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

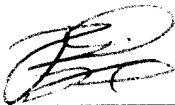
FIRST REPUBLIC BANK d/b/a	:	September Term 2017	DOCKETED
REPUBLIC BANK,	:		
	:	No. 98	MAR 23 2018
Plaintiff,	:		
v.	:		
TR-PHILADELPHIA, L.P. and ANTHONY M.	:	Commerce Program	R. POSTELL
RUFO,	:		COMMERCE PROGRAM
Defendants.	:		
	:	Control Number 17103148	

ORDER

AND NOW, this 22nd day of March 2018, upon consideration of the Petition of defendants TR-Philadelphia, L.P. and Anthony Rufo to Strike and/or Open Confessed Judgment and for a Stay of all Execution Proceedings, Plaintiff's response in opposition and the attached Memorandum Opinion, it hereby is **ORDERED** as follows:

1. The Petition to Strike is **Denied**.
2. The Petition to Open is **Granted in part** as it pertains to the assessment of actual attorney fees incurred, late charge fees and interest charged. All other aspects of the Petition to Open are **Denied**.
3. The parties shall have until Monday, May 7, 2018 to conduct discovery on issues of actual attorney fees and late charges.
4. The parties shall appear for a hearing on the aforementioned issues on Thursday, May 10, 2018 at 10:00am in Court Room 425, City Hall, Philadelphia, Pa.
5. The Stay of Execution shall remain in place until further order of the court.

BY THE COURT



RAMY I. DJERASSI, J.

Republic First Bank D/B-ORDOP



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

FIRST REPUBLIC BANK d/b/a	:	September Term 2017
REPUBLIC BANK,	:	
	:	
Plaintiff,	;	No. 98
	:	
v.	:	
TR-PHILADELPHIA, L.P. and ANTHONY M.	:	Commerce Program
RUFO,	:	
	:	
Defendants.	:	Control Number 17103148
	:	
	:	

OPINION

Presently before the court is defendants TR-Philadelphia, L.P. and Anthony M. Rufo's Petition to Strike and/or Open Confessed Judgment and for a Stay of All Execution Proceedings. For the reasons discussed below the petition is granted in part and denied in part.

On November 24, 2003, First Republic Bank d/b/a Republic Bank ("Bank") extended to TR-Philadelphia, L.P. and Anthony M. Rufo ("Rufo")(collectively referred to as "Defendants") a commercial real estate line of credit in the amount of \$4,000,000 (hereinafter "Line of Credit Note").¹ Rufo is a real estate developer and builder who has been a customer of the Bank for a number of years. From November 24, 2003 until April 13, 2017, the Line of Credit Note was extended, renewed and modified by the Bank. The Line of Credit Note and the Extension and Modification Agreements contained confession of judgment provisions. On July 31, 2013, AMR Construction, Inc. and TR-Suburban, L.P., entities controlled by Rufo, respectively executed Continual and Unconditional Guarantee Agreements which also contained a confession of judgment provision. The Line of Credit Note matured on July 1, 2017. On July 19, 2017, the

¹ In addition to the Line of Credit Note, the Bank also issued a Term Loan in 2007 to TR-Jackson, L.P., an entity controlled by Rufo. The Line of Credit Note, which is the subject of this petition, and the 2007 Term Loan were not cross collateralized. The Term Loan was secured by a former paintbrush factory at 1201 Jackson Street. The Bank also filed a confession of judgment on the term loan which has been marked satisfied.

Bank issued a Notice of Maturity wherein Bank notified defendants that it expected to be paid and that there would be no further extension.

On September 1, 2017, Bank filed a complaint in confession of judgment against defendants in the amount of \$2,976,617.52, consisting of \$2,537,406.06 in principal, \$32,739.57 in interest, \$135,870.30 in late charges and \$270,601.59 in attorneys' fees.² Bank attached to its confession of judgment complaint the original Line of Credit Note dated November 24, 2003 and utilized the warrant of attorney contained therein to confess judgment. On September 11, 2017, Bank issued two writs of execution on the properties it held as collateral. Also, on September 11, 2017, Bank filed a petition with the court seeking a charging order to charge Rufo's economic interest in TR-Jackson L.P. and its general partner. On October 4, 2017, after the docket failed to reflect any opposition to the Bank's request for a charging order, the court granted the petition. On October 17, 2017, defendants filed a motion to strike the charging order. On the same date, the court granted defendants motion *ex parte* and struck the order dated October 4, 2017 and granted a stay of the charging order pending resolution of this petition. The instant petition is now ripe for disposition.

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.³ 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*

² Bank also confessed judgment against Guarantors, respectively. Petitions to strike and/or open are currently pending in those matters.

