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

WALNUT STREET 2014—1 ISSUER, LLC	:	March Term, 2016
Plaintiff	:	
	:	Case No. 01672
v.	:	
	:	
MICHAEL S. PEARLSTEIN	:	Commerce Program
	:	
Defendant	:	Control No. 16071907

ORDER

AND NOW, this 1ST day of AUGUST, 2016, upon consideration of the motion for reconsideration of defendant Michael S. Pearlstein, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT,

***MCINERNEY*, J.**

Walnut Street 2014-1 Is-ORDER

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COMMERCE PROGRAM

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MEMORANDUM OPINION[1]

The motion for reconsideration requires this Court to re-examine its Order-and-*Memorandum* Opinion which denied defendant's petition to open judgment by confession. For the reasons below, the motion for reconsideration is denied.

BACKGROUND

Plaintiff Walnut Street 2014—1 Issuer, LLC ("Walnut"), is a limited liability company with an address in Philadelphia, Pennsylvania. Individual defendant Michael S. Pearlstein ("Pearlstein"), is a resident of Pennsylvania. At all times relevant to this case, Pearlstein was the sole owner in control of an entity named Empire Schuylkill, LP, ("Empire"), a limited partnership based in Philadelphia, Pennsylvania.

On May 5, 2007, a lending institution named The Bancorp Bank (the "Bank"), entered into a "Loan Agreement" with Empire. Pursuant to the Loan Agreement, the Bank provided Empire with a $16.5 million loan to fund the acquisition of a shopping mall (the "Shopping Mall"), in a rural district of Pennsylvania, and to enable Empire to

[1] Unless stated otherwise, the Court incorporates in this *Memorandum* Opinion the facts narrated in its prior Order-and *Memorandum* Opinion dated July 7, 2016.

fit the Shopping Mall for use by commercial tenants.[2] On February 2, 2011, the Bank and Empire entered into an "Amended Loan Agreement."[3] This Amended Loan Agreement is evidenced by three promissory notes (the "Notes"), which are backed by an "Open-End and Security Mortgage Agreement."[4] Furthermore, The Bank and Pearlstein executed on the same day a Guaranty and Security Agreement (the "Personal Guaranty").[5] Pursuant to the Personal Guaranty, Pearlstein agreed to be liable to the Bank for the obligations of Empire under the afore-mentioned documents. The Personal Guaranty contained a warrant-of-attorney provision empowering the Bank and its successors to confess judgment against Pearlstein in the event of Empire's default.[6]

On August 10, 2010, the Bank sought to protect its loans to Empire by seeking additional guarantees. To this end, the Bank filed an Application for Loan Guarantee with the United States Department of Agriculture—Rural Development ("USDA").[7] On November 15 and December 17, 2010, USDA informed the Bank that the application for loan guarantees had been approved.[8] USDA also informed the Bank that the approval would become effective after the Bank executed two Conditional Commitment Forms which were supplied by USDA and were subsequently executed by the Bank on February 2, 2011 (the "USDA Guarantees").[9] On December 30, 2014, The Bank sold its rights to

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[2] Loan Agreement dated May 5, 2007, ¶ 2.2, Exhibit A to the petition of defendant Pearlstein to open the confessed judgment of plaintiff Walnut.
[3] Amended, Restated and Consolidating Loan Agreement dated February 2, 2011, Exhibit 1—A to the complaint-in-confession-of-judgment.
[4] The agreements identified in the paragraph *supra* are found in the complaint-in-confession-of-judgment, at Exhibit 1—B, in the following order: first, an Amended and Restated Note of $17.3 million; second, an Amended and Restated Note of $5,862,789; and third, a Note of $4,093,211. Finally, an Amended, Restated, and Consolidating Open—End Mortgage and Security Agreement is found at Exhibit C of plaintiff's complaint.
[5] Personal Guaranty, Exhibit 1—D to the complaint-in-confession-of-judgment.
[6] Id. ¶ 7.
[7] Application for Loan Guarantee, Exhibit I to Pearlstein's petition to open the confessed judgment.
[8] USDA letter of approval, Exhibit J to Pearlstein's petition to open the confessed judgment.
[9] Id.

the Empire obligations to Walnut.[10]

On March 17, 2016, Walnut confessed judgment against Pearlstein by filing against him a complaint-in-confession-of-judgment. On May 16, 2016, Pearlstein filed a petition to open the confessed judgment, and this Court, on July 7, 2016, issued an Order-and-*Memorandum* Opinion denying the petition in its entirety. On July 15, 2016, Pearlstein filed the instant motion for reconsideration.

