fees are excessive.

Finally, the Court addresses defendant's second defense –namely, that she

¹Ferrick v. Bianchini, 69 A.3d 642, 647 (Pa. Super. 2013).

² Haggerty v. Fetner, 332 Pa. Super. 333, 343; 431 Pa. Super. 541, 552; 481 A.2d 641, 646 (Pa. Super. 1984) (citing Pa. R.C.P. 2959(e)).

³Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994) (emphasis supplied).

⁴ Exhibits A, B to the petition to strike or open judgment by confession and for a stay of execution.

“**tendered** a check to Plaintiff ... representing the full **principal** payment for the two outstanding Notes....”⁵ Specifically, defendant has produced evidence in the form of a letter which she sent to plaintiff on October 22, 2015, and a copy of a check purporting to represent full payment of the principal owed under the promissory notes. The letter states:

Dear Marcye [plaintiff],

I appreciate your patience in this matter; I am glad we are able to resolve this amicably. Please find the enclosed check # 587 in the amount of \$88,333.18 dated today, representing Payment in Full of the two outstanding Notes (**interest paid to date**), adjusted for the duplicate payments made to you as follows:

| | |
|---|--------------------------------|
| Principal of “Note 1” Matured 10/1/15 | \$50,000.00 |
| Principal of “Note 2” Matured 7/1/15 | \$75,000.00 |
| Duplicate Payment on MG’s Loan, 7/1/06—8/1/11 | <u>(\$36,666.82)</u> |
| Net Due | \$88,333.18⁶ |

In Pennsylvania,

[t]he petitioning party [seeking to open judgment by confession] bears the burden of producing sufficient evidence to substantiate its alleged defenses [which] ... must be valid ones.”⁷

In this case, defendant has failed to produce at least two essential proofs: first, defendant has not offered any evidence that she had made a duplicate payment which would justify the deduction of \$36,666.82 from the sum of Notes 1 and 2; second, defendant has failed to offer any evidence in support of her statement that interest on

⁵ Petition to Strike or Open, ¶ 8 (emphasis supplied).

⁶ Letter from defendant Barbara H. Fleisher to plaintiff Marcye Shayer, dated October 22, 2015 (which includes a facsimile copy of check No. 587 mentioned above), Exhibit B to the petition to strike or open judgment by confession and for a stay of execution.

⁷ Haggerty v. Fetner, 332 Pa. Super. at 339; 481 A.2d at 644 (Pa. Super. 1984).

both Notes was “paid to date” at the time she forwarded the above-cited letter-with-check to plaintiff.⁸ Defendant has not produced sufficient evidence to substantiate her defenses based on satisfaction, and has not met her burden of proof necessary to open judgment by confession. For all of the above reasons, defendant’s petition to strike or open judgment by confession and for a stay of execution, is denied in its entirety.

⁸ Defendant’s letter-with-check bear the date of October 22, 2015. The docket in this case shows that plaintiff confessed judgment against defendant eight days earlier, on October 14, 2015.