

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

DOCKETED

JUL 23 2020

R. POSTELL
COMMERCE PROGRAM

SPRING GARDEN MALL, LLC	:	November Term, 2019
	:	Case No. 01232
V.	:	
	:	Commerce Program
SPRING GARDEN NAIL & SPA, LLC	:	
	:	Control No. 20032672

ORDER

AND NOW, this 23rd day of July, 2020, upon consideration of the petition to strike or open confession of judgment and for a stay of execution, the response in opposition, and the parties' briefs, it is **ORDERED** that the petition is **DENIED** in its entirety.

The amount of judgment as confessed is **MODIFIED** and **REDUCED**. The new itemized total amount of judgment is as follows:

Rent	\$18,774.40
Water	\$243.85
Late Fees	\$6,615.85
Legal Fees	\$5,000.00
(Payments Received)	-\$28,060.00
Total	\$2,574.10

BY THE COURT



RAMY I. DJERASSI, J.

Spring Garden Mall, Llc-ORDRC



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OPINION

Before the Court is a petition to strike or open confessions of judgment for money. For the reasons below, the petition is denied, but the amount of judgment is reduced.

BACKGROUND

Plaintiff is Spring Garden Mall, LLC (“Landlord”), owner of real property (the “Premises”), located at 533—B Spring Garden Street, in Philadelphia, Pennsylvania. Defendant is Spring Garden Nail & SPA, LLC (“Tenant”).

On March 8, 2018, Tenant leased the Premises of Landlord, pursuant to the terms of a contract which comprises two documents: a “Basic Lease” and the “Agreement” (together, the “Lease”).¹ The Lease contains warrants-of-attorney empowering Landlord to confess judgment against Tenant, for money and in ejection, upon a default committed by Tenant.² Under the Lease, Tenant remitted to Landlord a “Security Deposit” of \$6,000.00.³

In November 2019, Landlord confessed judgment against Tenant by filing separate complaints, for money, and for repossession of the Premises.⁴ The record shows that on November 26, 2019, notice of the judgments was served upon Tenant not at the address identified in the Lease, but at a different address, 1406 Ridge Avenue, Side B, in Philadelphia, Pennsylvania (the “Ridge Avenue Address”). Notice of the entry of both confessed judgments was delivered at the Ridge Avenue Address after Tenant

¹ Lease, Exhibit A to the complaint. In the event of a default by Tenant, Landlord is entitled to claim attorney’s fees in the amount of \$5,000.00. See, Lease, ¶ 68-B.

² Id., ¶ 68 at pp. 22-23.

³ Security Deposit, Lease, Exhibit A to the complaint, ¶ 20, p.9.

⁴ Landlord concedes that Tenant was evicted by the Sheriff of Philadelphia County on March 10, 2020. See, memoranda-of-law of Landlord in support of its opposition to the petitions, p. 18.

had designated it as an alternative to the address identified in the Lease.⁵ Tenant admits receipt of that notice; accordingly, Tenant had actual or implied notice of the entry of the confessions-of-judgment.⁶

The instant complaint-in-confession-of-judgment asserts that Tenant defaulted when it “failed to make payments when due under the Lease,” and “has continued in its failure and refusal to pay the amounts due....”⁷ Through the confession-of-judgment for money, Landlord seeks to recover \$31,614.73. This amount is itemized as follows:

CAM	\$84.83
Rent	\$18,774.40
Use & Occupancy	\$860.00
Water	\$243.85
Late Fees	\$6,615.85
Returned Checks	\$35.00
Legal Fees	\$5,000.00
Total	\$31,614.73

On March 12, 2020, Tenant remitted to Landlord a money order in the amount of \$3,060.00, for the month of March, 2020. On the same day, Tenant remitted to a second payment of \$25,000.00, representing a portion of the outstanding amount.

