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

SEMARK ASSOCIATES, LLC

Plaintiff

v.

NEGEL BENTICK and MAX MARCELIN

Defendants

: June Term, 2017
: Case No. 02923
:
:
: Commerce Program
:
:
: Control No. 19105316

ORDER

AND NOW, this 2nd day of March, 2020, upon consideration of defendants' petition to open or strike confession of judgment, and plaintiff's response and brief thereto, and for the reasons explained in the attached Opinion it is **ORDERED** that the petition is **DENIED** and **THE STAY OF EXECUTION IS LIFTED**.

BY THE COURT



RAMY I. DJERASSI, J.

DOCKETED

MAR - 3 2020

R. POSTELL
COMMERCE PROGRAM

Semark Associates Llc V-ORDRC



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OPINION

On June 11, 2015, plaintiff (“Landlord”), leased approximately 500 square feet of commercial space within a building (the “Leased Space”), to herein defendants (“Tenants”), pursuant to the terms of a “Lease.”¹ The Lease required Tenants to remain in possession for two years, from July 1, 2015 through June 30, 2017, and to remit rent payments of \$750.00 per month, for a total of \$9,000.00 per year.² The Lease also contained a warrant-of-attorney empowering Landlord to confess judgment against Tenants, for money and in ejection, upon a default committed by them.³

On September 8, 2015, Landlord and Tenants entered into a LEASE MODIFICATION AGREEMENT (hereinafter, the “New Term Agreement”), which preserved the existing two-year term of the Lease, except that the commencement and expirations dates thereof were slated forward by two months –that is, the commencement date was postponed from July 1, 2015 to September 1, 2015, and the expiration date was correspondingly postponed from June 30, 2015, to August 31, 2017.⁴ The New Term Agreement shows that no additional consideration was exchanged.⁵

Landlord confessed judgment against Tenants on June 26, 2017, on grounds that Tenants had failed to remit rent payments when due.⁶ On November 1, 2017, one of the Tenants, Negel Bentick (“Bentick”), filed the instant petition to strike or open the confessed judgment. Bentick’s petition is improperly captioned “Affidavit” and contains

¹ Lease Agreement, Exhibit A to the complaint.

² Id.

³ Id., ¶ 40.

⁴ See, New Term Agreement (a/k/a Lease Modification Agreement), Exhibit B to the complaint.

⁵ Id.

⁶ Complaint, ¶ 14.

no numbered paragraphs as required under the Rules of Civil Procedure.⁷ Nevertheless, this Court elects to disregard this error because it does not affect the substantial rights of the parties.⁸

THE PETITION TO STRIKE.

The law on striking a confession of judgment is well-settled:

[a] petition to strike a judgment is a common-law proceeding that 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.... An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.⁹

In the petition to strike, Bentick avers that he was “never served as required by law...” or “in accordance with Pennsylvania Rule of Civil Procedure 440 [relating to service other than original process], nor ... with Pa. Rule 205.4(g) [relating to the electronic filing of legal papers].”¹⁰ This challenge to the validity of the judgment is rejected because under the Rules of Civil Procedure, “[t]he prothonotary shall immediately give written notice of the entry of ... a judgment entered by confession to the defendant by ordinary mail.”¹¹ In this case, Bentick does not allege that the prothonotary failed to give him written notice by mail; rather, he avers that he was never served under Pa. R.C.P. 440 and/or Pa. R.C.P. 205.4(g). However, neither Pa. R.C.P. 440, nor Pa. R.C.P. 205.4(g), are implicated in this instance because any requirements

⁷ “A petition [to strike or open confession of judgment] shall be divided into paragraphs numbered consecutively ... [and] ... shall contain as far as practicable only one material allegation.” Pa. R.C.P. 206.1(b), Pa. R.C.P. 2016.1(c).

⁸ Pa. R.C.P. 126.

⁹ Dime Bank v. Andrews, 115 A.3d 358, 364 (Pa. Super. 2015).

¹⁰ Petition to strike (un-numbered paragraphs).

¹¹ Pa. R.C.P. 236(a)(1).

to notify Bentick were discharged by the prothonotary of Philadelphia County pursuant to Pa. R.C.P. 236(a)(1).

Bentick has not identified a fatal flaw in the record, and for this reason the petition to strike confession of judgment is denied.¹²

THE PETITION TO OPEN.

The law on opening a confession of judgment is equally well-settled:

The trial court may open a confessed judgment if the petitioner—

- (1) acts promptly,
- (2) alleges a meritorious defense, and
- (3) can produce sufficient evidence to require submission of the case to a jury.¹³

The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses. The defenses raised must be valid ones.¹⁴

In the petition to open, Bentick avers that the New Term Agreement did not extend the term of the lease. Specifically, Bentick asserts that he “vacated the property in June of 2017 because ... [he] understood [the end of June] to be the end of ...

