

DOCKETED

FEB 15 2017

R. POSTELL  
COMMERCE PROGRAM

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

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VICTOR GUR

*Plaintiff*

v.

JONATHAN NADAV

*Defendant*

: November Term, 2016

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: Case No. 02384

: Commerce Program

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: Control No. 16122875

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ORDER

AND NOW, this 15<sup>th</sup> day of February, 2017, upon consideration of the petition to strike or open judgment by confession filed by defendant Jonathan Nadav, the response in opposition filed by plaintiff Victor Gur, and the respective *memoranda* of law, it is **ORDERED** that the Petition is **DENIED** in its entirety and the **STAY OF EXECUTION IS LIFTED**.

BY THE COURT,

  
MCINERNEY, J.

Gur Vs Nadav-ORDRC



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### MEMORANDUM OPINION

Before the Court is defendant's petition to strike or open judgment by confession. For the reasons below, the petition is denied in its entirety.

#### BACKGROUND

On March 18, 2016, defendant Jonathan Nadav (hereinafter "Borrower"), executed a Commercial Judgment Promissory Note (the "Note"), containing his promise to repay certain loaned funds to plaintiff Victor Gur (hereinafter "Lender"), in a principal amount not to exceed \$200,000.00.<sup>1</sup> Under the Note, Borrower agreed to pay a simple rate of interest of fifty percent (50%) per year, payable on a monthly basis.<sup>2</sup> Borrower also agreed to pay a default interest of two percent (2%).<sup>3</sup> In addition, the Note contained a warrant-of-attorney clause which, upon default, authorized the entry of a confessed judgment against Borrower for the full amount owing to Lender.<sup>4</sup> Specifically, the Note stated as follows in pertinent part:

**UPON THE OCCURRENCE OF AN EVENT OF DEFAULT ...  
[BORROWER] AUTHORIZES ... ANY ATTORNEY ... TO ENTER  
JUDGMENT AGAINST ... [BORROWER] FOR THE FULL  
AMOUNT DUE HEREUNDER ... AND ... THE AMOUNT DUE  
HEREUNDER SHALL INCLUDE THE UNPAID PRINCIPAL SUM,  
INTEREST AND ALL SUMS OWED BY ... [BORROWER]  
PURSUANT TO THIS NOTE, INCLUDING COSTS AND  
ATTORNEY'S FEES IN THE AMOUNT OF TEN (10%) PERCENT  
OF THE FULL AMOUNT DUE....<sup>5</sup>**

On November 25, 2016, Lender confessed judgment against Borrower in the amount of \$146,721.71. This amount includes the full, unpaid principal of \$100,000.00, interests of \$31,249.95, default interest of \$2,000.00, attorney's fees of \$13,325.00, and

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<sup>1</sup> COMMERCIAL JUDGMENT PROMISSORY NOTE—FUTURE ADVANCES, Exhibit 1 to the complaint.

<sup>2</sup> Id., p. 1.

<sup>3</sup> Id., p. 2.

<sup>4</sup> Id., CONFESSION OF JUDGMENT CLAUSE, p. 3.

<sup>5</sup> Id.

court costs of \$146.76.<sup>6</sup> On December 22, 2016, Borrower filed a petition to strike or open the confession of judgment. On January 20, 2017, the Court issued an Order staying execution proceedings and directing Lender to file a response in opposition and *memorandum* to Borrower's petition to strike or open the confession of judgment. The response in opposition was timely filed, and the petition to strike or open the confessed judgment is ripe for a decision.

#### PETITION TO STRIKE—DISCUSSION

A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. 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.... An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.<sup>7</sup>

Borrower asserts a number of arguments in support of his petition to strike. The Court shall address each argument.

First, Borrower asserts that the record is fatally flawed, and the confessed judgment should be stricken, because the inordinate interest charged by Lender constitutes a "Racketeering Activity" in violation of 18 Pa. C.S. § 911(b) of the Crime-and-Offenses Code, also known as the corrupt organization statute.<sup>8</sup> This argument is rejected because "[t]he express intent [of the corrupt organization statute] was to

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<sup>6</sup> Complaint-in-confession-of-judgment.

<sup>7</sup> *Neducsin v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015), appeal denied, 131 A.3d 492 (Pa. 2016).

<sup>8</sup> Petition to strike, ¶¶ 21–23.

prevent infiltration of legitimate businesses by organized crime.”<sup>9</sup> In this case, the petition to strike or open does not remotely aver that the inordinate interest charged by Lender is connected with an attempt by organized crime to infiltrate Borrower’s legitimate business. Furthermore, Borrower’s argument appears to imply that he failed to knowingly and intelligently grasp the immoderate nature of the interest charged by Lender in the Note. However, even if Borrower had openly advanced such an argument, it would have been found by this Court to lack any merit because in Pennsylvania, the failure to read and understand a confession of judgment clause cannot defeat the judgment.<sup>10</sup> In this case, Borrower executed a Note which not only specifically contemplated the interest rate at issue, but also contained a warrant-of-attorney clause empowering Lender to Confess judgment in the event of a default by Borrower. For these reasons, Borrower’s argument is rejected.<sup>11</sup>

Second, Borrower argues that the record is fatally flawed and the judgment should be stricken, because Lender seeks to recover an unreasonable amount in attorney fees. This argument is quickly rejected: in Pennsylvania, attorney’s fees of 15% have been routinely upheld if they are “specifically authorized by the warrant of attorney.”<sup>12</sup> In this case, the warrant-of-attorney clause specifically states that Lender may recover

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<sup>9</sup> Com. v. Bobitski, 632 A.2d 1294, 1296 (Pa. 1993).

