

DOCKETED

NOV - 3 2015

R. POSTELL
COMMERCE PROGRAM

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

WHITAKER ACQUISITIONS LP	:	August Term, 2015
	:	
<i>Plaintiff</i>	:	Case No. 03343
	:	
v.	:	
	:	Commerce Program
NET COST WHOLESALE INC.	:	
	:	
<i>Defendant</i>	:	Control No. 15092516

ORDER

AND NOW this 2nd day of November, 2015,

upon consideration of the petition to strike or open judgement by confession filed by Defendant Net Cost Wholesale Inc., the *memorandum* of law in support thereof, all the matters of record, and in accordance with a *Memorandum* Opinion simultaneously filed *herewith*, it is **ORDERED** that the petition to strike judgment by confession is **GRANTED** and **JUDGMENT IS STRICKEN**.

BY THE COURT,



RAMY I. DJERASSI, J.

Whitaker Acquisitions L-ORDRF



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<i>Defendant</i>	:	Control No. 15092516

MEMORANDUM OPINION

The court is asked to rule on a petition to strike or open judgment by confession. Judgment was entered by plaintiff (*hereinafter* “Landlord”), on August 26, 2015; subsequently defendant (*hereinafter* “Tenant”), filed its petition to strike or open the confessed judgment on September 22, 2015. The docket shows that Landlord received service of the petition to strike or open from Defendant, yet failed to file a response in opposition thereto at any time.

BACKGROUND AND DISCUSSION

In Pennsylvania—

a petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike ... may be granted only for a fatal defect or irregularity appearing on the face of the record.... In considering 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.... In other words, the petition to strike a confessed judgment must focus on any defects or irregularities appearing on the face of the record, as filed by the party in whose favor the warrant was given, which affect the validity of the judgment and entitle the

petitioner to relief as a matter of law.¹

In addition,

[i]t is well-settled that a written lease or contract which authorizes a party to confess judgment must be clear and explicit and strictly construed.”²

Finally,

[a]n order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.”³

The complaint in confession of judgment asserts that Landlord is entitled to recover “accelerated rents” for the duration of the full term of lease.⁴ However, a reading of the Lease Agreement, and specifically the provision authorizing Landlord to confess judgment, states that Landlord may recover “arrears of rent **and rent treated as if in arrears....**”⁵ This language requires the court to determine whether the words “rent treated as if in arrears” are synonymous with, and have the same meaning as, the words “accelerated rents.” Tackling this work, the court is mindful that “the terms of a contract are ambiguous if the [language thereof] ... is “obscure in meaning through indefiniteness of expression or has a double meaning.”⁶ In addition, “[w]here the language of the contract is ambiguous, the provision is to be construed against the drafter.”⁷

In this case, the court finds that words “rent treated as if in arrears” are

¹ Midwest Fin. Acceptance Corp. v. Lopez, 2013 Pa. Super. 239; 78 A.3d 614, 622-623 (Pa. Super. 2013).

² Fourtees Co. v. Sterling Equip. Corp., 242 Pa. Super. 199, 206, 363 A.2d 1229, 1232 (1976).

³ Neducsin v. Caplan, 2015 Pa. Super. 158; 121 A.3d 498, 504 (Pa. Super. 2015).

⁴ Complaint, ¶ 5.

⁵ Lease Agreement, Exhibit 1 to the complaint in confession of judgment, ¶ 18(b) (emphasis supplied).

⁶ State Farm Fire & Cas. Co. v. PECO, 540A.3d 921, 928 (Pa. Super. 2012).

⁷ Id.

indefinite: their meaning is not necessarily in lock-step with the meaning of the words “accelerated rents.” Therefore, the court finds that the language relied upon by Landlord to recover accelerated rents is not clear and explicit, and the ambiguity therein creates a fatal flaw in the record which requires this court to strike the judgment entered by confession.⁸

This conclusion is supported by another provision contained in the Lease Agreement. The pertinent portion thereof, captioned Right to Re-let, states as follows:

“[after] recovering the Premises, Landlord may lease said Premises or any part thereof to such a person or persons upon such terms as may in Landlord’s discretion seem best and for a term within or beyond the terms of this lease ... and **Tenant will be liable for any loss or rent for the balance of the term** ... plus the costs and expenses of re-letting and making repairs, improvements and alterations to the Premises.”⁹

This language clearly and unambiguously requires Tenant to pay the full balance of the term –in effect, accelerated rents– after Landlord regains possession of the premises, yet decides in its discretion to not re-let. However, if Landlord re-lets the premises, then two possibilities exists: first, if Landlord fails to be made whole by any new rental income, then Landlord will be entitled to recover any rent shortfalls from Tenant; conversely, if Landlord re-lets the premises and secures a new rental income in excess of the rental income expected under the instant Lease Agreement, then Landlord may not collect any amounts over and above those collected with the new rents. In this case, only time will inform this court as to whether Landlord shall be entitled to recover the full amount of accelerated rents, a shortfall therefrom, or no amount at all.

⁸ “The task of interpreting a contract is generally performed by a court rather than by a jury.” Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 304, 469 A.2d 563, 566 (1983)

⁹ Lease Agreement, Exhibit 1 to the complaint in confession of judgment, ¶ 18(c) (emphasis supplied).

Finally, the court notes that the Lease Agreement also contains the following language:

[the] authority [to confess judgment] shall not be exhausted by one exercise thereof, but judgment may be confessed from time to time as often as any rent in arrears ... or charge fall due and are not paid. Such powers may be exercised during, as well as after, the expiration or termination of the original term and during and at any time after any extension or renewal of the term.¹⁰

This language clearly and unambiguously empowers Landlord to confess judgment anew, from time-to-time and as often as necessary, whenever additional rents and other charges fall due and are not paid. Furthermore, this power is provided through the use of the same warrant of attorney which Landlord used to confess the instant judgment.¹¹

For the reasons explained above, the petition to strike Landlord's confessed judgment is granted. Judgment is stricken.¹²

BY THE COURT,



RAMY I. DJERASSI, J.

¹⁰ Lease Agreement, Exhibit 1 to the complaint in confession of judgment, ¶ 18(b).

¹¹ “Where an instrument authorizes judgments to be confessed from time to time for separate sums as of after they become due, successive actions may be commenced and judgments entered for such sums.” Pa. R.C.P. 2953(a). The rules of Civil Procedure also instruct as follows: “[i]f an instrument authorizes entry of judgments for money and in ejectment, the entry of judgment in ejectment shall not prevent the entry of judgment for money. Pa. R.C.P. 2953(b).

¹² “The entry of a valid judgment by confession can only be accomplished if such entry is accomplished in rigid adherence to the provisions of the warrant of attorney; otherwise, such judgment will be stricken. B. Lipsitz Co. v. Walker, 361 Pa. Super. 238, 244, 522 A.2d 562, 565 (1987)