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

BERKSHIRE BANK	:	October Term, 2019
	:	Case No. 02987
Plaintiff	:	
	:	
v.	:	Commerce Program
	:	
58 YORK PARTNERS, LLC, BERNIE'S HATBORO, LLC, ERIC S. KRETSCHMAN and ORELAND ASSOCIATES II, LLC	:	
	:	
Defendants	:	Control No. 19121858

ORDER

AND NOW, this 12th day of March, 2020, upon consideration of the petition to strike or open confession of judgment and for a stay of execution, the answer in opposition thereto, and the respective *memoranda*-of-law, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**.

BY THE COURT,

***RAMY I. DJERASSI*, J.**

OPINION

Plaintiff confessed judgment against defendants, and defendants challenged the judgment by filing the instant petition to strike or open judgment and for a stay of execution. The petition to strike is denied because defendants have not shown any fatal flaws in the record; the petition to open is likewise denied because defendants have not produced evidence of a meritorious defense.

FACTS

Plaintiff is Berkshire Bank ("Lender"), a Massachusetts company. Defendants 58 York Partners, LLC and Bernie's Hatboro, LLC are Pennsylvania-based companies (hereinafter, "Borrowers"). Individual defendant Eric S. Kretschman, and defendant Oreland Associates II, LLC, both with addresses in Pennsylvania, are identified hereinafter as "Guarantors."

On July 18, 2017, Borrowers executed in favor of Plaintiff a promissory note (the "Note"), with a face amount of $1,772,000.00; on the same day, Guarantors executed an Unconditional Guarantee (the "Guaranty").[1] The Note and Guarantee contains warrants-of-attorney empowering Lender to confess judgment against Borrowers and Guarantors upon default committed by the former.[2] Specifically, the warrants-of-attorney state as follows:

> **THE UNDERSIGNED ... AUTHORIZES ANY ATTORNEY-AT-LAW TO APPEAR IN ANY COURT ... AND TO CONFESS JUDGMENT AGAINST THE UNDERSIGNED FOR THE UNPAID AMOUNT OF THIS NOTE ... THEN DUE, TOGETHER WITH ALL INDEBTEDNESS PROVIDED FOR THEREIN (WITH OR WITHOUT ACCELERATION OF MATURITY), PLUS ATTORNEY'S FEES OF TEN PERCENT (10%) OF THE TOTAL INDEBTEDNESS OR FIVE THOUSAND DOLLARS ($5,000.00) WHICHEVER IS THE LARGER AMOUNT**

[1] Note, Exhibit A to the complaint; Guarantee, Exhibit B to the complaint.
[2] Note, id. at ¶ 10; Guarantee, id. at ¶ 10.

> **... WHICH [BORROWER/GUARANTOR] AND LENDER AGREE IS REASONABLE....**[3]

On October 25, 2019, Lender entered a confession-of-judgment against Borrowers and Guarantors. The judgment was entered as a result of "Borrower's failure to make payments when due under the Note."[4] On December 16, 2019, Borrowers and Guarantors filed this petition to strike or open confession-of-judgment and for a stay of execution.

DISCUSSION

> 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, a petition to strike is aimed at defects that affect the validity of the judgment and that entitle the petitioner, as a matter of law, to relief.[5]
>
> [I]f the truth of the factual averments contained in the complaint in confession of judgment ... are disputed, then the remedy is by proceeding to open the judgment, not to strike it....
>
> 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.[6]

Borrowers and Guarantors assert that the confession-of-judgment should be stricken because the amount of attorney's fees, equal to 10% of the total indebtedness, is grossly excessive. Alternatively, they state that the judgment should be opened because

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[3] Note, Id.; Guarantee, Id., (emphasis supplied).
[4] Complaint, ¶ 11.
[5] Green Acres Rehab. & Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1267 (PA. Super. 2015).
[6] Neducsin v. Caplan, 121 A.3d 498, 504-506 (PA. Super. 2015).

such fees are excessive for the mere "preparation, filing and service of a complaint ... and notice of ... execution."[7] The two arguments are rejected because Pennsylvania law allows a plaintiff to recover "an attorney collection commission of fifteen percent (15%) of the aggregate amount," if specifically provided-for by the warrant-of-attorney.[8] In this case, the warrants-of-attorney provide that Lender may recover 10% "of the total indebtedness," and Borrower and Guarantors agreed in writing that such a percentage was "reasonable."[9]

In addition, Borrowers and Guarantors assert that the judgment should be stricken, or alternatively opened, because their signatures on the Note and Guaranty do not bear a direct relation to the warrants therein.[10] Specifically, Borrowers and Guarantors argue that their signatures do not bear a direct relation to the warrants because they were placed one page removed. Borrowers and Guarantors conclude that since their signatures do not bear a direct relation to the warrants, they did not knowingly and intelligently waive their due process rights.[11] This argument is rejected. Under the laws of this Commonwealth—

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[7] Petition, ¶¶ 10-16, 39-46.

