

DOCKETED

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R. POSTELL
COMMERCE PROGRAM

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

STEPHEN HARASZKIEWICZ and OLENA VACATOVA	:	February Term, 2020
	:	Case No. 01039
Plaintiffs	:	
	:	
v.	:	Commerce Program
	:	
JONATHAN BARACH	:	
	:	Control Nos. 20081967,
Defendant	:	20082119

ORDER

AND NOW, this 2nd day of November, 2020, upon consideration of the petition to strike or open confession of judgment and for a stay of execution, the response in opposition thereto, and the reply to the response, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**.

FURTHERMORE, upon consideration of plaintiffs' motion to enforce *subpoena*, the response in opposition thereto, the parties' briefs, and the reply to the response, it is **ORDERED** that the motion is **GRANTED-IN-PART** as follows:

- 1) Ms. Christine Bonanno ("Ms. Bonanno") shall submit to a deposition, to be held via remote technology, no later than twenty (20) days from the docketing date of this **ORDER**.¹
- 2) Ms. Bonanno shall produce to opposing counsel true and correct copies of

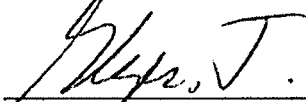
¹ "Plaintiff at any time after judgment, before or after the issuance of a writ of execution, may, for the purpose of discovery of assets of the defendant, take the testimony of any person ... upon oral examination or written interrogatories as provided by the rules relating to Deposition and Discovery...." Pa. R.C.P. 3117(a).



documents specifically and exclusively requested of her, as identified in Schedule A of the *subpoena*. Such copies, if any, shall be delivered to opposing counsel at the address thereof by the time her deposition begins.

3) The remainder of plaintiff's motion is **DENIED**.

BY THE COURT,



GLAZER, J.

OPINION

Plaintiffs are two individuals, Stephen Haraszekiewicz and Olena Vacatova, husband and wife (“Lenders”). Defendant is an individual, Jonathan Barach (“Borrower”), a licensed real estate agent. Borrower is allegedly the sole owner of a limited liability company trading as The Barach Group, LLC (the “Barach Group”).

On September 20, 2018, Lenders wire-transferred \$150,000.00 to the Barach Group.² On September 21, 2018, Borrower executed a promissory note (the “Note”), in favor of Lenders.³ The Note acknowledges the debt owed by Borrower, in the amount of \$165,000.00, representing a principal amount of \$150,000.00, and interest due at the maturity of the Note of \$15,000.00. The Note also contains a warrant-of-attorney empowering Lenders to confess judgment against Borrower upon a default committed by the same, including a default for failure to pay principal and interest, when due.⁴ Finally, the Note bears a maturity date of March 21, 2019.⁵ Lenders confessed judgment against Borrower on February 10, 2020.

The complaint-in-confession-of-judgment avers that Borrower defaulted by failing to make any payments under the Note.⁶ The complaint also avers that on October 7, 2019, after the maturity date on the Note had expired, Borrower issued in the name of one of the two Lenders a \$175,000.00 check through an entity named TBG Real Estate, LLC.⁷ However, this check was returned for lack of sufficient funds.⁸ In the complaint-in-confession-of-judgment, Lenders claim the full principal amount of

² Wire transfer, Exhibit 1 to the complaint.

³ Note, Exhibit 3 to the complaint, 1st paragraph.

⁴ *Id.*, ¶¶ IV-V.

⁵ *Id.*, ¶ I.

⁶ Complaint, ¶¶ 21-28.

⁷ Complaint, 29; *see*, Check No. 220, Exhibit 4 to the complaint.

⁸ *Id.*, at ¶ 30.

\$150,000.00 and interest of \$15,000.00, plus accruing interest of \$8,679.45, unspecified court costs, and accruing attorney's fees of \$8,250.00, for a total of \$181,929.45. Borrower filed a petition to strike or open the judgment and for a stay of execution.

DISCUSSION

The petition to strike confession-of-judgment.

Borrower avers that the judgment should be stricken because Lenders have abused the legal process by threatening Borrower with criminal prosecution.⁹ This argument is rejected because such threats do not create a fatal flaw in the record and cannot require that the judgment be stricken.¹⁰

Borrower also avers that the judgment should be opened because Lenders violated several requirements under the Pennsylvania Rules of Civil Procedure, by failing, *inter alia*, to personally serve Borrower. At the onset, the court notes that an alleged violation of the Pennsylvania Rules of Civil Procedure would require striking, not opening, a judgment entered by confession. Nevertheless, Borrower's argument is rejected. A review of the docket shows that Lenders confessed judgment against Borrower on February 10, 2020, and filed, on February 13, 2020, a writ of execution against Borrower and his garnishees. This document accompanied Lenders' notice identified as a "NOTICE UNDER RULE 2958.3 OF JUDGMENT AND EXECUTION THEREON—

⁹ Petition to strike, ¶ 18.

