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

DOCKETED

RISING SUN PLAZA ASSOCIATES, L.P., : February Term 2022
C/O LRF SLATER COMPANIES, INC., :
Plaintiff, : No. 1608
v. :
YI ZHOU and TASTYPOT, LLC, : COMMERCE PROGRAM
Defendants. :
Control Number 22034480

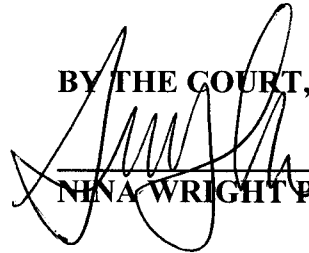
SEP 19 2022

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 19th day of September, 2022, upon consideration of Defendants' Motion to Open and/or Strike Confessed Judgment and Plaintiff's Response in Opposition, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED** that Defendants' Motion to Open and/or Strike Confessed Judgment is **Denied**.

BY THE COURT,


NINA WRIGHT PADILLA, S.J.

220201608-Rising Sun Plaza Associates, L.P. Vs Zhou Etal



22020160800016

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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| C/O LRF SLATER COMPANIES, INC., | : | |
| Plaintiff, | : | No. 1608 |
| v. | : | |
| YI ZHOU and TASTYPOT, LLC, | : | COMMERCE PROGRAM |
| Defendants. | : | |
| | : | Control Number 22034480 |

OPINION

Presently before the court is Defendants Yi Zhou and Tasty Pot, LLC's (collectively referred to as "Defendants") Petition to Open and/or Strike Confessed Judgment. For the reasons discussed below, the Petition to Open and/or Strike is Denied.

BACKGROUND

On September 30, 2019, Plaintiff Rising Sun Plaza Associates, L.P. c/o LRF Slater Co. Inc. ("Plaintiff") and Defendant Tasty Pot LLC ("Defendant Tasty Pot") entered into a lease for the property located at 5675 Rising Sun Avenue #2, Philadelphia, PA 19120.¹ Defendant Tasty Pot agreed to pay annual rent of \$45,000 in monthly installments of \$3740.00 on the first of each month. In addition to the monthly rent, Defendant Tasty Pot also agreed to pay Common Use Areas and Facilities Charges, including liability and fire insurance, Public Utility Charges, including electric, real estate taxed and late fees.²

Defendant Tasty Pot also authorized entry of a judgment by confession against it in the event of default on the payment terms. Paragraph 37 (k) of the Lease provides in relevant part as follows:

¹ Lease Agreement dated September 30, 2019 attached to the Complaint in Confession of Judgment as Exhibit "A".

² Id. ¶¶ 5,6,8,9.

TENANT HEREBY AUTHORIZES AND EMPOWERS ANY PROTHONOTARY, THE CLERK OF COURT OR ATTORNEY OF ANY COURT OF RECORD TO APPEAR FOR THE TENANT (AND TENANT HEREBY APPOINTS LANDLORD AS THE ATTORNEY-IN-FACT OF ENANT, COUPLES WITH AN INTEREST IN TENANT'S NAME, PLACE AND STEAD AS IF SIGNED AND DELIVERED BY TENANT), IF AN EVENT OF DEFAULT OCCURS HEREUNDER: (1) IN ANY AND ALL ACTIONS WHICH MAY BE BROUGHT FOR SAID RENT AND/OR SAID OTHER SUMS; AND/OR (II) IN ANY CIVIL ACTION BROUGHT BY LANDLORD FOR THE COLLECTION OF SUCH RENT, SUM OR SUMS, TO CONFESS JUDGEMENT, AGAINST TENANT, AND OTHERWISE TO ENTER AND AUTHORIZE ENTRY OF JUDGEMENT AGAINST TENANT FOR ALL OR ANY PART OF THE RENT AND/OR OTHER SUMS; FOR ALL OTHER DAMAGES AND SUMS PAYABLE BY TENANT HEREUNDER, AND FOR INTEREST AT THE DEFAULT RATE AND FOR COSTS, TOGETHER WITH AN ATTORNEY'S COMMISSION EQUAL TO FIVE PERCENT (5%) OF THE AMOUNT OF SUCH SUMS (BUT IN NO EVENT LESS THAN \$5,000) AND ALSO TOGETHER WITH LANDLORD'S REASONABLE ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH SUCH EVENT OF DEFAULT AND SUCH POWERS MAY BE EXERCISED AS WELL AFTER THE EXPIRATION OF THE TERM AND/OR DURING ANY EXTENDED OR RENEWED TERM. ³

