

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

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WALNUT STREET 2014—1 ISSUER, LLC

*Plaintiff*

v.

MICHAEL S. PEARLSTEIN

*Defendant*

: March Term, 2016  
:  
: Case No. 01672  
:  
:  
: Commerce Program  
:  
: Control No. 16052130

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ORDER

AND NOW, this 7<sup>th</sup> day of July, 2016, upon consideration of the petition to open judgment by confession and for a stay of execution filed by defendant Michael S. Pearlstein, the response in opposition of plaintiff Walnut Street 2014—1 Issuer, LLC, and the respective *memoranda* of law, it is **ORDERED** that the Petition is **DENIED** in its ENTIRETY.

BY THE COURT,

  
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MCINERNEY, J.

DOCKETED

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R. POSTELL  
COMMERCE PROGRAM

Walnut Street 2014-1 Is-ORDRC



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## MEMORANDUM OPINION

Plaintiff Walnut Street 2014—1 Issuer, LLC (“Walnut”), is a limited liability company with an address in Philadelphia, Pennsylvania. Individual defendant Michael S. Pearlstein (“Pearlstein”), is a resident of Pennsylvania. At all times relevant to this case, Pearlstein was the sole owner in control of an entity named Empire Schuylkill, LP, (“Empire”), a limited partnership based in Philadelphia, Pennsylvania.

On May 5, 2007, a lending institution named The Bancorp Bank (the “Bank”), entered into a “Loan Agreement” with Empire. Pursuant to the Loan Agreement, the Bank provided Empire with a \$16.5 million loan to fund the acquisition of a shopping mall (the “Shopping Mall”), in a rural district of Pennsylvania, and to enable Empire to fit the Shopping Mall for use by commercial tenants.<sup>1</sup> On February 2, 2011, the Bank and Empire entered into an “Amended Loan Agreement.”<sup>2</sup> This Amended Loan Agreement is evidenced by three promissory notes (the “Notes”), which are backed by an “Open-End and Security Mortgage Agreement.”<sup>3</sup> Furthermore, The Bank and Pearlstein executed on the same day a Guaranty and Security Agreement (the “Personal Guaranty”).<sup>4</sup> Pursuant to the Personal Guaranty, Pearlstein agreed to be liable to the Bank for the obligations of Empire under the afore-mentioned documents. The Personal Guaranty contained a warrant-of-attorney provision empowering the Bank and

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<sup>1</sup> Loan Agreement dated May 5, 2007, ¶ 2.2, Exhibit A to the petition of defendant Pearlstein to open the confessed judgment of plaintiff Walnut.

<sup>2</sup> Amended, Restated and Consolidated Loan Agreement dated February 2, 2011, Exhibit A to the complaint-in-confession-of-judgment.

<sup>3</sup> The agreements identified in the paragraph *supra* are found in the complaint-in-confession-of-judgment, at Exhibit B, in the following order: first, an Amended and Restated Note of \$17.3 million; second, an Amended and Restated Note of \$5,862,789; and third, a Note of \$4,093,211. Finally, an Amended, Restated, and Consolidated Open—End Mortgage and Security Agreement is found at Exhibit C of plaintiff’s complaint.

<sup>4</sup> Personal Guaranty, Exhibit D to the complaint-in-confession-of-judgment.

its successors to confess judgment against Pearlstein in the event of Empire's default.<sup>5</sup>

On August 10, 2010, the Bank sought to protect its loans to Empire by seeking additional guarantees. To this end, the Bank filed an Application for Loan Guarantee with the United States Department of Agriculture—Rural Development ("USDA").<sup>6</sup> On November 15 and December 17, 2010, USDA informed the Bank that the application for loan guarantees had been approved.<sup>7</sup> USDA also informed the Bank that the approval would become effective after the Bank executed two Conditional Commitment Forms which were supplied by USDA and were subsequently executed by the Bank on February 2, 2011 (the "USDA Guarantees").<sup>8</sup> On December 30, 2014, The Bank sold its rights to the Empire obligations to Walnut, plaintiff herein.<sup>9</sup>