³*Franklin Interiors v. Wall of Fame Management Co., Inc.*, 510 Pa. 597, 511 A.2d 761 (1986); *Parliament Industries, Inc. v. William H. Vaughan & Co., Inc.*, 501 Pa. 1, 459 A.2d 720 (1983).

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.⁴ However, if the truth of the factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike.⁵ The original record that is subject to review in a motion to strike a confessed judgment consists of the complaint in confession of judgment and the attached exhibits.⁶

Defendant argues that the judgment should be stricken because the Bank improperly confessed judgment by using the original warrant of attorney contained in the 2003 Line of Credit Note which was extinguished by the twelve subsequent modifications agreements. While the court recognizes that the original Line of Credit Note was modified on twelve occasions, these extension agreements are outside the record of this confessed judgment proceeding and therefore the court may not consider them on a petition to strike off.⁷ The complaint in confession of judgment and the exhibits attached thereto are procedurally proper and are therefore self-sustaining. They may not be grounds for striking off the judgment and accordingly, the Petition to Strike in this regard is denied.

⁴ *Franklin Interiors, supra; Parliament Industries, supra.*

⁵ *Northway Village No. 3, Inc. v. Northway Properties, Inc.*, 430 Pa. 499, 244 A.2d 47 (1968); *Manor Building Corporation v. Manor Complex Associates, Ltd.*, 435 Pa.Super. 246, 645 A.2d 843 (1994).

⁶ *Neducsin v. Caplan*, 121 A.3d 498, 504 (Pa.Super. 2015) citing *Resolution Trust Corp.v. Copley Qu-Wayne Ass.*, 546 Pa. 98, 683 A.2d 269 (1986).

⁷ *See, Resolution Trust supra* at 683 A.2d at 274–75.

Defendant also argues that the judgment should be stricken as it contains items, late charges and excessive attorney fees, not authorized by the warrant. The warrant of attorney in the 2003 Line of Credit Note provides as follows:

Maker irrevocably authorizes and empowers any attorney of any court of record, after the occurrence of any Event of Default hereunder, to appear for Maker in any action brought against Maker on this Note at the suit of Payee, and to confess or enter judgment against Maker for the entire principal balance of this Note, all accrued interest and all other amounts due hereunder, together with costs of suit and an attorney's commission of the greater of 10% of such principal and interest and other sums due or \$5,000 added as a reasonable attorney's fee; and for so doing this Note for a copy of it verified by affidavit shall be sufficient warrant. Notwithstanding the attorney's commission provided for in the preceding sentence (which is included in the warrant for purposes of establishing a sum certain), the amount of attorney's fees that Payee may recover from Maker shall not exceed the actual attorney's fees incurred by Payee. MAKER ACKNOWLEDGES THAT BY AGREEING TO THE FOREGOING CONFESSION OF JUDGMENT, MAKER WAIVES THE RIGHT TO NOTICE AND A PRIOR JUDICIAL PROCEEDING TO DETERMINE ITS RIGHTS AND LIABILITIES AND FURTHER ACKNOWLEDGES THAT PAYEE MAY, ON DEFAULT, OBTAIN A JUDGMENT AGAINST MAKER FOR ALL SUMS DUE HEREUNDER WITHOUT THE PRIOR KNOWLEDGE OR CONSENT OF MAKER AND WITHOUT ANY OPPORTUNITY OF MAKER TO RAISE ANY DEFENSE, SET-OFF, COUNTERCLAIM OR OTHER CLAIM THAT MAKER MAY HAVE. MAKER GRANTS THE FOREGOING RIGHT TO CONFESS JUDGMENT AS AN EXPLICIT AND MATERIAL PART OF THE CONSIDERATION BARGAINED FOR BETWEEN MAKER AND PAYEE.

Defendants' objection to the inclusion of late charges in the confessed judgment is not warranted. The warrant of attorney allows the Bank to confess judgment for the entire principal balance of the Note, all accrued interest and all other amounts due under the Line of Credit Note. Late charges are a permissible item to be charged per § 3.4 of the Line of Credit Note and the late charge is an authorized item.

Defendants also argue the judgment should be stricken because the Bank confessed judgment for grossly excessive attorney's fees. The warrant of attorney does provide for an attorney commission of greater than 10% of the principal, interest and all other amounts due or

\$5,000. However, the warrant also provides that the ten percent commission is a place holder for a sum certain and that the amount of attorney fee shall not exceed the actual attorneys' fee incurred by Bank. Since the attorney fee is authorized by the warrant, the judgment will not be stricken. However, the judgment will be opened so that the actual amount of attorney's fee incurred by the Bank may be determined and assessed.