¹² The court is aware that the New Term Agreement purports to reaffirm “all terms ... and conditions of the Lease,” including its warrant-of-attorney. See, New Term Agreement a/k/a Lease Modification Agreement, Exhibit B to the complaint, at p. 1 (un-numbered). The Court is also aware that normally, such generic language of reaffirmation is insufficient to preserve a warrant-of-attorney in the original agreement. See, Egyptian Sands Real Estate, Inc. v. Polony, 294 A.2d 799, 803 (Pa. Super. 1972) (“Pennsylvania will not presume an intent of parties to a modified contract to perpetuate a warrant of attorney”). However, restating or republishing by reference a warrant-of-attorney in a modifying document is unnecessary where the “modification ... [is] nothing more than an extension of the original ... maturity date and not ... a new, comprehensive agreement setting new burdens and benefits upon the parties.” See, Graystone Bank v. Grove Estates, LP, 58 A.3d 1277 (Pa. Super. 2013) (aff’d 81 A.3d 880 (Pa. 2013)). As the Court has already indicated, the New Term Agreement (a/k/a Lease Modification Agreement), imposed no new burdens or benefits upon the parties, and required no exchange of new consideration, but merely postponed the two-year term of the original Lease by two months. For this reason, the Court finds that Tenants remained bound to the warrant-of-attorney from the original Lease, even after they executed the New Term Agreement.

¹³ Pops PCE TT, LP v. R & R Rest. Grp., LLC., 208 A.3d 79, 85–86 (Pa. Super. 2019), re-argument denied (June 12, 2019), appeal denied sub nom. Pops PCE TT, LP v. R&R Rest. Grp., LLC., No. 223 WAL 2019, 2020 WL 241012 (Pa. Jan. 16, 2020).

¹⁴ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

[the] Lease.”¹⁵ In addition, Bentick asserts that the New Term Agreement was executed not to postpone by two months the commencement and expiration of the Lease, but only “to remove [one of the two Tenants] Max Marcelin[,]” therefrom.¹⁶ Both defenses are rejected. As to the first defense, this Court notes that both Tenants, including Bentick, executed the New Term Agreement which postponed the commencement and expiration of the Lease by two months. His signature appears at the end of that agreement and he has not averred that his signature was forged. Having executed a document which clearly postponed by two months the commencement and expiration of the Lease, Bentick may not now assert that the Lease would expire two months before the agreed-upon postponement.¹⁷ As to the second defense, Bentick has offered no evidence that the New Term Agreement was meant to remove his co-Tenant from the obligations thereunder. Instead, the Court notes that both Bentick and his co-Tenant executed the New Term Agreement, and both reaffirmed their existing obligations from the original Lease.

Finally, Bentick avers that the judgment should be opened because the entry thereof denied him “an opportunity to have due process.”¹⁸ This last defense is rejected because Bentick relinquished certain due process rights as soon as he executed a document containing a warrant-of-attorney:

[a] warrant of attorney constitutes a grant of authority by one contracting party to the other, upon the happening of a certain event, *i.e.*, a breach of the terms of the agreement wherein the warrant is contained, **to enter that**

¹⁵ Petition to open, (un-numbered paragraphs).

¹⁶ Id.

¹⁷ “[A] failure to read ... [an] agreement does not render it either invalid or unenforceable. The law of Pennsylvania is clear: one who is about to sign a contract has a duty to read that contract first.” Hinkal v. Pardoe, 133 A.3d 738, 743 (Pa. Super. 2016).

¹⁸ Petition to strike (un-numbered paragraphs).

which results ordinarily only after a trial of the issue between the parties, i.e., a judgment.¹⁹

In addition—


[A] confession of a judgment is a voluntary submission to the jurisdiction of the court, **giving by consent and without the service of process, what could otherwise be obtained by summons and complaint, and other formal proceedings.** A person who confesses a judgment submits to be sued in that form and manner.²⁰

Lastly—

in the context of a judgment confessed ... the hearing required to comport with due process means simply an opportunity to be heard; **it does not require a proceeding comparable to a full trial, but may be satisfied by other procedural opportunities to be heard, such as a petition to open judgment,** a stay of execution, a rule to show cause why the judgment should not be opened, depositions to support the allegations in the petition, and oral argument.²¹

In this case, Bentick granted to Landlord the authority to enter judgment without service of process, and agreed to limit his due process rights within specific procedural devices, including the instant petition to open the confession of judgment. He was not deprived due process, and for the foregoing reasons the petition to strike or open confession of judgment is denied in its entirety.

BY THE COURT,



RAMY I. DJERASSI, J.

¹⁹ TCPF Ltd. P'ship v. Skatell, 976 A.2d 571, 575 (Pa. Super. 2009) (citing Scott Factors, Inc. v. Hartley, 228 A.2d 889 (Pa. 1967)) (emphasis supplied).

²⁰ O'Hara v. Manley, 12 A.2d 820, 822 (Pa. Super. 1940) (emphasis supplied).

²¹ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994) (emphasis supplied).