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

CITIZENS BANK OF PENNSYLVANIA, : December Term 2016
Successor in interest to MELLON BANK, N.A., :
Plaintiff, :
v. : No. 2736
ERWIN A. CARNER and LINDA CARNER, :
Defendants. :
Commerce Program
Control Number 17011496

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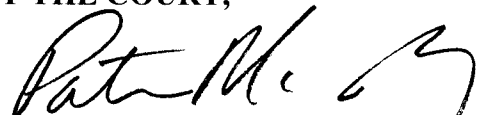
FEB 15 2017

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 14th day of February 2017, upon consideration of Defendant's Petition to Open and/or Strike Confessed Judgment, Plaintiff's response in opposition and this attached Memoranda, it hereby is **ORDERED** that the Petition to Strike/Open is **Denied**.

BY THE COURT,


PATRICIA A. McINERNEY, S.J.

Citizens Bank Of Pennsy-ORDRC



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	:	
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OPINION

Presently before the court is Defendants/Petitioners Erwin A. Carner and Linda Carner's ("Guarantors") Petition to Strike/Open Confessed Judgment. On January 2, 2001, Mellon Bank, N.A. extended to Cambridge Behavioral Health, Inc. ("Borrower") a loan in the principal amount of two hundred eight thousand dollars (\$208,000.00) which is evidenced by a Note and Line of Credit Agreement with the same date as the loan. Erwin A. Carner and Linda Carner signed the Guaranty and Suretyship Agreement ("Guaranty") wherein Guarantors guaranteed all the obligations of the Borrower to Mellon Bank. Thereafter, Mellon Bank, N.A. assigned the Loan Agreement and the related documents to Citizens. In accordance with the terms of the Loan, Borrower was required to make monthly payments on the Loan. In 2012, Borrower discontinued business operations. Guarantors continued to make monthly payments on the loan. At some point, Bank notified Guarantors that it intended to demand payment of the Loan and at the Guarantors request entered into Forbearance Agreements on December 18, 2013, September 30, 2014, November 18, 2014, and January 5, 2015, respectively. The Forbearance Agreements ratify and confirm the obligation and liability of Borrower and Guarantors to Bank under the loan documents; reaffirm, ratify and continue the Bank's liens on, and security interests in its

collateral; and set forth the terms and conditions under which Bank would forbear from exercising and enforcing the rights available to it under the loan documents. The January 5, 2015 Third Amendment to the Forbearance Agreement dated January 5, 2015 between Bank and Guarantors provides that Bank agrees to forbear from exercising rights and remedies available to it under the Loan Documents, until the earlier of (the “Termination Date”) (a) the occurrence of any default or Event of Default under the Loan Documents, (b) a breach of any of the obligations of Borrower and/or Executing Guarantors thereunder, or (c) February 1, 2015.

On May 16, 2016, Bank sent a letter declaring Guarantor in default and demanding payment in full for failing to make interest payments for the months of February, March and April 2016. The letter advised that Guarantors’ partial payments would not cure the defaults or operate as a waiver of any of Bank’s rights or remedies. Despite the demand for payment, Guarantors did not pay Bank the amounts due and owing under the loan agreements. On December 23, 2016, Bank filed a complaint in confession of judgment in the amount of \$220,341.79.¹ Guarantors now move to strike and/or open the confession of judgment.

DISCUSSION

A petition to strike a confessed judgment and a petition to open a confessed judgment are distinct remedies; they are not interchangeable.² A petition to strike a judgment operates as a demurrer to the record and may be granted only for a fatal defect or irregularity appearing on the

¹On December 15, 2016, approximately one week prior to Bank’s confession of judgment filing, Bank discovered that Guarantors sold a piece of artwork subject to a lien in favor of Bank. The letter regarding the artwork and the Consignment Agreement are not exhibits to the complaint in confession of judgment and were attached solely to Bank’s response to Guarantors’ petition to strike/open. Guarantors failed to turn over the proceeds from the art work sale to Bank to satisfy the outstanding debt obligation.

² *Midwest Fin. Acceptance Corp. v. Lopez*, 78 A.3d 614, 623 (2013) citing *Hazer v. Zabala*, 26 A.3d 1166, 1169 (Pa.Super.2011).

face of the record.³ In considering the merits of a petition to strike, the petition must focus on any defects or irregularities appearing on the face of the record, as filed by the party in whose favor the warrant was given, which affect the validity of the judgment and entitle the petitioner to relief as a matter of law.⁴ “[T]he record must be sufficient to sustain the judgment.” An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.⁵

On the other hand, a petition to open a confessed judgment is an appeal to the equitable powers of the court.⁶ The court shall open the confessed judgment if the petitioner promptly presents evidence on a petition to open which in a jury trial would require that the issues be submitted to the jury.⁷ A petitioner must offer clear, direct, precise and believable evidence of a meritorious defense, sufficient to raise a jury question.⁸ In the case *sub judice*, the only question raised in the petition to open is whether Guarantors have set forth a meritorious defense thus necessitating opening the judgment.

