

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

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DOMINIC'S INC.

*Plaintiff*

v.

TONY'S FAMOUS TOMATO PIE BAR & RESTAURANT, INC.

*Defendant*

: October Term, 2018

: Case No. 01546

: Commerce Program

: 50 EDA 2019

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OPINION

Defendant Tony's Famous Tomato Pie Bar & Restaurant, Inc. has appealed the Order of this Court dated November 30, 2018, which Order denied defendant's petition to strike or open judgment entered by confession. For the reasons stated in the Order dated November 30, 2018 and in this Opinion, the Court respectfully suggests that its decision be affirmed on appeal.

Dated: 1/31/19

BY THE COURT,

  
\_\_\_\_\_  
NINA W. PADILLA, J



### BACKGROUND

On February 26, 2016, appellant (“Borrower”), executed a promissory note (the “Note”), in favor of appellee (“Lender”). The Note arose out of an “AGREEMENT OF SALE,” whereby Lender sold to Borrower a tavern, its building, and equipment. The Note contained a warrant-of-attorney empowering Lender to confess judgment upon the occurrence of a default committed by Borrower.<sup>1</sup> On October 11, 2018, Lender confessed judgment against Borrower on the grounds that Borrower had failed to make two monthly payments as required under the Note.<sup>2</sup> On November 6, 2018, Borrower filed its petition to strike or open the judgment. On November 30, 2018, this court entered an Order denying the petition to strike or open the judgment. The court included in its Order an expansive footnote explaining the grounds for its decision.<sup>3</sup> On December 27, 2018, Borrower appealed to the Pennsylvania Superior Court and subsequently filed, on January 15, 2019, a 1925(b) statement of errors complained of on appeal.

### THE PETITION TO STRIKE OR OPEN CONFESSION OF JUDGMENT

The petition to strike or open the judgment asked this court to strike the judgment on grounds that the record contained several fatal flaws. The petition asserted that the judgment should have been stricken because Lender was not the real party entitled to confess the judgment, and the amounts claimed by Lender were grossly excessive as Borrower had defaulted merely upon two monthly payments for an amount of only \$6,459.22. The petition also asserted that the judgment should have been stricken because Lender had insufficiently alleged the occurrence of an event of default.

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<sup>1</sup> Promissory note, p. 6, Exhibit A to the complaint-in-confession-of-judgment.

<sup>2</sup> Complaint-in-confession-of-judgment, ¶ 8.

<sup>3</sup> The Order dated November 30, 2018 is attached to this Opinion.

The law on striking a confessed judgment is well-settled:

[a] petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.... A petition to strike is not a chance to review the merits of the allegations of a complaint. Rather ... [it is] aimed at defects that affect the validity of the judgment and that entitle the petitioner, as a matter of law, to relief....<sup>4</sup>

In this case, a review of the record showed that the Note properly identified Lender as the party entitled to confess judgment upon a default committed by Borrower.<sup>5</sup> In addition, the Note and its warrant-of-attorney showed that upon a default committed by Borrower, **Lender was fully empowered to confess judgment for the entire unpaid principal.**<sup>6</sup> Moreover, a review of Lender's complaint-and-affidavit-of-default showed that Lender had properly alleged the occurrence of a default committed by Borrower.<sup>7</sup> Based on the foregoing, this court respectfully suggests that it properly denied the petition to strike because the record was not fatally flawed, the amounts claimed by Lender were not excessive, and the events of default had been properly alleged by Lender.

The petition to open asserted that the judgment should be opened because Lender had misrepresented the financial conditions and profitability of the tavern, had misrepresented the soundness of the building and the value of the equipment therein, had depleted foodstuff inventory in violation of the sale agreement, and had improperly discontinued power and cable services to the premises.<sup>8</sup>

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<sup>4</sup>Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267 (Pa. Super. 2015).

<sup>5</sup> Promissory note, p. 1, Exhibit A to the complaint-in-confession-of-judgment.

<sup>6</sup> Promissory note, p. 2 (2<sup>nd</sup> full paragraph); warrant-of-attorney, p. 6, Exhibit A to the complaint-in-confession-of-judgment.