⁵ See, e-mail attached as Exhibit E to the response in opposition of Landlord to the petition of Tenant.
⁶

Actual notice has been defined as notice expressly and actually given, and brought home to the party directly. The term “actual notice,” however, is generally given a wider meaning as embracing two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge. In this sense **actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry.**

Sabbeth v. Tax Claim Bureau of Fulton Cty., 714 A.2d 514, 517 (Pa. Commw. 1998) (finding that strict compliance with mandatory notice requirements are waived where a property owner acquires **actual notice** of the planned auction of its property).

⁷ Complaint for possession, ¶ 7-9; complaint for money ¶ 7-9.

Landlord admits receipt of these amounts totaling \$28,060.00.⁸ Fifteen days later, on March 27, 2020, Tenant filed the instant petition to strike or open confession of judgment and for a stay of execution.⁹

DISCUSSION

THE PETITION TO STRIKE

A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.... A fatal defect on the face of the record denies the prothonotary the authority to enter judgment.... When deciding if there are fatal defects on the face of the record for the purposes of a petition to strike ... a court may only look at what was in the record when the judgment was entered.¹⁰

In the petition-and-*memorandum*, Tenant argues that the record is fatally flawed and the judgment should be stricken because the Lease and the power-of-attorneys thereof are not notarized, in violation of 20 Pa. C.S.A. §5601 *et seq.*¹¹ This argument is rejected because 20 Pa. C.S.A. § 5601, known as the “Decedents, Estates and Fiduciaries Code,” applies to powers-of-attorney in the context of fiduciary relationships, not in the instant case involving a commercial, arms-length lease agreement.¹² In addition, Pa. R.C.P. 2952(a), which lists the contents required in a complaint-in-confession-of-judgment, states that such a complaint shall contain “the original or photostatic copy ...

⁸ Admission by Landlord in its opposition to the petition to strike or open confession of judgment, ¶¶ 27-28.

⁹ The petition to strike or open was untimely filed; nevertheless, “[t]he Court at any stage of any ... action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.” Pa. R.C.P. 126. In addition, Tenant provides a compelling reason that convinces this Court to entertain the petition to strike or open confession of judgment: “[u]less the defendant can demonstrate that there were **compelling reasons** for the delay [in filing a petition to strike], a petition not timely filed shall be denied.” Pa. R.C.P. 2959(a)(3) (emphasis supplied). In this case, the Court is additionally compelled to entertain the untimely petition because Landlord has admitted receipt of a substantial portion of the amount it claims, well after it confessed the instant judgment. A discussion of the issues created by Landlord’s receipt of a substantial portion to the judgment is found in the section titled “Petition to Open” within the attached Opinion, *infra*.

¹⁰ Green Acres Rehab. & Nursing Ctr. v. Sullivan, 2015 PA Super 73, 113 A.3d 1261, 1267–68 (2015)

¹¹ *Memorandum of law in support of the petition to strike*, p. 13.

¹² 20 Pa. C.S.A. § 101, footnote 1 (2020).

of the instrument showing the defendant's signature...."¹³ Nothing in this language instructs that the instrument at issues herein, including its warrant-of-attorney, be notarized.

Next, the petition to strike asserts that the record is fatally flawed because the warrant-of-attorney does not permit Landlord to recover late charges.¹⁴ This argument is easily rejected because the Lease clearly contemplates "Late Charges" of ten percent of the unpaid, partially paid, or untimely paid rents, as "Additional Rent."¹⁵ Furthermore, and to the extent Tenant's petition attempts to merely challenge the amount of Late Charges claimed by Landlord, then Tenant should have petitioned this Court to open the judgment rather than to strike it, because when "evidence is produced which in a jury trial would require the issues to be submitted to the jury [then] the court shall **open** the judgment."¹⁶ In this case, however, Tenant has offered no evidence showing that the amount of Late Charges is incorrect, and the judgment may not be opened on such grounds.

Next, the petition to strike asserts that the record is fatally flawed because the warrant-of-attorney for money occupies two pages of the Lease, and are unnecessarily sub-divided into four paragraphs as to destroy any direct relation between that provisions and Tenant's signature.¹⁷ This argument is rejected because a warrant-of-attorney is conspicuous—

¹³ Pa. R.C.P. 2952(a)(2).