The motion for reconsideration avers that this Court erred in its decision to deny Pearlstein's petition because it failed to adhere to the requirements of the Pennsylvania Rules of Civil Procedure. According to Pearlstein, the Rules require a two-step process: first, "[t]here is the initial pleading phase where the petitioner asserts defenses in a petition and the respondent files an answer in response [thereto]," and second, "[a]fter the answer is filed, the court considers the legal sufficiency of the petitioner's defenses and determines whether the respondent's answer disputes any of the petitioner's factual allegations.[11] In the motion for reconsideration, Pearlstein asserts that to "the extent ... the petitioner states legally valid defenses and the respondent raises disputed issues of fact, the court issues a rule to show cause allowing the petitioner to conduct discovery into the disputed issues of fact and ... present evidence in support of the defenses.[12] Pearlstein's motion avers that only during the second step of the process "the petition is ripe for an evaluation," and only at that stage the Court may resolve the petition "based on the petition and answer, and any testimony, depositions, admissions and other evidence."[13] Pearlstein concludes that although the petition had stated *prima facie*

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[10] Complaint-in-confession-of-judgment, ¶ 9; petition to open judgment by confession, ¶ 83.
[11] Motion for reconsideration, ¶¶ 3–5.
[12] Id., ¶ 6.
[13] Id., ¶ 8, ¶ 7 (citing PA. R.C.P. 2959(e)).

grounds for relief, the Court denied the petition and thus erred "by skipping the second step in the process –i.e., rule to show cause, discovery and presentation of evidence."[14] Pearlstein's challenge to this Court's ruling boils down to this: the Court denied the petition to open judgment by confession "without first affording Pearlstein the opportunity to conduct discovery and thereafter present evidence in support of its defense."[15]

DISCUSSION

The motion for reconsideration asserts that the judgment should be opened to afford Pearlstein an opportunity to establish seven separate defenses. The Court shall address each alleged defense *seriatim*.

I. The challenge based on Walnut's lack of standing.

In the petition to open the judgment, Pearlstein asserted that Walnut lacked standing to confess the judgment. According to Pearlstein, the Bank assigned the obligations of Pearlstein in violation of the conditions contained in the USDA Guarantees, and this violation effectively voided the assignment which the Bank made in favor of Walnut. According to Pearlstein, the void assignment operates to preclude Walnut from asserting any standing to confess the judgment. This argument was rejected because it failed to state any prima facie grounds for relief.

The Pennsylvania Rules of Civil Procedure instruct as follows:

> [r]elief from a judgment by confession shall be sought by petition.... [A]ll grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition.[16]
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> ***
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> **If the petition states prima facie grounds for relief**

[14] Id., ¶ 19, ¶ 9.
[15] Id., ¶ 17.
[16] Pa. R.C.P. 2959(a)(1).