In support of their petition to strike, Guarantors argue that Bank failed to comply with Pa. R. Civ. P. 2952 (a)(2), (4)⁹, and (7) by failing to attach to the complaint a full and complete copy of the instrument upon which judgment was confessed, failed to attach proof that the instrument

³ *Resolution 623 Trust Corp. v. Copley Qu-Wayne Associates*, 546 Pa. 98, 106, 683 A.2d 269, 273 (1996).

⁴ *ESB Bank v. McDade*, 2 A.3d 1236, 1239 (Pa.Super.2010).

⁵ *Hazer v. Zabala*, 26 A.3d 1166, 1169 (Pa.Super.2011) (quoting *Resolution Trust Corp.*, *supra*).

⁶ *PNC Bank v. Kerr*, 802 A.2d 634, 638 (Pa.Super.2002), *appeal denied*, 572 Pa. 735, 815 A.2d 634 (2002).

⁷ Pa.R.Civ.P. 2959(e); *Pittsburgh Nat'l Bank v. Larson*, 352 Pa.Super. 250, 507 A.2d 867 (1986).

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

⁹ Inadvertently identified as (3) by Guarantors.

upon which judgment was confessed was assigned to Bank, failed to set forth a computation of the actual amount due, and fails to provide an accounting of the payments made by Borrower and Guarantor for the past sixteen years. These alleged deficiencies lack merit. Bank fully complied with Pa. R. Civ. P. 2952(a)(2), (4) and (7). Bank attached a copy of the Loan Agreements, the Guarantee and the Third Amended Forbearance Agreement, the instruments upon which judgment was confessed.¹⁰ Additionally, Bank is not required to provide proof of any alleged assignment between Mellon and Bank. Pa. R. Civ. P. 2952(a)(4) solely requires a statement that the loan at issue has been assigned. Bank fully complied with this requirement.¹¹ Additionally, Bank fully complied with Pa. R. Civ. P. 2952(a)(7) by including in the complaint an itemized computation of the amount due.¹² Bank is not required to provide a complete accounting of payment but need only aver a default and allege the amounts due.¹³ Since, Bank complied with the technical requirement of the rule to confess judgment, the petition to strike is denied.

Similarly, the petition to open suffers the same fate. Guarantors argue that the petition to open should be granted because the claimed amount due and owing is not correct, Bank breached the duty of good faith and fair dealing by confessing judgment two days after receipt of a monthly payment from Guarantor, and that the default interest, forbearance fees and attorney's fees are not reasonable, not supported by calculation and not due and owing. Guarantors' arguments do not constitute a meritorious defense. A petitioner must offer clear, direct, precise

¹⁰ Exhibit "B" to the complaint in confession of judgment.

¹¹ See complaint in confession of judgment paragraph 6.

¹² See complaint in confession of judgment paragraph 12.

¹³ *Davis v. Woxall Hotel, Inc.*, 395 Pa.Super. 465, 469, 577 A.2d 636, 638 (1990).

and believable evidence of a meritorious defense, sufficient to raise a jury question.¹⁴ Here, Guarantors have presented no evidence to dispute the existence of a default. Instead, Guarantors rely upon the statement “upon information and belief” and course of dealing between Bank and Guarantors to support the opening of the judgment. “Upon information and belief” is not clear, direct, precise and believable evidence. As for the course of dealing argument, the record shows that the Loan is sixteen years old, there have been four forbearance agreements entered into between the Borrower and Bank, Borrower defaulted and the loan was accelerated. Course of dealing which in this case is a partial payment on an accelerated debt without any evidence to support the course of dealing does not constitute a meritorious defense and is insufficient to support opening the judgment.

As for the reasonableness of the interest, default interest, attorney fees and forbearance fees, there is no evidence provided by Guarantors to substantiate the unreasonableness of said calculations. The right to interest, default interest, attorney fees and forbearance fees is set forth in the loan documents and is authorized by the warrant.¹⁵ As such, the petition to open is denied in this regard.

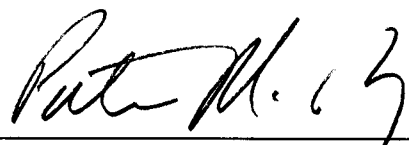
¹⁴ *Iron Worker's S. & L. v. IWS, Inc.*, 424 Pa.Super. 255, 622 A.2d 367, 370 (1993).

¹⁵ See Exhibit “A” to the complaint in confession of judgment Note and Line of Credit Agreement, Default Rate (s) pg. 2, Exhibit “C” to the complaint in confession of judgment Third Amended Forbearance Agreement, ¶ 2 Confirmation of Existing Indebtedness, ¶ 5 Forbearance payment and fee and ¶ 9 (b) attorney fees. See *RAIT Partnership, LP v. E Pointe Properties, I, Ltd.*, 957 A.2d 1275 (Pa.Super.2008) (upholding attorney collection commission of 15% of balance, or \$450,000.00); *Dollar Bank, Federal Savings Bank v. Northwood Cheese Co., Inc.*, 637 A.2d 309 (Pa.Super.1994) (upholding attorney collection fee of 15% of balance), *appeal denied*, 653 A.2d 1231 (Pa.1994).

CONCLUSION

For the foregoing reasons, the Petition to Strike/Open is **Denied**.

BY THE COURT,



PATRICIA A. McINERNEY, SJ.