On March 17, 2016, Walnut confessed judgment against Pearlstein by filing against him a complaint-in-confession-of-judgment. On May 16, 2016, Pearlstein filed the instant petition to open the judgment. In the petition, Pearlstein advances a number of arguments: first, Pearlstein asserts that Walnut lacks standing to enforce the Personal Guaranty because the Bank assigned the obligations of Pearlstein to Walnut in violation of the conditions contained in the USDA Guarantees. According to Pearlstein, the Bank "expressly represented to ... USDA ... [Empire] and Pearlstein that it would not sell the Loans if [Empire] was in default."<sup>10</sup> In pursuit of this argument Pearlstein asserts that the Bank violated the terms of the USDA Guarantees by failing to report to USDA the insolvency and default of Empire. Pearlstein appears to conclude that the

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<sup>5</sup> Id. ¶ 7.

<sup>6</sup> Application for Loan Guarantee, Exhibit I to Pearlstein's petition to open the confessed judgment.

<sup>7</sup> USDA letter of approval, Exhibit J to Pearlstein's petition to open the confessed judgment.

<sup>8</sup> Id.

<sup>9</sup> Complaint-in-confession-of-judgment, ¶ 9; petition to open judgment by confession, ¶ 83.

<sup>10</sup> Petition to open confessed judgment, ¶ 115.

alleged failure of the Bank to advise USDA had the effect of voiding the assignment from the Bank to Walnut. According to Pearlstein, the absence of a valid assignment precludes Walnut from having standing to confess judgment against the Pearlstein Guaranty. This argument is rejected because Pearlstein has failed to advance a valid defense.

Preliminarily, the Court notes that—

[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses ... **The defenses raised must be valid ones.**<sup>11</sup>

Next, the Court shall examine the Loan Note Guarantee –a document executed by the Bank– whereby the USDA specifically guaranteed a portion of the loan made by the Bank to Empire. This document states as follows:

[i]n consideration of the making of the subject loan by the above named Lender [the Bank], the United States Department of Agriculture (“USDA”), pursuant to the Consolidated Farm and Rural Development Act ... does hereby agree that ... it will pay ...

B. The Lender [the Bank] ...

1. Any loss sustained by such Lender on the guaranteed portion ... or
2. The guaranteed principal advanced to or assumed by the Borrower [Empire] under said notes....<sup>12</sup>

This clear language leaves no doubt: the Loan Note Guarantee is a contract between USDA as guarantor of the loans, and the Bank as lender: nowhere in any of the documents related to this transaction could this Court find that Pearlstein was a party to

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<sup>11</sup> Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984) (emphasis supplied).

<sup>12</sup> Loan Note Guarantee, UNITED STATES DEPARTMENT OF AGRICULTURE—RURAL DEVELOPMENT, Exhibit 7 of plaintiff Walnut’s answer to the petition to open the confessed judgment.

such a contract. Having established that Pearlstein was not a party to the Loan Note Guarantee, this court additionally notes that under Pennsylvania law—

[i]n a claim for breach of contract, the **plaintiff** must allege that there was a contract, the defendant breached it, and plaintiff suffered damages from the breach.<sup>13</sup>

In this case, Pearlstein may not remotely assert that he was a party to the Loan Note Guarantee agreement, let alone that he is a plaintiff entitled to assert thereunder a breach-of-contract claim. For this reason, it is Pearlstein who has no standing to assert that the Loan Note Guarantee was breached by the Bank. As a result, Pearlstein may not rely on this argument to invalidate the assignment from the Bank to Walnut.<sup>14</sup> Pearlstein has failed to bear the burden of producing a sufficient, valid defense in his first challenge to the confessed judgment, and for this reason the first challenge is rejected.

Pearlstein's second challenge to the confessed judgment avers that that the Bank fraudulently induced Empire to execute the Loan Note Guarantee. Specifically, Pearlstein asserts that Empire was already preparing to terminate its relationship with the Bank when it agreed to execute the Loan Note Guarantee upon the Bank's fraudulent representation that the loan guarantees would "stabilize" the value of the Property.<sup>15</sup> This argument is also rejected because Pearlstein, as the petitioning party seeking to open the judgment, "bears the burden of producing sufficient evidence to substantiate

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<sup>13</sup> *Discover Bank v. Stucka*, 33 A.3d 82, 87 (Pa. Super. 2011).

