

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

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| DUNGAN HEIGHTS ASSOCIATES, LLP, | : | May Term 2016 |
| Plaintiff, | : | |
| v. | : | No. 3771 |
| COLLEEN SWEENEY and THOMAS REMICK, | : | |
| Defendants. | : | Commerce Program |
| | : | |
| | : | Control Number 17021748 |

ORDER

AND NOW, this *21st* day of March 2017, upon consideration of Colleen Sweeney and Thomas Remick's Petition to Strike or, in the alternative, Open Confessed Judgment and Dungan Heights Associates, LLP's response in opposition, it hereby is **ORDERED** that the Petition to Strike/Open is **Granted in part** and the Judgment shall be reduced by \$19,139.92 and modified to \$88,464.14.

All other aspects of the Petition are **Denied**.

BY THE COURT,



PATRICIA A. McINERNEY, SJ

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COMMERCE PROGRAM

Dungan Heights Associat-ORDRF



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| | : | Control Number 17021748 |
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OPINION

Presently pending before the court is Petitioners Colleen Sweeney and Thomas Remick's petition to open/strike confessed judgment. For the reasons set forth below, the petition to strike/open is granted in part and the judgment shall be reduced by \$19,139.92 and modified to \$88,464.08. All other aspects of the Petition are denied.

BACKGROUND

On February 20, 2015, Dungan Heights Associates (hereinafter "Landlord") leased the property known as 7770 Dungan Road, Store Number 07, Philadelphia, Pa. to Colleen Sweeney and Thomas Remick (hereinafter "Tenants"). The Lease was for a period of five years beginning March 1, 2015 and ending February 28, 2020. The leased premises were to be used solely as a day care. The Lease, in section 13.2 entitled Remedies, provides that in the event of default by the tenant, the landlord shall have the right to a confession of judgment in ejectment and for damages. Each page of the Lease, including the section setting forth the confession of judgment provisions, is initialed by the tenant.

Tenants stopped paying rent and on June 1, 2014, landlord confessed judgment against tenants in the amount of \$107,604.06. In or about July 6, 2016, tenant Colleen Sweeney sold property located at 2532 Coral Street, Philadelphia, Pa. The HUD 1 settlement sheet earmarked

\$19,139.92 as “PAYOFF LIEN 16 03771 to Dungan Heights Assoc.” In January 2017, landlord issued a writ of execution. On February 13, 2017, tenants filed the instant petition to open/strike the confessed judgment. Additionally, tenants requested a stay of execution proceedings. On March 13, 2017, the court entered an order staying all execution proceedings pending disposition of the petition to open/strike confessed judgment. The petition is now ripe for consideration.

DISCUSSION

A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record.¹ A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record *as filed by the party in whose favor the warrant is given*, i.e., the complaint and the documents which contain confession of judgment clauses. Matters *dehors* the record filed by the party in whose favor the warrant is given will not be considered. If the record is self-sustaining, the judgment will not be stricken.²

In support of their petition to strike, tenants argue that landlord failed to comply with Pa. R. Civ. P. 2952 (a)(3),(6),(7) and (10). These alleged deficiencies lack merit. Landlord fully complied with Pa. R. Civ. P. 2952 (a)(3),(6),(7) and (10). While tenants are correct that any amendment to the lease should acknowledge specifically the existence of warrants of attorney, no amendment is at issue here since the only document attached to the complaint in confession of judgment is the February 20, 2015 Lease, the original Lease. Landlord did allege per Pa. R. Civ. P. 2952 (a)(3) that “judgment was not being entered by confession against a natural person in connection with a consumer credit transaction.” Additionally, landlord is not required to provide

¹ *Bethlehem Steel Corporation v. Tri State Industries, Inc.*, 290 Pa. Super. 461, 434 A.2d 1236 (1981).