¹⁴ *Memorandum* of law in support of the petition to strike, p. 14.

¹⁵ Lease, Exhibit A to the complaint, p. 4, item No. 5. "The task of interpreting a contract [such as the commercial lease in this matter] is generally performed by a court rather than by a jury. The goal of that task ... is to ascertain the intent of the parties as manifested by the language of the written instrument." Humberston v. Chevron USA, Inc., 75 A.3d 504, 510 (Pa. Super. 2013).

¹⁶ Pa. R.C.P. 2959(e) (emphasis supplied).

¹⁷ *Memorandum-of-law* in support of the petition to strike, pp. 18-19.

when it is so written that a reasonable person against whom it is to operate ought to have noticed it.... Language ... is conspicuous if it is larger or [has] other contrasting type of color....¹⁸

In addition, a warrant-of attorney appears “conspicuously” when it is printed in “all caps” ... and is “immediately preceded where the executor ... signed ... his name.”¹⁹

In this case, the warrants-of-attorney are capitalized, they occupy the last two pages of the Lease, and the Tenant’s initials and signature appear immediately below such warrants. The warrants are so written and capitalized that Tenant should have noticed them, and for this reason this challenge to the warrants is rejected.

Finally, the petition to strike asserts that the judgment should be stricken because Landlord seeks to recover \$5,000.00 in attorney’s fees, where the amount in judgment barely exceeds \$26,600.00. Tenant notes that \$5,000.00 in attorney’s fees is not reasonable, even though the warrants-of-attorney contemplate that Landlord may recover no less than \$5,000.00 for such fees.²⁰

On the issue of excessive attorney’s fees, the Pennsylvania Supreme Court has stated that—

parties may contract to provide for the breaching party to pay the attorney fees of the prevailing party in a breach of contract case, but ... the trial court may consider whether the fees claimed to have been incurred are reasonable, and ... [may] reduce the fees claimed if appropriate.²¹

In this case, the parties agreed that the attorney’s fees may not be “less than five thousand dollars,” and a quick calculation reveals that this amount is equal to nearly

¹⁸ Moscatiello v. Pittsburgh Contractors Equipt. Co., 595 A.2d 1190, 1193 (Pa. Super. 1991)

¹⁹ Graystone Bank v. Grove Estates, LP, 58 A.3d 1277, 1283 (Pa. Super. 2012) (*aff’d sub nom.*, Graystone Bank v. Grove Estates, LP, 81 A.3d 880 (Pa. 2013)).

²⁰ *Memorandum-of-law in support of the petition to strike*, pp. 19-20.

²¹ McMullen v. Kutz, 985 A.2d 769, 776-77 (Pa. 2009).

19% of the judgment amount of \$26,614.73. A review of case law on this matter indicates that a smaller percentage of attorney's fees, usually 15% of the judgment amount, overwhelmingly represents the highest percentage allowed in an action-in-confession-of-judgment, but only if so authorized in the warrant. However, the record in this action shows that Landlord's counsel drafted and sent to Tenant at least three letters dated July 10 and 11, 2019, and September 13, 2019; in addition, Landlord's counsel drafted two separate complaints –for money and in ejection– and filed timely responses and *memoranda* to the petitions of Tenant. Based on the foregoing, this Court is satisfied that attorney's fees of \$5,000.00 are reasonable, and Tenant's last challenge to the validity of the judgments is likewise rejected because there are not fatal flaws in the record.

