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

S. HARVEY, JR.
CIVIL TRIAL DIVISION

MICHAEL'S LA VERANDA, INC.	:	June Term, 2020
	:	Case No. 01545
v.	:	
	:	Commerce Program
RIVERSTONE RIVERFRONT, INC.	:	Control No. 20072240

ORDER

AND NOW, this 19th day of October, 2020, upon consideration of defendant's petition to strike or open confession of judgment, for a stay of execution, and for consolidation with a separate matter, the response in opposition of plaintiff, and the parties' respective *memoranda-of-law*, it is **ORDERED** that the petition is **DENIED IN ITS ENTIRETY**.

BY THE COURT,

DOCKETED
OCT 20 2020
R. POSTELL
COMMERCE PROGRAM


NINA W. PADILLA, J.

Michael'S La Veranda In-ORDRC



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OPINION

Before the Court is a petition to strike or open confession of judgment and for a consolidation of the instant action with an action pending in the Court of Common Pleas, Philadelphia County, Trial Division—Civil. For the reasons below, the petition is denied.

Plaintiff (“Sub-Lessor”), and defendant (“Sub-Lessee”), entered into a “Sub-Lease” agreement on December 16, 2019. Under the terms of the Sub-Lease, Sub-Lessor granted to Sub-Lessee a portion of its commercial leasehold interest (the “Demised Premises”), in exchange for rent and fees.¹ The Sub-Lease contains a warrant-of-attorney empowering Sub-Lessor to confess judgment against Sub-Lessee upon a default committed by the latter. The Sub-Lease also empowers Sub-Lessor to claim accelerated rent upon the commission of a default by Sub-Lessee.²

In June 2020, Sub-Lessor confessed judgment against Sub-Lessee, in the amount of \$2,280,016.39, for Sub-Lessee’s failure to pay rent and fees, as required.³ This amount includes attorney’s fees of 5%, and accelerated rent of \$2,130,000.00.⁴

On July 27, 2020, Sub-Lessee filed a petition to strike or open the confessed judgment, for a stay of execution proceedings, and to consolidate the instant action with a separate matter, Riverstone Riverfront, Inc. v. Michael’s La Veranda, Inc. et al., case No. 2003-02732 (the “Separate Matter”), wherein Sub-Lessee is the plaintiff, and Sub-

¹ Sub-Lease, Exhibit A to the complaint, pp. 1-2.

² *Id.*, at ¶ 14(b)(i).

³ Complaint, ¶¶ 8-10).

⁴ *Id.*, ¶ 11. With respect to the accelerated rent claimed by Sub-Lessor, in the amount of Two Million, One Hundred Thirty Thousand Dollars, the Court notes that Pennsylvania law allows such claims: “where a commercial tenant vacates the leasehold premises, the landlord [or Sub-Lessor] may seek accelerated rent if the lease [or Sub-Lease] so provides, and re-let the premises. The landlord [or Sub-Lessor], however, must credit tenant [or Sub-Lessee] ... for sums paid by the replacement tenant [or replacement sub-lessee]. Ferrick v. Bianchini, 69 A.3d 642, 656 (Pa. Super. 2016).

Lessor is a defendant. Sub-Lessor filed a timely answer to the petition, and the parties have fully briefed their positions.

THE PETITION TO STRIKE

In the brief in support of the petition, Sub-Lessee asserts that the judgment should be stricken because the Sub-Lease contains an ambiguity.⁵ This argument is rejected because a mere contractual ambiguity, if any, does not amount to a fatal flaw in the record, and does not require judgment to be stricken.⁶ In this case, the Court is empowered with the task of resolving a contractual ambiguity; therefore, the presence of a resolvable ambiguity, if any, cannot amount to a fatal flaw in the record: for this reason, the petition to strike is denied.⁷

THE PETITION TO OPEN

In the petition to open, Sub-Lessee argues that it was induced to enter into the Sub-Lease upon the intentional or negligent misrepresentations provided by Sub-Lessor. According to Sub-Lessee, Sub-Lessor misrepresented, *inter alia*, the commercial zoning status of the Demised Premises, the number of occupants lawfully allowed therein, the existence of a food license, and the faulty, outdated, and inoperable conditions of the electric and fire sprinkler systems.⁸ According to Sub-Lessee, the judgment should be opened either on grounds that Sub-Lessee was fraudulently induced into the agreement, or because the Sub-Lease is unconscionable.⁹ These arguments are rejected.

⁵ Memorandum-of-law in support of the petition, at V. (B).