<sup>7</sup> Complaint-in-confession-of-judgment, ¶¶ 8-9; Affidavit of default, ¶ 2, attached as Exhibit F to the complaint-in-confession-of-judgment.

<sup>8</sup> Petition to open, ¶¶ 3-19, 41-42.

The law on opening confessions of judgment is well-settled: “a judgment of confession will be opened **if ... petitioner seeking relief therefrom produces evidence which in a jury trial would require issues to be submitted to a jury.**”<sup>9</sup> In this case, Borrower provided no evidence in support of its defenses asserting fraud and breach-of-contract. Borrower failed to sustain its burden of proof, and for this reason it is respectfully suggested that this Court properly denied the petition to open the judgment.

THE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

Paragraphs 1-3 of the Statement of Errors Complained of on Appeal assert that this court erred (1) by failing to issue a Rule-to-Show-Cause; (2) by failing to allow discovery, and (3) by denying the petition prior to any discovery, pursuant to Pa. R.C.P. 206.6.<sup>10</sup>

Preliminarily, it is noted that in this confession-of-judgment action, an automatic Rule-to-Show-Cause Order was issued as of course, notwithstanding Borrower’s assertion to the contrary. The docket shows that on the same day when Borrower filed its petition, the Motion Court of the Court of Common Pleas of Philadelphia County generated an automatic Order for a “Response Date” to the petition.<sup>11</sup> The automatic Order generated by the Motion Court conformed not only to the Pennsylvania Rules of Civil Procedure, but also to the Philadelphia County Rules of Court. Specifically, Pa. R.C.P. 206.6 states that—

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<sup>9</sup> Neducsin v. Caplan, 121 A.3d 498, 506 (Pa. Super. 2015) (emphasis supplied).

<sup>10</sup> “A rule to show cause shall be issued as of course upon the filing of ... [a] petition.” Pa. R.C.P. 206.6 (2018).

<sup>11</sup> The docket page requiring that a response to the petition to strike or open be filed within twenty days is attached to this Opinion.

[a]rule to show cause shall be issued as of course upon the filing of the petition. **The rule shall direct an answer be filed to the petition within twenty days after service of the petition to respondent.**<sup>12</sup>

In addition, the Philadelphia County Rules of Court instruct that—

[t]he Rule to Show Cause ... set forth in PA. R.C.P. 206.6 is hereby adopted.... **Upon the filing of a petition, a rule to show cause order shall be issued as of course by the Motion Court clerk on behalf of the Court.** The form of rule to show cause shall be substantially as set forth hereunder.<sup>13</sup>

Upon a reading of the afore-quoted Rules, this Court determined that the automatic Order, and the response date therein, conformed to the requirements of PA. R.C.P. 206.6 because it directed that an answer be filed within twenty days. For this reason, it is respectfully suggested that this Court did not err in failing to issue an Order captioned “Rule-to-Show-Cause” because the equivalent to such an Order had been automatically issued by the clerk of the Motion Court of this Court of Common Pleas.

Next, the Statement of Errors complains that this Court erred by failing to allow discovery. The law protecting the due process rights of petitioners in a confessions-of-judgment action is settled:

in the context of a judgment confessed on a judgment note, 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.<sup>14</sup>

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<sup>12</sup> Pa. R.C.P. 206.6 (2018) (emphasis supplied).

<sup>13</sup> Phila. Civ. R. 206.4(c) (2018) (emphasis supplied).

<sup>14</sup> Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994). The Philadelphia Rules of Court

In this case, it is respectfully suggested that Borrower did not suffer a deprivation of due process rights when this Court abstained from ordering discovery, or from holding oral argument and a hearing.<sup>15</sup> There was no deprivation of due process rights because Borrower did avail itself of a petition to strike or open the judgment, and did enjoy an opportunity to file a petition to stay execution proceedings. Moreover, Borrower received the benefit of an automatic Order which was equivalent to a Rule-to-Show-Cause. For the reasons stated above, it is respectfully suggested that this court did not err when it abstained from ordering discovery, or from holding an argument and a hearing.

