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

SMS FINANCIAL P, LLC	:	August Term, 2018
	:	Case No. 00397
Plaintiff	:	
	:	
v.	:	Commerce Program
	:	
ETERNITY AT THE GALLERY, INC., NIRA JACOBSON and **MIRIAM HEMO**	:	
	:	Control No. 18093400
Defendants	:	

ORDER

AND NOW, this 5th day of February, 2019, upon consideration of the petition to strike or open judgment entered by confession and for a stay of execution, the response in opposition, and the respective *memoranda*-of-law, it is **ORDERED** that the petition is **DENIED**. The amount in confession of judgment is **REDUCED** from $100,490.19 to **$94,489.74** as to all defendants. The **STAY OF EXECUTION** proceedings is **LIFTED**.

BY THE COURT,

NINA W. PADILLA, J.

Sms Financial P, Llc Vs-ORDRC

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OPINION

On May 29, 2007, defendant, Eternity at the Gallery, Inc. ("Borrower"), executed a promissory note in favor of lender, PNC Bank, N.A., in the amount of $80,000.00.[1] Borrower's obligation to repay the loan was guaranteed by two individuals, defendants Nira Jacobsen and Miriam Hemo (the "Guarantors"), pursuant to two separate commercial guaranties which they respectively executed.[2] On April 12, 2018, lender PNC Bank, N.A. assigned its rights to the promissory notes and guaranties to herein plaintiff, SMS Financial P, LLC ("Plaintiff").[3]

The complaint-in-confession-of-judgment avers that Borrower and Guarantors defaulted on their respective obligations. Subsequently, Plaintiff demanded payment of the loan's balance, and entered the instant judgment by confession after Borrower and Guarantors failed to cure.[4] The judgment, in the amount of $100,490.19, was entered on August 8, 2018: this amount comprises a loan balance of $60,793.27, interest of $30,561.00, and attorney's fees of $3,135.47.[5]

On September 27, 2018, one of the individual guarantors, Nira Jacobson ("Jacobson"), filed a petition to strike or open the judgment and for a stay of execution with an accompanying *memorandum*-of-law; Plaintiff timely filed a response.

THE PETITION TO STRIKE

In the petition, Jacobson asks the Court to strike the judgment because Plaintiff

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[1] Promissory note, Exhibit A to the complaint.
[2] Commercial Guaranties of Nira Jacobsen and Miriam Hemo, Exhibits B, C to the complaint.
[3] Endorsement and Allonge, Exhibit D to the complaint.
[4] Complaint, ¶¶ 9-10.
[5] The several amounts provided by Lender do not add up: the correct total is $94,489.74, not $100,490.19 as claimed by Lender. Under Pennsylvania law, "if the judgment as entered is for items clearly within the judgment note, but excessive in amount, the court will modify the judgment and cause a proper judgment to be entered." Dollar Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994). Accordingly, the amount in judgment is modified and reduced to $94,489.74 as to **all defendants**, even though only individual defendant Nira Jacobson has filed a petition to strike or open the instant judgment.

is not the same party in whose favor the confession of judgment was authorized. This challenge to the judgment is rejected because the operative warrants-of-attorney executed by Jacobson unequivocally state that upon an event of default, judgment could be entered against Borrower and Jacobson as a guarantor, "**IN FAVOR OF [THE ORIGINAL] LENDER OR ANY HOLDER HEREOF....**"[6] In this case, Plaintiff is the holder of the promissory note and guaranty by virtue of an assignment, and for this reason the first argument seeking to strike the judgment is rejected.[7]

Additionally, Jacobson asks the Court to strike the judgment on grounds that the pertinent warrants-of-attorney have no identifying headings, nor do they inform the defendants that execution of the promissory note and personal guaranty would result in a waiver of defendants' rights. This challenge is likewise rejected. Under Pennsylvania law—

> [a] **warrant** of **attorney** to confess judgment must be self-sustaining; the **warrant** must be in writing and signed by the person to be bound by it; and the requisite signature must bear a direct relation to the **warrant** and may not be implied extrinsically nor imputed from assignment of the instrument containing the **warrant**.[8]

Here, nothing in the above-quoted language requires that a warrant-of-attorney be headlined, or that it specifically inform a party of a waiver of any constitutional rights. Instead, a warrant-of-attorney is self-sustaining if the writing is signed by the person to be bound thereunder, as long as the party's signature bears a direct relation to the warrant-of-attorney. In this case, the various signatures of defendant Jacobson

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[6] Promissory Note, Exhibit A to the complaint, p. 3; Commercial Guaranty of Jacobson, Exhibit B to the complaint, p. 4 (underlining added).
[7] See, Endorsement and Allonge, Exhibit D to the complaint.
[8] Ferrick v. Bianchini, 69 A.3d 642, 651 (Pa. Super. 2013).

appear immediately below the pertinent warrants-of-attorney, and such signatures bear a direct relation thereto. For this reason the warrants are self-sustaining and the petition to strike is denied in its entirety.

THE PETITION TO OPEN.

In the petition, Jacobson asks the court to open the judgment because the claims asserted in the complaint-in-confession-of-judgment are time barred by the applicable statute of limitations. The applicable statute of limitations states that—

> [n]otwithstanding section 5525(7) (relating to four year limitation), an action upon an instrument in writing **under seal** must be commenced within 20 years.[9]

In this case, Jacobson executed a promissory note and guaranty, wherein the word "seal" appears in both documents next to Jacobson's signatures; therefore, this Court finds that the promissory note and Jacobson's guaranty were executed under seal. In addition, the Court notes that Plaintiff confessed the instant judgment well before the expiration of the 20-year statute of limitations applicable to instruments under seal; therefore, the judgment entered by confession is not time-barred, and the first argument advanced by Jacobson in support of the petition to open is rejected.

In the petition, Jacobson also asserts that the judgment should be opened because the petitioner has other meritorious defenses.[10] One defense states that the judgment should be opened because Plaintiff "has failed to give Defendants appropriate and accurate credit for all the payments...."[11] This assertion is easily rejected because "the petitioning party bears the burden of producing sufficient evidence to substantiate

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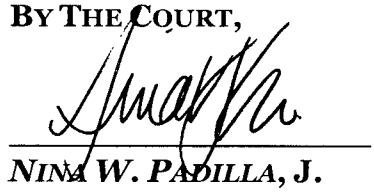
[9] 42 Pa. C.S.A. § 5529(b)—Instruments Under Seal (emphasis supplied). See, Osprey Portfolio, LLC v. Izett, 67 A.3d 749, 798 (Pa. 2013) (affirming the lower courts' decision and finding that an instrument under seal, including a guaranty, is governed by a twenty-year statute of limitations.)
[10] Petition to open, Count II—B, pp. 6-7.
[11] Id.

its alleged defenses."[12] In this case, Jacobson has offered no evidence tending to show that Plaintiff failed to credit certain payments, nor did Jacobson provide evidence in support of any other defenses listed in the petition. Jacobson has not sustained the burden of proof of a petitioner in this attempt to open the judgment; therefore, the petition to open is likewise denied in its entirety.[13]

BY THE COURT,



NINA W. PADILLA, J.

[12] Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).
[13] The various defenses listed by Jacobson include the doctrine of laches, failure to mitigate, unclean hands, accord and satisfaction, res judicata, waiver, assumption of risk, and others. These defenses are rejected because Jacobson has not substantiated such defense with any evidence. Id.