⁶ See, Midwest Fin. Acceptance Corp. v. Lopez, 78 A.3d 614, 623 (Pa. Super. 2013), (instructing that a petition confession-of-judgment to strike will be granted if a fatal flaw appears on the record).

⁷ See, Humberston v. Chevron USA, Inc., 75 A.3d 504, 510 (Pa. Super. 2013), (stating that “the task of interpreting a contract is ... performed by a court rather than by a jury”).

⁸ Petition, ¶¶ 5-12.

⁹ Id. at §§ V. (E), V. (F).

Under Pennsylvania law—

[w]here the parties to an agreement adopt a writing as the final and complete expression of their agreement ... evidence of negotiations leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement.... Thus the written contract, if unambiguous, must be held to express all of the negotiations, conversations, and agreements made prior to its execution, and neither oral testimony ... or written agreements ... are admissible to explain or vary the terms of the contract.¹⁰

In addition, upon the filing of a petition to open confession of judgment, “[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.”¹¹ Finally, to determine whether Sub-Lessee may offer evidence of certain alleged misrepresentation made by Sub-Lessor before execution of the Sub-Lease, this Court turns its attention to three pertinent provisions therein:

6.01—CONSTRUCTION OF PREMISES IMPROVEMENTS:

(a) Sub-Lessee hereby accepts possession of the
Demised Premises in **as is** condition. (Emphasis
supplied).

* * *

6.05—CONDITION-AND-ZONING:

Sub-Lessee acknowledges that Sub-Lessee has examined the Demised Premises and accepts the same in its existing condition without any obligation on Sub-Lessor to make any repairs, improvements or alterations. Sub-Lessee accepts the Demised Premises subject to all zoning and other laws, regulations and restrictions....

* * *

9.09—ENTIRE AGREEMENT:

¹⁰ McGuire v. Schneider, Inc., 534 A.2d 115, 117 (Pa. Super. 1987), aff'd, 548 A.2d 1223 (Pa. 1988).

¹¹ Haggerty v. Fetner, 481 A. 2d 641, 644 (Pa. Super. 1984).

It is expressly understood ... by ... all the parties hereto that this Sub-Lease and any riders attached hereto set forth all the promises, agreements, conditions, warranties, representations and understanding between Sub-Lessee and Sub-Lessor.... (Emphasis supplied).¹²

The afore-quoted provisions, when read in conjunction with the laws applicable to the issues at hand, leave this Court with no doubt: the petitioner/Sub-Lessee cannot sustain its burden of proof because it is precluded from offering evidence of any misrepresentations allegedly made by Sub-Lessor prior to the execution of the Sub-Lease. Sub-Lessee is precluded from offering evidence of fraud or misrepresentation because the Sub-Lease not only states clearly and unambiguously that Sub-Lessee would receive the Demised Premises “as is,” but also because the Sub-Lease is a fully integrated agreement crafted to prevent the injection therein of prior representations at variance with its terms. For this reason, Sub-Lessee’s defense based on fraud and/or misrepresentation is rejected.

As to the second defense advanced by Sub-Lessee –that is, the defense based on the alleged unconscionability of the Sub-Lease, this Court notes that under Pennsylvania law—

[t]he doctrine of unconscionability provides an affirmative defense to an adhesion contract's enforcement.... The party challenging the contract or provision bears the burden of affirmatively pleading and proving the unconscionability. There are two requirements. First, for a contract or a term to be unconscionable, the party signing the contract must have lacked a meaningful choice in accepting the challenged provision. Second, the challenged provision must unreasonably favor the party asserting it.¹³

¹² Sub-Lease, Exhibit A to the complaint, §§ 6.01, 6.05, 9.09.

¹³ Am. S. Ins. Co. v. Halbert, 203 A.3d 223, 228 (Pa. Super. 2019).

In this case, Sub-Lessee has offered no evidence that it lacked a meaningful choice when it entered into the Sub-Lease agreement with Sub-Lessor, and such a failure requires this court to reject the defense based on unconscionability, and to deny the petition to strike or open in its entirety.¹⁴

Finally, the motion to consolidate the instant action with the afore-mentioned Separate Matter is likewise denied.

BY THE COURT,



NINA W. PADILLA, J.

¹⁴ In an action in confession-of-judgment, "[t]he 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...." Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994). Here, Sub-Lessee had an opportunity to be heard through the device of a petition to open the judgment; alongside that petition however, Sub-Lessee failed to offer any evidence in support of the defense of unconscionability, and such a failure is fatal to that defense.