² *Franklin Interiors v. Wall of Fame Management Company, Inc.*, 510 Pa. 597, 511 A.2d 761 (1986).

notice of default in order to exercise the warrants of attorney³ and a verification as required by Pa. R. Civ. P. 2952 (a)(10) was attached to the complaint in confession of judgment. Landlord fully complied with Pa. R. Civ. P. 2952(a)(7) by including in the complaint an itemized computation of the amounts due.⁴ Since, landlord complied with the technical requirements to confess judgment, the petition to strike is denied.

The petition to open suffers a similar fate. A party is entitled to have a judgment entered by confession opened if evidence is produced which in a jury trial would require the issues to be submitted to the jury.⁵ When determining a petition to open a judgment, matters *dehors* the record filed by the party in whose favor the warrant is given, i.e., testimony, depositions, admissions, and other evidence, may be considered by the court.⁶ A petition to open a confessed judgment is an appeal to the equitable powers of the court.⁷ A petitioner must offer clear, direct, precise and believable evidence of a meritorious defense, sufficient to raise a jury question.⁸

In regards to the instant petition to open, it is clear that the petition was not timely filed. Pursuant to Pa. R. Civ. P. 2959 (a)(3), a petition to open “shall be filed within thirty days after such service”. Here, the complaint in confession of judgment was filed on June 1, 2016 and

³ In support of this argument, tenants rely upon Pa. R. Civ. P. 2952(6) to support its notion that landlord failed to provide proper notice of the occurrence of an event of default. Pa. R. Civ. P. 2952 (a) sets forth the requirements necessary to file a complaint in confession of judgment. Subsection (6) requires that if the judgment may be entered only after a default or the occurrence of condition precedent an averment of the default or of the compulsion of the condition precedent is required. This subsection has nothing to do with notice as argued by tenants.

⁴ See complaint in confession of judgment paragraph 14. Landlord need only aver a default and allege the amounts due. *Davis v. Woxall Hotel, Inc.*, 395 Pa.Super. 465, 469, 577 A.2d 636, 638 (1990).

⁵ Pa.R.C.P. 2959(e).

⁶ *Resolution Trust Corp. v. Copley Qu-Wayne Assocs.*, 546 Pa. 98, 106–07, 683 A.2d 269, 273–74 (1996).

⁷ *PNC Bank v. Kerr*, 802 A.2d 634, 638 (Pa.Super.2002), *appeal denied*, 572 Pa. 735, 815 A.2d 634 (2002).

⁸ *Iron Worker's S. & L. v. IWS, Inc.*, 424 Pa.Super. 255, 622 A.2d 367, 370 (1993).

tenants were provided with notice of the judgment.⁹ Tenants did not file the petition to open/strike confession of judgment until February 13, 2017, more than thirty days after service. As such, the petition to open was not timely filed. Notwithstanding the timeliness of the filing, tenants failed to offer clear, direct, precise and believable evidence of a meritorious defense sufficient to raise a jury question. The only evidence produced by tenants is the HUD 1 settlement sheet which indicates “PAYOFF LIEN 16 03771 to Dungan Heights Assoc.” Based on this submission, tenants expect the court to draw the inference that the judgment for \$107,604.06 should have been marked satisfied with the payment of \$19,139.92. The HUD 1 does not support this defense. While the HUD 1 shows that monies were earmarked to the landlord for the judgment in question, there is no evidence to suggest that the earmarked amounts were in full satisfaction of the judgment. At best, the HUD 1 only shows that a partial payment was made and that the judgment should be reduced by \$19,139.92. Based on the foregoing, the judgment amount shall be modified to reflect the \$19,139.92 payment.

CONCLUSION

Based on the foregoing, tenants’ petition to open/strike the judgment is granted in part and the judgment shall be reduced by \$19,139.92 and modified to \$88,464.18. All other aspects of the petition are denied.

BY THE COURT,


PATRICIA A. McINERNEY, SJ

⁹ The docket shows that tenants’ counsel entered an appearance on June 29, 2016.