> **the court shall issue a rule to show cause and may grant a stay of proceedings.**[17]

In City of Pittsburgh v. Allegheny County Distributors, Inc., the City of Pittsburgh (the "City") leased real property to Allegheny County Distributors, Inc. ("ACDI").[18] The lease agreement empowered the City to confess judgment against ACDI. Subsequently, the City confessed judgment against ACDI and sought to recover possession of the leased premises. ACDI filed a petition to stay execution and to strike or open the confessed judgment, which included a rule to show cause why the judgment should not be opened. The Court denied issuance of a rule to show cause, as well as the petition to open the judgment. ACDI appealed the Court's refusal to open the judgment, and the Pennsylvania Superior Court subsequently affirmed the lower court's decision. The Superior Court explained that—

> to open a confessed judgment, the petitioner must first comply with the requirements of Pa. R.C.P. 2959(b). Section 2959(b) requires the trial court to first determine whether the petition states a prima facie ground for relief. If such grounds do not exist, the court may not issue a rule to show cause why the confessed judgment should not be opened. This threshold requirement of subsection (b) must be met before the other procedures outlined in Rule 2959 are to take place.[19]

Based upon this specific requirement under the Rules, the Superior Court examined the allegations contained in ACDI's petition to open the confessed judgment, and found that such allegations were "merely conclusions of law which [were] not supported by any allegations of fact."[20] Based on ACDI's failure to state any prima facie

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[17] Pa. R.C.P. 2959(b) (emphasis supplied).
[18] City of Pittsburgh v. Allegheny County Distributors, Inc., 488 A.2d 333 (Pa. Super. 1985).
[19] Id., 488 A.2d at 334.
[20] Id.,

grounds for relief, the Superior Court held that the lower court "[had] not erred in refusing to grant a rule to show cause why the judgment should not have been opened."[21]

Similarly in this case, the Court examined Pearlstein's petition and the language of the specific agreement between the Bank and USDA,[22] and found that Pearlstein was not a party thereto. Since Pearlstein was not a party to the USDA Guarantee, it is he who lacked standing to assert that the USDA Guarantee was void. Stated differently, the argument advanced by Pearlstein presented a mere conclusion of law which failed to state prima facie grounds for relief. For this reason Pearlstein's first argument was rejected.

II. The challenge based on fraud-in-the-inducement.

In the petition to open, Pearlstein asserted that Walnut could not confess the judgment because the Bank, as predecessor-in-interest of Walnut, had fraudulently induced Pearlstein to execute the USDA guarantee documents.[23] Specifically, Pearlstein asserted that when Empire was ready to terminate its relationship with the Bank, the Bank fraudulently represented that new loan guarantees would stabilize the value of the Property. Therefore, Empire executed the loan and guarantee documents in reliance of the Bank's fraudulent representations.[24]

In the Order-and-*Memorandum* Opinion denying the petition to open, this Court relied on well-settled law stating that the elements of the tort of fraud-in-the-inducement are—

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[21] Id., 488 A.2d at 334—335.
[22] Loan Note Guarantee, United States Department of Agriculture—Rural Development, Exhibit 7 of Walnut's answer to the petition to open the confessed judgment.
[23] Petition to open confessed judgment, ¶ 121.
[24] Id., ¶ 127.

> (1) a representation;
> (2) which is material to the transaction at hand;
> (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
> (4) with the intent of misleading another into relying on it;
> (5) justifiable reliance on the misrepresentation; and
> (6) the resulting injury was proximately caused by the reliance.[25]

The Court also stated that—

> fraud and misrepresentation [are] meritorious defenses that could support the opening of a confessed judgment. However, the mere pleading of those defenses is insufficient. Appellant must also establish that it set forth sufficient evidence in support of those defenses to give rise to a question that would require submission of the case to a jury.[26]

Based on the foregoing, this Court found that Pearlstein had failed to offer any evidence in support of the claim of fraud-in-the-inducement. For this reason, this Court rejected Pearlstein's second challenge to the confessed judgment of Walnut.[27]

Furthermore, the Court was aware that the various documents executed by Empire and Pearlstein were fully integrated contracts. Specifically, the Amended, Restated and Consolidating Loan Agreement executed by Pearlstein stated as follows:

> **Integration. This Agreement and the other Loan Documents constitute the sole agreement of the parties with respect to the subject matter hereof and thereof and supersede all oral negotiations and prior writings with respect to the subject matter hereof and thereof.**[28]