[8] Rait Partnership, LP v. E. Pointe Properties I, Ltd., 957 A.2d 12751279 (Pa. Super. 2008). See, also Dollar Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994) (holding that attorney fees of up to fifteen percent are allowed in confessions-of-judgment, if such a percentage is specifically authorized by the warrant). The Court notes that Borrowers and Guarantors rely on a case, PNC Bank v. Bolus, 655 A.2d 997, 1000 (Pa. Super. 1995), in support of their argument that the amount of attorney's fees claimed herein require that the judgment be stricken or opened. Reliance on Bolus is inappropriate because in that case, the Pennsylvania Superior Court merely opined *in dicta* that the amount of attorney's fees claimed therein was "blatantly unreasonable," "for what in most cases amounts to filing a single document with the prothonotary." Id. However, the Pennsylvania Superior Court immediately thereafter recognized that its pronouncement was *dicta*: [w]e do not specifically enforce the trial court's chosen amount as appropriate, nor offer guidelines for this or future cases, **since the issue is not directly before us**. We would merely encourage trial courts to monitor the amounts charged in such circumstances, and to reduce clearly excessive fees." Id., (emphasis supplied).

[9] As stated earlier, Borrowers and Guarantors specifically agreed that attorney's fees of 10% of the total indebtedness were "**REASONABLE**." See, Note, Exhibit A to the complaint at ¶ 10; Guaranty, Exhibit B to the complaint at ¶ 10.

[10] Note, Exhibit A to the complaint at ¶ 20; Guaranty, Exhibit B to the complaint at ¶ 50.

[11] Id.

> [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.... There should be no doubt that the lessee signed the warrant and that he was conscious of the fact that he was conferring a warrant upon the lessor to confess judgment in the event of breach.[12]

The law is also clear as to the placement of an obligor's signature in relation to a warrant-of-attorney: where a warrant-of-attorney is conspicuous, and a party executes his signature on the following page therefrom, that party has effectively signed his name to the warrant-of-attorney.("Because the location of the warrant of attorney related directly to the signature that immediately followed it, albeit on the next page, we concur with the trial court that a valid, signed, and self-containing warrant of attorney resulted.")[13]

In this case, the signatures of Borrowers and Guarantors are placed one page removed from the conspicuous, upper-cased warrants and follow the mandate of *Graystone;* therefore, we reject their claim that they did not knowingly and intelligently waive their due process rights.

Finally, Borrowers and Guarantors aver that the parties re-negotiated and modified the terms of the Note and Guaranty; they assert that pursuant to the modifications, Lender waived its rights under the warrants, and is estopped from confessing judgment thereunder.[14] Borrowers and Guarantors thus conclude that the judgment should be opened. This argument is rejected because "[t]he petitioning party

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[12] Ferrick v. Bianchini, 69 A.3d 642, 651 (PA. Super. 2013).
[13] Graystone Bank v. Grove Estates, LP., 58 A.3d 1277, 1283 (PA. Super. 2012), aff'd sub nom. Graystone Bank v. Grove Estates, L.P., 623 Pa. 107, 81 A.3d 880 (PA. 2013).
[14] Petition to open, ¶¶ 55-60.

bears the burden of producing sufficient evidence to substantiate its alleged defenses."[15] In this case, Borrowers and Guarantors have offered no evidence that the parties modified the Note and Guaranty as to trigger the defenses of estoppel and waiver. Borrowers and Guarantors have failed to meet their burden, and the petition to strike or open the judgment is thus denied in its entirety.

BY THE COURT

***RAMY I. DJERASSI*, J.**

[15] Haggerty v. Fetner, 481 A.2d 641, 644 (PA. Super. 1984). In support of their argument asserting estoppel and waiver, Borrowers and Guarantors rely on a Philadelphia Court of Common Pleas case, *Wamco XXV v. Desouza*, 51 Pa. D.& C. 4th 328 at *11. (Herron, J., April 3, 2001, C.P. Philadelphia). Reliance on *Wamco* is misplaced. In *Wamco*, estoppel and waiver were accepted by the court as potential general defenses but were ultimately rejected because the petition to open was untimely--- and no factual evidence was shown in support of a meritorious defense explaining why the time deadline was missed. When a petitioner fails to produce evidence supporting a meritorious defense, its petition to open may not be granted.