<sup>10</sup> Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994).

<sup>11</sup> Although Borrower asserts that the judgment should be stricken because the interest rate charged by Lender is usurious and creates a fatal flaw in the record, such an argument would have been properly advanced in the petition to open and not in the petition to strike. “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.” Pa. R.C.P. 2959(3)(e). In this case, evidence would be necessary to show that the interest rates charged by Lender constituted a racketeering activity. Nevertheless, even if Borrower had properly asserted his argument under the petition to open, this Court would have rejected it for failure to state *prima facie* grounds for relief, as discussed by this Court in the body of this *Memorandum Opinion*, *supra*. In a petition to open judgment, “the threshold burden is on the petitioner to state *prima facie* grounds for relief.” Ohio Pure Foods, Inc. v. Barbe, 697 A.2d 252, 253 (Pa. 1997).

<sup>12</sup> Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994).

“attorney’s fees in the amount of ten (10%) percent of the full amount then due....”<sup>13</sup> A quick calculation shows that Lender properly included attorney’s fees of 10% of the amount due, and for this reason the second argument asserted in the petition to strike is rejected.

Third, Borrower argues that the record is fatally flawed, and the judgment should be stricken, because Lender’s complaint fails to specify the date and time in which Lender advanced the \$100,000.00 loan to Borrower. This argument is also rejected.

The Pennsylvania Rules of Civil Procedure instruct in pertinent part that—

[t]he complaint [in confession of judgment] shall contain ... an itemized computation of the amount then due, based on matters outside the instrument, if necessary, which may include interest and attorneys’ fees authorized by the instrument.<sup>14</sup>

This provision merely requires the confessing party to provide an itemized computation of the amounts due: nothing in these Rules requires any party confessing judgment to identify the date or time in which a loan was advanced.

Fourth, Borrower argues that he failed to make a knowing and intelligent waiver of his due process rights at the time he executed the Note which contained the warrant-of-attorney. This argument is quickly rejected because in Pennsylvania—

[t]here is ... no merit [in the] assertion that [a party] lack[ed] ... knowledge and/or understanding of the warrant of attorney provisions in the note.... The failure to read a confession of judgment clause will not justify avoidance of it.... This is particularly true where the confession of judgment clause is clear and conspicuous and part of a commercial transaction.<sup>15</sup>

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<sup>13</sup> COMMERCIAL JUDGMENT PROMISSORY NOTE—FUTURE ADVANCES, Exhibit 1 to the complaint, p. 3 (Warrant-of-Attorney, un-numbered).

<sup>14</sup> Pa. R.C.P. 2952(a)(7).

<sup>15</sup> Id.

In this case, Borrower executed a Note in the course of his commercial transaction with Lender. The commercial Note contains a clear and conspicuous warrant of attorney clause advising Borrower that he would waive his due process rights upon executing the Note. Having executed the Note, Borrower may not now argue that he did not intelligently and knowingly deprive himself of his due process right. For this reason, the petition to strike judgment by confession is denied in its entirety.

#### PETITION TO OPEN—DISCUSSION

A petition to open is an appeal to the court's equitable powers and is addressed to the sound discretion of the court.... However, the discretion exercised by the lower court must be guided by Rule 2959(e), Pa.R.C.P. which states in pertinent part [that if] evidence is produced which in a jury trial would require the issues to be submitted to the jury[,] the Court shall open judgment. Thus the standard of sufficiency the court must employ is that of a directed verdict, viewing all evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense, while rejecting the adverse allegations of the party obtaining the judgment.<sup>16</sup>

In the petition to open the judgment, Borrower re-asserts each of the arguments which the Court has already discussed and rejected in the preceding portion of this *Memorandum Opinion*. However, Borrower also avers in his petition to open that after “the alleged default, [Lender] and his wife came to [Borrower’s] store and took merchandise in excess of \$7,000.00 without [Borrower’s] consent.”<sup>17</sup> Borrower thus concludes that the “judgment should be opened and [Lender should be] required to account for the value received.”<sup>18</sup> This defense is rejected because in an action-in-

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<sup>16</sup> *Indus. Valley Bank & Trust Co. v. Lawrence Voluck Assocs., Inc.*, 428 A.2d 156, 158 (Pa. Super. 1981).

<sup>17</sup> Petition to open judgment by confession, ¶ 43; *memorandum* of law in support of the petition to open judgment by confession, pp. 8–9.

<sup>18</sup> *Id.*

confession-of-judgment, “[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses. The defenses raised must be valid ones.”<sup>19</sup> In this case, Borrower has produced no evidence showing that Lender engaged in self-help; consequently, Borrower may not seek a set-off by attempting to open the confession of judgment. For this final reason, the petition to strike or open judgment by confession is denied in its entirety.

**BY THE COURT,**

  
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**MCINERNEY, J.**

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<sup>19</sup>Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).