Defendants also seek to open the judgment. 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."⁸ "A meritorious defense is one upon which relief could be afforded if proven at trial."⁹ Pa.R.Civ.P. 2959(e) sets forth the standard by which a court determines whether a moving party has properly averred a meritorious defense. 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. Furthermore, the court must view the evidence presented in the light most favorable to the moving party, while rejecting contrary evidence of the non-moving party.¹⁰

In the case *sub judice*, defendants argue the judgment should be opened because the Bank misappropriated \$2,108,739.00 obtained from the sales of various properties and failed to apply the money to the balance of the Line of Credit Note.¹¹ This defense is not meritorious. Defendants acknowledged on April 13, 2017 in the Twelfth Extension and Loan Modification

⁸ *PNC Bank, Nat. Ass'n. v. Bluestream Technology, Inc.*, 14 A3d 831, 836 (Pa. Super. 2010).

⁹ *Ferrick v. Bianchini*, 69 A.3d 642 (Pa. Super. 2013).

¹⁰ *Continental Bank v. Axler*, 510 A.2d 726, 728 (1986); *Pawco v. Bergman Knitting Mills, Inc.*, 424 A.2d 891, 897 (1980).

¹¹ The Bank argues that defendants' petition was not timely filed. However, it is not clear from the record provided when defendants was notified per the Rules of Civil Procedure that a confessed judgment was filed. As such, the court will deem the petition timely filed.

Agreement that the outstanding balance on the Loan as of April 12, 2017 was \$2,537,406.06, the amount upon which the Bank confessed judgment. Additionally, a review of the twelve extension and modification agreements shows that the Bank did acknowledge and deduct amounts received from Borrower for the properties as is evident from the outstanding balances identified on each of the various modification and extension agreements.¹² As such, the petition to open is denied in this regard.

Defendants also argue that the judgment should be opened because the Bank never declared an “Event of Default”, a prerequisite to the entry of a confessed judgment. On July 19, 2017, the Bank issued a letter to defendants stating that the loan would no longer be extended and that the Bank expected to be paid in full. Defendants failed to pay and the Bank confessed judgment per the warrant of attorney. A declaration or notice of default is not a prerequisite to confessing judgment. The Line of Credit Note contains a waiver of notices of non-performance and of demands for performance. As such, defendants’ defense in this regard is not meritorious and the petition to open is denied.

Defendants also argue that the judgment should be opened because the calculation of late charges is erroneous. The Line of Credit Note provides the following as it pertains to late fees:

3.4. If the entire amount of any required installment of principal and/or interest is not paid in full within fifteen (15) days after the same is due (whether a regularly scheduled payment or following demand by Payee in accordance with the terms of this Note), Maker shall pay to Payee a late fee equal to five percent (5%) of the required payment (but in no event less than \$75.00). Such fifteen day shall not construed in any way to extend the due date of any such payment. If after an Event of Default, Payee elects to accelerate the maturity of the Loan and declare the entire debt due and owing immediately, Payee may, as an element of damages, continue to assess late charges against Maker pursuant to the late charge terms that have heretofore been set forth.

¹² See Exhibit “2” to Plaintiff’s response in opposition to Defendants’ Petition - Extension and Loan Modification Agreements.

On July 19, 2017, when the Bank accelerated the debt and declared the principal and interest due, the amount of late fee due was \$623.56. In September 2017, when the Bank confessed judgment, the late fee was identified as \$135,870.30. Due to the inconsistent and possibly excessive nature of the late charge, the judgment is opened to determine the correct calculation for late charge fees.

Lastly, defendants also challenge the amount of interest in the confessed judgment stating that the Bank failed to explain how the interest was calculated. This is correct as neither the interest rate, nor the time period to which the interest rate is applicable, is readily discernible from the calculations averred in the complaint. A hearing is therefore necessary to assure that the confessed judgment is correct and final. As such, defendants' petition to open in this regard is granted.

CONCLUSION

For the foregoing reasons, defendants' petition to strike the judgment is denied. Defendants' petition to open the judgment is granted in part as it pertains to the actual attorney fee commission, the late charge fee and applicable interest. All other aspects of the petition to open are denied. The parties shall have until Monday, May 7, 2018 to conduct discovery on issues of attorney fees, late charges and interest. The parties shall appear for a hearing on these aforementioned issues on Thursday, May 10, 2018 at 10:00am in Court Room 425, City Hall, Philadelphia, Pa. The stay of execution shall remain in place until further order of the court.

BY THE COURT,



RAMY I. DJERASSI, J.