Finally, Borrower complains that the judgment should have been opened because Borrower had been fraudulently induced by Lender to enter into a contractual relation.<sup>16</sup> Specifically, Borrower averred in its petition that Lender had misrepresented the financial strength of the tavern, the soundness of its building, and the conditions of its equipment.<sup>17</sup> This Court respectfully suggests that it did not err for two reasons: first, any evidence to show fraud in the inducement, as is the case here, is inadmissible by operation of the parol evidence rule. In Pennsylvania—

parol evidence of prior representations is inadmissible as to a matter covered by the written agreement with an integration clause....<sup>18</sup>

However—

parol evidence is admissible only to prove fraud in the execution, not the inducement....<sup>19</sup>

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<sup>15</sup> The form-order adopted by the Philadelphia County Rules of Court clearly states that “[a] **Hearing or Argument shall be scheduled at the discretion of the Assigned Judge....**” Phila. Civ. R. 206.4(c) (2018) (emphasis supplied).

<sup>16</sup> Statement of Errors Complained of on Appeal, ¶ 4.

<sup>17</sup> Petition to open, ¶¶ 41-42

<sup>18</sup> Hart v. Arnold, 884 A.2d 316, 340 (Pa. Super. 2005).

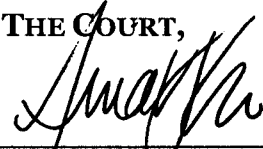
<sup>19</sup> 1726 Cherry St. P'ship by 1726 Cherry St. Corp. v. Bell Atl. Properties, Inc., A.2d 663, 669 (Pa. Super.

In this case, Borrower executed an Agreement of Sale containing an integration clause.<sup>20</sup> Under Pennsylvania law, Borrower might have been able to assert against the confessed judgment a defense based on fraud-in-the-execution; here however, Borrower alleged that it had been induced to enter into a contractual relation with Lender by its fraudulent misrepresentations regarding the tavern's financial viability, the structural conditions of the building, and the soundness of its equipment.<sup>21</sup> These averments can only lead to one conclusion: Borrower alleged fraud-in-the-inducement and may not rely on this defense in an effort to open the judgment.

Second, this Court would not have erred even if Borrower had averred fraud-in-the-execution. This Court would not have erred because Borrower had failed to offer in its petition any evidence tending to show that the tavern was in poor financial conditions, or that the building and equipment lay in a state of disrepair.<sup>22</sup> Stated another way, Borrower did not sustain its burden of proof as required of a petitioner in an action in confession of judgment. For this additional reason, it is respectfully suggested that this Court did not err in denying the petition to strike or open the confession of judgment.

Dated: 1/31/19

BY THE COURT,



NINA W. PADILLA, J.

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1995).

<sup>20</sup> AGREEMENT OF SALE, ¶ 29, Exhibit 2 to the petition to open.

<sup>21</sup> Petition to open, ¶¶ 41-42.

<sup>22</sup> "The petitioning party [in a confession of judgment] bears the burden of producing sufficient evidence to substantiate its alleged defenses." *Haggerty v. Fetner*, 481 A.2d 641, 644 (Pa. Super. 1984).

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

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Dominic'S, Inc. Vs Tony-ORDER



18100154600011

**DOMENIC'S INC.**

*Plaintiff*

**v.**

**TONY'S FAMOUS TOMATO PIE BAR & RESTAURANT, INC.**

*Defendant*

: October Term, 2018  
: Case No. 01546  
:  
:  
: Commerce Program  
:  
: Control No. 18110756  
:

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**ORDER**

AND NOW, this 30<sup>th</sup> day of November, 2018, upon consideration of defendant's petition to strike or open confession of judgment, the answer in opposition of plaintiff, and the respective *memoranda-of-law*, it is **ORDERED** that the petition is **DENIED**.<sup>1</sup>

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<sup>1</sup> On February 26, 2016, defender ("Borrower"), executed a promissory note (the "Note"), in favor of plaintiff ("Lender"). The Note arose out of the sale of a tavern/restaurant, from Lender to Borrower. The Note contained a warrant-of-attorney empowering Lender to confess judgment upon the occurrence of a default committed by Borrower. *See*, Note at p. 6, Exhibit A to the complaint. On October 11, 2018, Lender confessed judgment against Borrower on the grounds that Borrower had failed to make two monthly payments as required under the Note. *See*, complaint at ¶ 8. On November 6, 2018, Borrower filed the instant petition to strike or open the judgment.