THE PETITION TO OPEN

A petition to open is an appeal to the court's equitable powers and is addressed to the sound discretion of the court.... However, the discretion exercised by the lower court must be guided by Rule 2959(e), Pa. R.C.P. which states in pertinent part: if evidence is produced which in a jury trial would require the issues to be submitted to the jury the Court shall open judgment. Thus the standard of sufficiency the court must employ is that of a directed verdict, viewing all evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense, while rejecting the adverse allegations of the party obtaining the judgment.²²

In the petition, Tenant asserts that the judgment should be opened because after it had been confessed, Tenant remitted to Landlord \$3,060.00 as rent for the month of March, 2020, and \$25,000.00 toward the amounts past due.²³ As stated earlier,

²² Indus. Valley Bank & Tr. Co. v. Lawrence Voluck Assocs., Inc., 428 A.2d 156, 158 (Pa. Super. 1981).

²³ *Memorandum-of-law* in support of the petition to open, p. 24.

Landlord has admitted receiving these two amounts.²⁴ The law is well-settled: “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.”²⁵ In this case, Landlord confessed judgment for an amount that was proper at the time; however, after the judgment had been confessed, Tenant forwarded to Landlord \$28,060.00 through two separate money orders. Landlord received and retained this amount, and, in so doing, recovered from Tenant a substantial amount of the original judgment. To permit the original amount to stand, despite evidence of Landlord’s receipt of a substantial portion thereof, would not serve the requirement of securing the “just, speedy and inexpensive determination” of this action.²⁶ Therefore, the judgment amount as entered has become excessive: accordingly, it is modified and reduced by \$28,060.00.

Lastly, Tenant asserts that the judgment should be opened because Landlord seeks to recover “CAM Charges” of \$84.83, “Use & Occupancy” fees of \$860.30, “Water” fees of \$243.85, and “Cancelled Check” fees of \$35.00, for a total of \$1,223.98, which items do not seem to appear in the warrant-of-attorney. This defense is rejected in part.

The warrant-of-attorney implicated in this action states in pertinent part as follows:

IF TENANT SHALL DEFAULT IN THE PAYMENT OF RENT ... PAYABLE
HEREUNDER ... TENANT HEREBY EMPOWERS ANY
PROTHONOTARY ... TO ... CONFESS JUDGMENT AGAINST TENANT
FOR ALL OR ANY PART OF SAID RENT AND SAID OTHER SUMS,

²⁴ Admission by Landlord in its opposition to the petition to strike or open confession of judgment, ¶¶ 27-28.

²⁵ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994).

²⁶ Pa. R.C.P. 126.

INCLUDING ... THE AMOUNTS DUE FROM TENANT TO LANDLORD
UNDER EACH OF THE SUBSECTIONS OF THIS SECTION....²⁷

This clear and unambiguous language indicates that Landlord is empowered to confess judgment against Tenant upon a default committed by Tenant in the payment of rent, and to recover from Tenant not only all or any part of said rent, but also other sums contemplated in the **various** Lease-provisions **hereunder**.²⁸ In this case, the Court has been able to identify a single document appended to the Lease –a document which clearly and unmistakable required Tenant to be responsible for its share in water usage.²⁹ However, the Court has not been able to find in the Lease any reference as to “CAM Charges,” “Use & Occupancy” fees and “Cancelled Checks” charges, and Landlord has nowhere pointed to the existence of such items in the Lease. For this reason, the items identified as “CAM Charges,” “Use & Occupancy,” and “Cancelled Checks” are stricken, and the judgment amount is modified accordingly.

BY THE COURT



RAMY I. DJERASSI, J.

²⁷ Lease, Exhibit A to the complaint, at ¶ 68-B, p. 22 –Confession-of-Judgment.

²⁸ “The task of interpreting a contract [such as the commercial lease in this matter] is generally performed by a court rather than by a jury. The goal of that task ... is to ascertain the intent of the parties as manifested by the language of the written instrument.” Humberston v. Chevron USA, Inc., 75 A.3d 504, 510 (Pa. Super. 2013). See, also: Trizechan Gateway LLC v. Titus, 976 A.2d 474, 484 (Pa. 2009) (finding that the word “hereunder,” found in one paragraph of a Lease, referred to all obligations of a tenant identified in “the lease as a whole....”

²⁹ “Utilities,” appended as Exhibit E to the Lease found at Exhibit A to the complaint.