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[25] Eigen v. Textron Lycoming Reciprocating Engine Div., 874 A.2d 1179, 1185 (Pa. Super. 2005).
[26] PNC Bank, Nat. Ass'n v. Bluestream Tech., Inc., 14 A.3d 831, 840 (Pa. Super. 2010).
[27] In PNC Bank v. Johnson, 2005 WL 2899736 (not reported on 2005 A.2d), this Court held that where a petitioner presents no evidence in support of its assertions, such "unsupported allegation ... does not state a prima facie ground for relief." (Relying on City of Pittsburgh v. Allegheny County Distribs., Inc., 488 A.2d 333, 334 (Pa. Super. 1985) and denying the petition to open on the papers).
[28] Amended, Restated and Consolidating Loan Agreement, Exhibit 1—D of the answer in opposition to the petition to open, § 9.10 (emphasis supplied). Also, USDA Form 4279—14 titled Unconditional Guarantee, states that Pearlstein, "Guarantor," "may not use an oral statement to contradict or alter the written terms of the Note of this Guarantee...." Exhibit 1—J to the answer in opposition to the petition to open.

The Court also notes that under Pennsylvania law—

> [o]nce a writing is determined to be the parties' entire contract, the parol evidence rule applies and evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is ... inadmissible to explain or vary the terms of the contract.[29]

In this case, parol evidence precluded Pearlstein as a matter of law from asserting the defense based on fraud-in-the-inducement; therefore, the allegations based on this defense did not state prima facie grounds for relief, and for this additional reason the Court rejected Pearlstein's second defense based on fraud.

III. Empire's breach of financial covenants.

In the complaint-in-confession-of-judgment, Walnut asserted that Empire had defaulted by breaching three financial covenants, and specifically the covenants identified as "Minimum Tangible Net Worth," "Current Ratio," and "Debt-to-Equity Ratio."[30] In the subsequently-filed petition to open, Pearlstein challenged Walnut's aforementioned averments by advancing two defenses: first, Empire had not violated the Current Ratio covenant at the time Walnut declared a default; and second, Walnut had failed on prior occasions to enforce the other two covenants and was therefore estopped from declaring a default thereunder.[31]

The Court shall address the second argument –namely, that Walnut is estopped from declaring a default. To this end, the Court turned to the allegations made by Pearlstein in his petition to open. In that petition, Pearlstein had stated that Walnut was aware of the alleged "violations" of the financial covenants, yet—

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[29] Youndt v. First Nat. Bank of Port Allegany, 868 A.2d 539, 546 (Pa. Super. 2005) (citing Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436 (Pa. 2004)).
[30] Complaint-in-confession-of-judgment, ¶ 15.
[31] Petition to open, ¶¶ 30, 141—148, 149—159.

> [d]espite being given may opportunities to raise any issues concerning these covenants, [Walnut's predecessor] remained silent at the time it ought to have spoken ... and ... took no action regarding these covenants for a period of five years....
>
> ***
>
> By remaining silent when they should have spoken, [Bank and Walnut] waived their ability to assert a default based on such covenants ... [and] Pearlstein can prove the meritorious defenses of waiver and estoppel.[32]

After examining the afore-quoted allegations in Pearlstein's petition, the Court also turned to the language of the Personal Guaranty which Pearlstein executed on February 2, 2011.[33] That document stated as follows in pertinent part:

> **[t]he liability of the Guarantor hereunder [Pearlstein] is absolute and unconditional, and shall not be affected in any way by reason of (a) ... the lack of prior enforcement of, any rights** against any person or persons ... (c) any delay in enforcing or failure to enforce any such rights ... **or (d) any delay in making demand on the Guarantor for performance or payment of the Guarantor's obligations hereunder.**[34]

This clear and unambiguous language left the Court with no doubt: Pearlstein, as personal guarantor of Empire, had agreed that his liability could not be washed away by the Bank's or Walnut's lack of prior enforcement of any of their rights, or by their delay in asserting such rights. Based on the clear language of the Personal Guaranty, this Court found that Walnut or its predecessor had not waived their right to hold Pearlstein liable as a guarantor, and could not be estopped from confessing judgment against

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[32] Id., ¶¶153—155, 158—159.