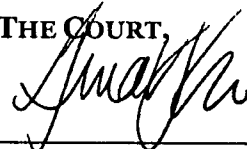
The petition to strike asserts that the judgment should be stricken because Lender is not a party entitled to confess the judgment, the amount claimed by Lender is grossly excessive, the default has been insufficiently alleged in the complaint, and the amount owed by Borrower, if any, equals \$6,459.22 –that is, an amount equivalent to only two missed monthly payments.

The law on striking a confessed judgment is well-settled:

[a] petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.... A petition to strike is not a chance to review the merits of the allegations of a complaint. Rather ... [it is] aimed at defects that affect the validity of the judgment and that entitle the petitioner, as a matter of law, to relief.... Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267 (Pa. Super. 2015).



BY THE COURT,



NINA W. PADILLA, J.

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In this case, a review of the record shows that the Note properly identifies Lender as the party entitled to confess judgment upon a default committed by Borrower. In addition, the Note and its warrant-of-attorney show that upon a default committed by Borrower, Lender is empowered to confess judgment for the entire unpaid principal. See, Note at p. 2 (2<sup>nd</sup> full paragraph), warrant-of-attorney at p. 6. Finally, a review of the record shows that Lender has claimed the unpaid balance of \$212,381.83 following Borrower's failure to make two monthly payments. See, complaint, ¶¶ 8-9. Based on the foregoing, the court finds that the record is not fatally flawed, the amount claimed by Lender is not grossly excessive, and the events of default have been sufficiently alleged. For these reasons, the petition to strike is denied.

The petition to open asserts that the judgment should be opened because Lender misrepresented the financial conditions and profitability of the tavern/restaurant, misrepresented the soundness of the building as well as the value of the equipment therein, depleted foodstuff inventory in violation of the sale agreement, and improperly discontinued power and cable services to the premises. See, petition to strike or open at ¶¶ 3-19, 41-42.

The law on opening confessions of judgment is well-settled: "a judgment of confession will be opened if ... **petitioner seeking relief therefrom produces evidence which in a jury trial would require issues to be submitted to a jury.**" Neducsin v. Caplan, 121 A.3d 498, 506 (Pa. Super. 2015) (emphasis supplied).

In this case, Borrower has provided no evidence in support of its defenses asserting fraud and breach-of-contract. Borrower has failed to sustain its burden of proof in this confession-of-judgment action, and for this additional reason the petition to open the judgment is likewise denied.

# Confession Of Judgment

Case ID: 181001546

DOMINIC'S, INC. VS TONY'S FAMOUS TOMATO PIE BAR &

Docket	Text	Party	Legal ID		
PTOJD	06-NOV-2018 16:36:42 *****	ADFT	A59115		
PETITION TO OPEN JUDGMENT (\$52.68)		DAUGHERTY, RONALD L.		Fee	\$57.68
ENAPP	06-NOV-2018 09:39:29 *****	ADFT	A59115		
ENTRY OF APPEARANCE		DAUGHERTY, RONALD L.		Fee	\$159.54
AFDVT	26-OCT-2018 16:01:33 *****	APLF	A34388		
AFFIDAVIT OF SERVICE FILED		MALONEY, DOUGLAS C.		Fee	

## Docket Text

56-18110756 RESPONSE DATE 11/26/2018. (FILED ON BEHALF OF TONY'S FAMOUS TOMATO PIE BAR & RESTAURANT INC)

Case Status

Quick Copy

Rollback

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Exit

**JUDGMENTS**