Defendant Yi Zhou ("Defendant Zhou") executed a Surety Agreement.⁴ The Surety Agreement also authorized the entry of a confession of judgment against him in the event of Defendant Tasty Pot's inability to pay. The provision provides as follows:

SUBJECT TO THE PROVISIONS OF OTHER SECTIONS HEREIN, WITH RESPECT TO GIVING NOTICE, IF ANY RENTAL OR ANY SUM PAYABLE BY TENANT UNDER THE LEASE REMAINS UNPAID AFTER THE DUE DATE (WHETHER BY ACCELERATION OR OTHERWISE) FOR PAYMENT OF SUCH SUM, SURETY, TO THE EXTENT PERMITTED BY LAW, AND WITHOUT FURTHER CONSENT OF OR NOTICE TO TENANT OR SURETY, HEREBY IRREVOCABLY AND UNCONDITIONALLY AUTHORIZES THE PROTHONOTARY, CLERK OF COURT, OR ANY ATTORNEY OF COURT OF RECORD IN THE COMMONWEALTH OF PENNSYLVANIA, OR ANY OTHER JURISDICTION, TO APPEAR AS ATTORNEY FOR SURETY IN SUCH COURT AND CONFESS JUDGMENT AGAINST SURETY AND IN FAVOR OF LANDLORD, AND ITS SUCCESSORS AND ASSIGNS, AT ANY TIME FOLLOWING THE OCCURRENCE OR AN EVENT OF DEFAULT HEREUNDER OR UNDER THE LEASE FOR ALL OR ANY PORTION OF SUCH ARREARAGES, TOGETHER WITH ATTORNEYS' FEES EQUAL TO THE

³ See Lease Agreement ¶ 37 (k).

⁴ Surety Agreement attached to the Complaint in Confession of Judgment as Exhibit "E".

GREATER OF 5% OF THE UNPAID BALANCE OF SUCH ARREARAGES OR WAIVER OF ANY RIGHT TO A STAY OF EXECUTION. THE AUTHORITY TO ENTER JUDGMENT SHALL NOT BE EXHAUSTED BY ONE EXERCISE HEREOF, BUT, TO THE EXTENT PERMITTED BY LAW, SHALL CONTINUE FROM TIME TO TIME UNTIL FULL PAYMENT OF ARREARAGES. THE FOREGOING RIGHT AND REMEDY IS IN ADDITION TO AND NOT IN LIEU OF ANY OTHER RIGHT OR REMEDY AVAILABLE TO LANDLORD UNDER THE LEASE OR OTHERWISE. FOR THE PURPOSE OF PROCEEDING UNDER THE SUBSECTION, THE LEASE AND THIS SURETY AGREEMENT SHALL BE A SUFFICIENT WARRANT, AND A TRUE AND CORRECT COPY OF THE LEASE AND THIS SURETY AGREEMENT MAY BE FILED WITH THE COURT IN LIEU OF FILING AN ORIGINAL COPY THEREOF. ⁵

Defendant Tasty Pot defaulted on the Lease beginning April 2020, when it failed to pay rent, common area charges, electric, real estate taxes, fire insurance, and liability insurance.⁶ On December 15, 2021, Plaintiff provided defendant Tasty Pot with notice of its default.⁷ On January 14, 2022, Defendant Tasty Pot abandoned the property.⁸ On February 15, 2022, Plaintiff filed a complaint in confession of judgment against Defendants in the amount of \$116,941.47. On March 22, 2022, Defendants filed a Petition to Open and/or Strike Confessed Judgment. On March 23, 2022, the court entered an order for Plaintiff to file a response to the Petition to Open and/or Strike. On April 4, 2022, Plaintiff filed its response. This matter is now ripe for disposition.