[33] "The task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument." Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 510 (Pa. Super. 2013).

[34] GUARANTY AND SURETYSHIP AGREEMENT, Exhibit 1—E to the answer in opposition to the petition to open judgment by confession, § 2.

Pearlstein. Therefore, this Court found that Pearlstein had failed to state prima facie grounds for relief as to the Minimum Tangible Net Worth and Debt-to-Equity Ratio covenants, and for this reason this Court rejected Pearlstein's challenges. Since Pearlstein had failed to state prima facie grounds for relief under two of the three alleged financial defaults, this Court deemed it unnecessary to address whether Empire had breached the Current Ratio covenant at the time of default.

IV. The Bank's alleged breach of its agreements with USDA.

In the petition to open, Pearlstein asserted that the Bank had breached various agreements with USDA. Pearlstein concluded that the judgment should be opened "so Pearlstein could prove the meritorious defense of breach of contract."[35] The Court rejected this argument because it had already determined that Pearlstein was not a party to the agreements between the Bank and USDA, and had no standing to assert breach of contract thereunder.[36]

V. The Bank's alleged breach of the Amended, Restated and Consolidating Loan Agreement.

In the petition, Pearlstein asserted that the Bank had breached § 4.2 of the Amended, Restated and Consolidating Loan Agreement by failing to obtain a guaranty from USDA.[37] Specifically, Pearlstein asserted that under the terms of the Amended, Restated and Consolidating Loan Agreement of February 2, 2011, the "[Bank had] agreed that it would obtain a guaranty from the USDA for repayment" of two loans identified as "Term Loan A" and "Term Loan B."[38] Based on this averment, the Court examined the Amended, Restated and Consolidating Loan Agreement. The pertinent

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[35] Petition to open, ¶ 166.
[36] See § I—The challenge based on Walnut's lack of standing, supra.
[37] Petition to Open, ¶ 32.
[38] Id., ¶¶ 162—165.

language thereof states as follows:

> 4. Conditions Precedent to the Bank's Obligations. The Bank's obligations hereunder are conditioned upon the satisfaction by [Empire] of the following conditions precedent....
>
> 4.1 ....
>
> 4.11 ....
>
> ***
>
> 4.1.18
>
> 4.2 USDA Guaranty. The USDA shall have agreed to guaranty the repayment of 70% of the Term Loan A and term Loan B pursuant to its Conditional Commitments and otherwise on terms acceptable to the Bank.[39]

This clear and unambiguous language leads to two conclusions: first, § 4 and its sub-sections describe the conditions precedent which Empire was required to fulfill before triggering the obligations of the Bank under the agreement. Second, § 4.2 merely states that "[t]he USDA shall have agreed to guaranty the repayment of 70% of the Term Loan A and Term Loan B...." Nothing in this section imposed on the Bank an affirmative obligation to obtain a guaranty from USDA. Indeed, it defies logic to suppose that § 4.2 created an affirmative obligation for the Bank to secure a guaranty since the Bank, as a lender, was the only party that would benefit from the issuance of a guaranty, while neither Empire nor Pearlstein had any right in such a benefit. Based on these conclusions, this Court found that Pearlstein's defense based on the Bank's alleged breach of the Amended, Restated and Consolidating Loan Agreement had not stated prima facie grounds for relief. For this reason Pearlstein's argument was rejected.

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[39] Amended, Restated and Consolidating Loan Agreement, §§ 4, 4.2., Exhibit 1—A to the complaint-in-confession-of-judgment.

