

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

DIETZ & WATSON, INC. DEFINED BENEFIT PLAN,	:	MAY TERM, 2016
	:	
Plaintiff,	:	NO. 04135
	:	
v.	:	COMMERCE PROGRAM
	:	
ECORE INVESTMENTS INC., et al.,	:	2930 EDA 2016
	:	
Defendant.	:	

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 OFFICE OF THE CLERK  
 FIRST JUDICIAL DISTRICT OF PA

**OPINION**

Defendant borrowers and guarantors, Ecore Investments LLC, Jerry E. Freeman, and PNP Real Estate Group, LLC, filed an appeal from this court's August 10, 2016 Order denying defendants' Motion to Strike or Open a Judgment by Confession, which had been filed against defendants by plaintiff lender, Dietz & Watson, Inc. Defined Benefit Pension Plan.

In July, 2013, the parties entered into a construction loan arrangement with respect to two adjacent properties in West Philadelphia. As is usual with construction loans, the loan amount was disbursed by the plaintiff lender to the defendant borrowers in installments over time as construction proceeded, and the parties anticipated that the loan would be refinanced upon completion of construction.<sup>1</sup>

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<sup>1</sup> This sort of commercial construction loan arrangement is by no means new or unusual as defendants imply in their motion papers. See "'building loan' (1851) - A type of bridge loan used primarily for erecting a building. The loan is typically advanced in parts as work progresses and is used to pay the contractor, subcontractors, and material suppliers. Also termed *construction loan*. See *interim financing* under financing." LOAN, Black's Law Dictionary (10th ed. 2014); "'interim financing' (1918) - A short-term loan secured to cover certain major expenditures, such as construction costs, until permanent financing is obtained. Also termed *construction financing*." FINANCING, *id*.

Dietz & Watson, Inc. Defined Benefit Pension-OPFLD



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The loan Note called for full repayment in February, 2014.<sup>2</sup> The parties subsequently amended the Note seven times, whereby they ultimately extended the due date to October 30, 2015.<sup>3</sup>

In May, 2015, approximately half of the loan was paid off with a refinancing by another lender, and the lien against one of the properties was released.<sup>4</sup> The remainder of the loan was not refinanced, came due in October, 2015, and went into default.<sup>5</sup>

In January, 2016, plaintiff filed a Judgment by Confession with respect to the remaining unpaid loan funds pursuant to the confession of judgment provisions in the construction loan Note and Guarantees.<sup>6</sup>

In February, 2016, the parties entered into a Forbearance Agreement and the first Confessed Judgment was vacated by plaintiff. In the Forbearance Agreement, defendants and plaintiff agreed that the loan was in default and that \$755,815.81 was due thereunder.<sup>7</sup> Plaintiff also agreed to accept \$625,000 in full satisfaction of the indebtedness if it was paid within 90 days, *i.e.*, on or before May 19, 2016.<sup>8</sup> Defendants were also given the right to extend that payment date for 120 days if they got a bona fide commitment to refinance the loan in an amount that would result in payment to plaintiff of the \$625,000 within those additional 120 days.<sup>9</sup>

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<sup>2</sup> Complaint, Ex. A.

<sup>3</sup> *Id.*, Exs. A(a) – A(g).

<sup>4</sup> *See id.*, Ex. E, ¶ C.

<sup>5</sup> *See id.*, Ex. D.

<sup>6</sup> *Id.*, Exs. A, B-1 and B-2. The January Confessed Judgment was case number 160102903.

<sup>7</sup> Complaint, Ex. E, ¶ 2.

<sup>8</sup> *Id.*, ¶ 4.

<sup>9</sup> *Id.*

As admitted by defendants, they “could not obtain a mortgage commitment from an unrelated financial institution by May 19, 2016 due to the incomplete nature of the said construction project as caused by [plaintiff].”<sup>10</sup> However, as the lender, plaintiff had no duty to undertake or complete the construction; instead that duty was defendants’ under the terms of the parties’ agreements. Plaintiff’s duty was to disburse the funds. Defendants object that some funds were paid at closing to others and not paid directly to them, but all such prior claims with respect to the loan were released under the terms of the Forbearance Agreement.<sup>11</sup>

Plaintiff was not duty bound, but instead it chose, to negotiate with defendants for over two years from the original due date of the loan. Plaintiff agreed to seven Amendments of the loan documents and ultimately the Forbearance Agreement, thereby extending the due date from March 3, 2014 until May 19, 2016, but defendants were still unable to complete construction and obtain alternate financing as contemplated under the parties’ original construction loan arrangement.

On June 2, 2016, plaintiff filed this Judgment by Confession pursuant to the Confession of Judgment provisions in the Forbearance Agreement. Defendants moved to strike or open that Judgment. The court denied the Motion to Strike or Open because there were no defects of record and there were no disputed issues of fact that: 1) the loan balance is overdue; and 2) the defendants are in default of the Forbearance Agreement.<sup>12</sup>

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<sup>10</sup> Motion to Strike or Open, ¶ 30.

<sup>11</sup> Exhibit E to Complaint, ¶ 3.

<sup>12</sup> See Resolution Trust Corp. v. Copley Qu-Wayne Associates, 546 Pa. 98, 106, 683 A.2d 269, 273 (1996) (“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. However, if the truth of the

Defendants' claim that they were acting under economic duress when they executed the Forbearance Agreement. However, such a defense is of no avail to them since this was clearly a commercial, and not a consumer, transaction, and they were and are sophisticated business borrowers acting with advice of counsel.<sup>13</sup>

For all the foregoing reasons, the court respectfully requests that its August 10<sup>th</sup> Order denying defendants' Motion to Strike or Open be affirmed on appeal.

**BY THE COURT**

  
PATRICIA A. McINERNEY, J.

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factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike.”)

<sup>13</sup> See *Carrier v. William Penn Broad. Co.*, 426 Pa. 427, 431–32, 233 A.2d 519, 521–22 (1967) (“The threat of civil process, however, is not such cause as would justify the officers of a corporation to be put in fear so that they would execute a note which they otherwise would not have executed. Not only did the corporate officers have the opportunity to consult counsel, but counsel actually carried on the negotiations. [The definition of duress is] ‘that degree of restraint or danger, either actually inflicted or impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness.’ Finding no abuse of discretion, we agree with the conclusion of the court below, which stated: ‘We do not believe that the defendant has met its burden of showing a valid non-technical defense in this action; nor are we convinced that there is any equitable consideration compelling us to open the subject judgment. Defendant signed the instant note with the full advice of counsel. We are not impressed with its efforts to avert the effects of its bargain.’”)