⁵ Surety Agreement, pp. 39-40.

⁶ Complaint ¶ 17.

⁷ Letter dated December 15, 2021 attached to the Complaint in Confession of Judgment as Exhibit “C”.

⁸ See Defendants’ Memo attached to the Complaint in Confession of Judgment as Exhibit “D”.

DISCUSSION

“A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record.”⁹ “A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.”¹⁰ In reviewing “the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, *i.e.*, the complaint and the documents which contain confession of judgment clauses.”¹¹

“A petition to open a confessed judgment is an appeal to the equitable powers of the court.”¹² The 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.”¹³ “[I]f the truth of the factual averments contained in the complaint in confession of judgment and attached exhibits are disputed, then the remedy is by proceeding to open the judgment, not to strike it.”¹⁴

Here, Defendants ask this court to strike and/or open the confessed judgment relying upon the same arguments, lack of personal jurisdiction, unconscionably, and failure to mitigate

⁹ *Resolution Trust Corp. v. Copley Qu-Wayne Assocs.*, 683 A.2d 269, 273 (Pa. 1996) (citation omitted).

¹⁰ *Id.* (citation omitted).

¹¹ *Id.*

¹² *Neduscin v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015).

¹³ *Id.* at 506 (citation and emphasis omitted).

¹⁴ *Id.* at 504 (internal quotation marks, citation, and brackets omitted).

damages. Upon review of Defendants papers and the law, the petition to open and/or strike the confessed judgment should be denied.¹⁵

1. Defendants consented to jurisdiction in this court.

Title 42 Pa. C.S.A. § 5301, allows this court to exercise personal jurisdiction over persons who consent to jurisdiction.¹⁶ Here, Defendants, respectively, consented to this court’s jurisdiction when the warrants of attorney were signed in the Lease and Surety Agreements. Specifically, Defendant Tasty Pot “authorized and empowered any prothonotary, the Clerk of Court or Attorney of any court of record to appear for Plaintiffs” and confess judgment.¹⁷ Additionally, Defendant Zhou “hereby irrevocably and unconditionally authorizes the prothonotary, clerk of court, or any attorney of court of record in the Commonwealth of Pennsylvania, or any other jurisdiction, to appear as attorney for surety in such court and confess judgment against surety”.¹⁸ As such, this court has personal jurisdiction over Defendants.

2. The Lease Agreement and the Surety Agreement are not Unconscionable.

Whether a contract is unconscionable is a matter of law. Unconscionability is a defensive contractual remedy that relieves a party from an unfair contract or an unfair portion of a contract. Unconscionability has been recognized to include an absence of a meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to

¹⁵ Plaintiff argues the Petition to Open and/or Strike Confessed Judgment should be denied as untimely. While the Petition was filed one day late, the court chose to disregard the technical error and review the Petition on the merits. See, Pa. R. Civ. P. 126.

¹⁶ See, 42 Pa. C. S. A. §§5301 (a)(1)(iii) Individuals and (3)(a)(ii) Partnerships.

¹⁷ See, Surety Agreement sub paragraph 1 attached to the Complaint in Confession of Judgment as Exhibit “E”.