<sup>14</sup> Pearlstein does not even assert that he is a third-party beneficiary to the Loan Note Guarantee between USDA and the Bank. The case of *Guy v. Liederbach*, 459 A.2d 744 (Pa. Super. 1983), explains the test which must be satisfied to enable a non-party to a contract to assert a claim under a third-party beneficiary theory. *Guy* clearly states that "[t]he first part of [such a] test sets forth a standing requirement." *Id.* at 459 A.2d at 751.

<sup>15</sup>Petition to Open, ¶¶ 120–128

its alleged defenses.”<sup>16</sup> In Pennsylvania—

fraud and misrepresentation [are] meritorious defenses that could support the opening of a confessed judgment. However, the mere pleading of those defenses is insufficient. Appellant must also establish that it set forth sufficient evidence in support of those defenses to give rise to a question that would require submission of the case to a jury.<sup>17</sup>

The elements of fraud in the inducement are as follows:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and
- (6) the resulting injury was proximately caused by the reliance.<sup>18</sup>

In this case, Pearlstein has offered no evidence showing that the Bank, with an intent to mislead, falsely made a material representation upon which Empire relied, and that Empire suffered an injury proximately caused by such reliance. Pearlstein has offered none of the afore-quoted elements which are required for submission to a jury, and for this reason his second challenge to the confessed judgment is rejected.

Pearlstein’ third, fourth, fifth, sixth and seventh challenges to the confessed judgment generally assert that the judgment must be opened to afford petitioner the opportunity to establish each of his listed defenses.<sup>19</sup> All of these challenges to the

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<sup>16</sup>Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

<sup>17</sup>PNC Bank, Nat. Ass'n v. Bluestream Tech., Inc., 2010 PA Super 215, 14 A.3d 831, 840 (2010).

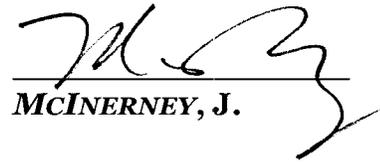
<sup>18</sup>Eigen v. Textron Lycoming Reciprocating Engine Div., 874 A.2d 1179, 1185 (Pa. Super. 2005).

<sup>19</sup> For example, Pearlstein *inter alia* avers that “THE JUDGMENT MUST BE OPENED TO AFFORD [PEARLSTEIN] THE OPPORTUNITY TO ESTABLISH THE MERITORIOUS DEFENSE THAT [WALNUT] DECLARED DEFAULT AGAINST [EMPIRE] EVEN THOUGH [EMPIRE] WAS NOT IN VIOLATION OF THE CURRENT RATIO COVENANT.” See Petition to Open confessed judgment, p. 26 (emphasis deleted). In addition, Pearlstein states that Walnut “offers no evidence, other than say that ... [Empire] breached this covenant.” *Id.* p. 27, ¶ 144 All the other challenges to the confessed judgment substantially repeat the same idea –namely, that the judgment “must be opened to afford [Pearlstein] the opportunity” of establishing each alleged defense. See petition to open, ¶¶ 138–183. However, nowhere does Pearlstein offer any evidence capable of substantiating the

confessed judgment are rejected because Pearlstein, as the petitioning party seeking to open the judgment, has failed to bear “the burden of producing sufficient evidence to substantiate its alleged defenses.”<sup>20</sup>

For all the foregoing reasons, Pearlstein’s petition to open judgment by confession and for stay of execution is denied.

**BY THE COURT,**

  
**MCINERNEY, J.**

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alleged defenses, as required under the law for confessions-of-judgment. In addition, Walnut, as the plaintiff in this confession-of-judgment action, is not required to bear the burden of proof; merely, Walnut is required to satisfy the requirements of Pa. R.C.P. 2952 titled Complaint—Contents, and this Court finds that Walnut did satisfy such requirements.

<sup>20</sup>Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).