¹⁰ "A petition to strike will not be granted unless a fatal defect in the judgment appears on the face of the record. **Matters outside of the record will not be considered.... For example, a judgment is properly stricken where the record indicates a fatal flaw such as a defective service.**" Yogt v. Liberty Mutual Fire Ins. Co., 900 A.2d 912, 916 (Pa. Super. 2006) (emphasis supplied). In this case, an alleged threat of criminal prosecution does not create a procedural defect in the record and does not deny Borrower of its due process rights; for this reason, the first challenge to the validity of the judgment is rejected.

NOTICE OF DEFENDANT'S RIGHTS." This court focused its attention to the afore-referenced Rule 2958.3 of the Pennsylvania Rules of Civil Procedure, which Rule states as follows in pertinent part:

Rule 2958.3 Notice of Execution Served with Writ of Execution....

Written notice ... shall be served upon the defendant **with the writ of execution** if the property to be levied upon or attached consists of—

- (1) personal property or
- (2) personal property and real property, not within the scope of Rule 2958.2 [relating to the sale of real property and personal property pursuant to § 9604(a) of the Uniform Commercial Code].¹¹

In light of the above-quoted Rule, and upon a review of the record, this court concludes that Lenders simultaneously and properly filed the notice of execution and the writ in accordance with Pa. R.C.P. 2958.3. Stated another way, this court cannot perceive any error or defect of procedure which would require striking the judgment. In addition, the court rejects the challenge based upon the Lender's failure to personally serve Borrower. This challenge is rejected because Pa. R.C.P. 236 clearly establishes that—

[t]he prothonotary shall immediately give written notice of the entry of ... a judgment entered by confession to the defendant by ordinary mail together with a copy of all documents filed with the prothonotary in support of the confession of judgment ... [including] the required notice and documents....¹²

Rule 236 clearly establishes that service upon defendant of a judgment entered by confession, as well as any notice of execution thereunder, shall be performed not by

¹¹ Pa. R.C.P. 2958.3 (emphasis supplied).

¹² Pa. R.C.P. 236 (emphasis supplied).

plaintiff but by the prothonotary; moreover, the dockets in this action clearly show that Borrower did receive notice from the prothonotary, in accordance with Pa. R.C.P. 236. For the foregoing reasons, this court rejects Borrower's challenge based on the violation of the Rules of Civil Procedure.

The petition to open confession-of-judgment

Borrower asserts that the judgment should be opened because it did not voluntarily assent to the warrant of attorney. Specifically, Borrower argues that it did not assent to the warrant for two reasons, first, the Note failed to provide a separate "Disclosure of Confession-of-Judgment," and second, the Note contains no initials indicating that Borrower had read and understood its terms.¹³ This argument is rejected because a valid warrant-of-attorney merely requires that a defendant's signature bear a direct relation thereto:

[a] warrant of attorney to confess judgment must be self-sustaining and to be self-sustaining the warrant must be in writing and signed by the person to be bound by it. The requisite signature must bear a direct relation to the warrant of attorney and may not be implied.¹⁴

There should be no doubt that ... [a party] signed the warrant and that he was conscious of the fact that he was conferring a warrant upon ... [another] to confess judgment in the event of breach.¹⁵

In this case, the Note is comprised of two pages only, wherein the warrant occupies the bottom portion of the first page, and the top portion of the second. In addition, the warrant is set in bold, capital lettering, while the signature of Borrower appears a few inches away below that warrant. There is no doubt that Borrower signed

¹³ Petition to open, ¶¶ 38-43.

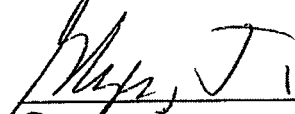
¹⁴ L. B. Foster Co. v. Tri-W Const. Co., 186 A.2d 18, 20 (Pa. 1962).

¹⁵ Ferrick v. Bianchini, 69 A.3d 642, 651 (Pa. Super. 2013)

the warrant and conferred upon Lenders the authority to confess judgment after the commission of a default, and for this reason the above-discussed defense is rejected.

Finally, Borrower asserts that the judgment should be opened because the amounts owed by Borrower are in dispute.¹⁶ This defense is easily rejected because Borrower has failed to offer any evidence in support of its defense: in an action in confession-of-judgment, "[t]he petitioning party bears the burden of producing evidence to substantiate its alleged defenses."¹⁷ In this case, Borrower has not offered any evidence tending to show that Lenders seeks to recover an improper amount, and has consequently failed to sustain its burden of proof. For this reason, the petition to strike or open confession of judgment and for a stay of execution is denied in its entirety.

BY THE COURT,


GLAZER, J.

¹⁶ Petition to open, ¶¶ 44-46.

¹⁷ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).