¹⁸ See Lease Agreement paragraph 37 (k) attached to the Complaint in Confession of Judgment as Exhibit “A”.

the other party. Unconscionability reaffirms the most basic tenet of the law of contracts—that parties must be free to choose the terms to which they will be bound.”¹⁹

With respect to confessions of judgment clause, emphasis is placed on the sophistication of the parties in determining whether a provision is unconscionable.²⁰ A party's signature to a contract is designed to evidence his or her intention to be bound by the contract's terms.²¹ However, agreements authorizing a confession of judgment require a clearer manifestation of consent than do some other types of contract provisions.²² The language contained in the agreement must be specific enough to demonstrate that the signing party has consented to the entry of the judgment by confession.²³

Unconscionability is construed to include procedural unconscionability, “an absence of meaningful choice on the part of one of the parties,” as well as substantive unconscionability, “contract terms which are unreasonably favorable to the other party.” In order for a contract to be held unconscionable, both procedural and substantive unconscionability must be

¹⁹ *Centric Bank v. Sciore*, 263 A.3d 31, 39 (Pa.Super., 2021) (citations omitted).

²⁰ *Id.*

²¹ *Id.* citing *Petrie v. Haddock*, 119 A.2d 45 (Pa.Super. 1956).

²² *Id.* citing *Scott v. 1523 Walnut Corp.*, 301 Pa.Super. 248, 447 A.2d 951 (1982).

²³ *Centric Bank v. Sciore*, 263 A.3d 31, 39 (Pa.Super., 2021) citing *Solebury Nat. Bank of New Hope v. Cairns*, 252 Pa.Super. 45, 380 A.2d 1273 (1977) (*en banc*).

demonstrated.²⁴ The burden of establishing the unconscionable nature of a contract or contract provision clearly rests upon the party challenging the contract or term.²⁵

Here, Defendants have not presented the court with any evidence that the Lease Agreement and Surety Agreement are procedurally and substantively unconscionable. The presence of a confession of judgment provision by itself is not enough, especially since the confessed judgment provisions are conspicuous and clear and are in commercial documents. Defendants direct this court to the Force *Majeur* provision of the Lease Agreement as an example of an unconscionable provision. First, this provision is not in issue in this action. Second, singling out this one provision without providing the court with any evidence that Defendants were prevented from negotiating the terms of the subject Lease Agreement or Surety Agreement or that Defendants were forced to sign the Lease Agreement and Surety Agreement by Plaintiff is not enough to satisfy their burden of proof. Similarly stating that English is Defendant Guarantor's second language alone in a commercial transaction is not enough to sustain a finding of unconscionability. Since Defendants failed to satisfy their burden of proof of producing evidence of unconscionability, the petition to strike and/or open is denied.

3. Plaintiff did not have a duty to mitigate its damages.

Lastly, Defendants argue that Plaintiff failed to mitigate its damages because it “breached its legal obligation to minimize the effects and losses resulting from the height of the pandemic since March 2020.” (See, Defendants’ Petition ¶44). Essentially, Defendants argue that

²⁴ *Glomb v. St. Barnabas Nursing Home, Inc.*, 2020 WL 5437736, at *2 (Pa.Super, 2020)(citations omitted).

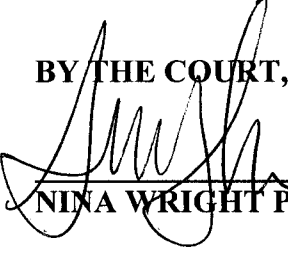
²⁵ *Centric Bank v. Sciore*, 263 A.3d 31, 39–40 (Pa.Super. 2021) citing *Denlinger, Inc. v. Dendler*, 415 Pa.Super. 164, 608 A.2d 1061 (1992). *Centric Bank v. Sciore*, 263 A.3d 31, 39–40 (Pa.Super., 2021).

Plaintiff should have issued the notice of default ten days after Defendants stopped paying rent, even though Defendants remained in possession of the premises until January 14, 2022.

Plaintiff, however, could not mitigate its damages in this instance because Defendants remained in possession of the premises until January 14, 2022. Since Defendants remained in possession of the premises until January 2022, its argument based on mitigation of damages fails.

CONCLUSION

Based on the foregoing, Defendants' petition to open and/or strike confessed judgment is Denied.

BY THE COURT,

NINA WRIGHT PADILLA, S.J.