VI. The Bank's breach of its alleged duty of good faith and fair dealing.

In the petition, Pearlstein asserted that the Bank breached a duty of good faith and fair dealing impliedly contained in the Amended Loan Agreement and the Personal Guaranty.[40] According to Pearlstein, the Bank breached its duty of good faith and fair dealing by failing to secure from USDA certain guaranties required under § 4.2 of the Amended Loan Agreement, and also by breaching its agreements with USDA, and by declaring against Empire a "bogus" default.[41] The Court readily rejected these arguments because—

> Pennsylvania law [does] not recognize a claim for breach of a covenant of good faith and fair dealing as an independent cause of action separate from the breach of contract claim since the actions forming the basis of the breach of contract claim are essentially the same as the actions forming the basis of the bad faith claim....
>
> A breach of [the] ... covenant [of good faith and fair dealing] is a breach of contract action, not an independent action for breach of a duty of good faith and fair dealing.[42]

In this case, Pearlstein failed to state prima facie grounds that the Bank had breached any of the agreements between Empire and Pearlstein, on one side, and any of the agreements between the Bank and USDA, on the other. Since Pearlstein did not state prima facie grounds under the defense of breach of contracts, this Court concluded that Pearlstein could not state prima facie grounds for relief under the defense of breach of the covenant of good faith and fair dealing. Pearlstein could not state prima facie grounds under the defense of breach of good faith and fair dealing because this defense is unavailable without prima facie grounds under the defense of breach of contract. For

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[40] Petition to open, ¶ 167.
[41] Id., ¶¶ 168—173.
[42] LSI Title Agency, Inc. v. Evaluation Servs., Inc., 951 A.2d 384, 391 (Pa. Super. 2008).

this reason, the Court rejected the defense based on breach of the covenant of good faith and fair dealing.

VII. Pearlstein's alleged waiver of his due process rights.

Pearlstein asserted in his petition to open that his waiver of due process rights had been given unknowingly, unintelligently, and involuntarily, when he executed the Personal Guaranty containing a confession-of-judgment clause. In support of this defense, Pearlstein averred as follows:

> [a]t the time [the Bank] induced [Pearlstein] to execute the [Personal] Guaranty, [the Bank] misled Pearlstein to believe that his Guaranty was required in order to obtain **valid** guaranties from the USDA, which [the Bank] represented were necessary to continue the lender/borrower relationship. [The Bank] never intended to obtain **enforceable** guaranties from the USDA and **submitted false information to the USDA during the application process rendering the USDA Guaranties invalid.**[43]
>
> ***
>
> [The Bank] induced Pearlstein to enter the [Personal] Guaranty and waive his constitutional rights to notice and hearing based on representations that it **intended to obtain valid and enforceable USDA Guaranties.**
>
> **Instead of obtaining valid and enforceable** USDA Guaranties, [the Bank] supplied the USDA with false information and failed to adhere to the requirements of the [Personal] Guaranty.[44]

Again, the Court examined Pearlstein's petition, including the previously quoted allegations, as well as the language of the specific agreement identified as the Loan Note Guarantee between the Bank and USDA.[45] After carefully reviewing this material, the Court determined that Pearlstein was not a party to the agreement between the Bank

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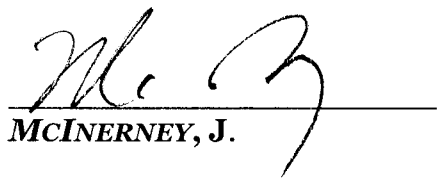
[43] Petition to open, ¶ 34 (emphasis supplied).
[44] Id., ¶¶ 179—180 (emphasis supplied).
[45] Loan Note Guarantee, United States Department of Agriculture—Rural Development, Exhibit 7 of Walnut's answer to the petition to open the confessed judgment.

and USDA, and had no standing to assert that such an agreement, or any of the guaranties thereunder, lacked validity or enforceability.[46] Rather, only the Bank and USDA, as parties to the Loan Note Agreement, had standing to challenge the validity of the guaranties thereof. Thus Pearlstein in this instance presented another mere conclusion of law which did not state prima facie grounds for relief. For this reason, his seventh and last defense was also rejected.

BY THE COURT,



***MCINERNEY*, J.**

[46] See § I—The challenge based on Walnut's lack of standing, supra. Furthermore, "[t]he task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument." Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 510 (Pa. Super. 2013).