

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

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STABILIS MASTER FUND III, LLC

*Plaintiff*

v.

JOHN J. KONTRA, JR., LISE A. MILLER,  
SOCIETY HILL, HOTEL, LP, 301 CHESTNUT, LLC,  
301 LEASING, LP, and EFL PARTNERS, LP

*Defendants*

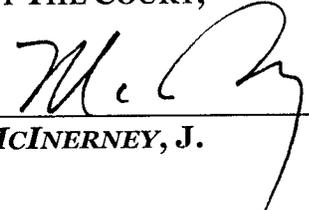
: March Term, 2016  
:  
: Case No. 02807  
:  
: Commerce Program  
:  
:  
: Control No. 16050271  
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**ORDER**

AND NOW, this 6<sup>th</sup> day of June, 2016, upon consideration of the petition to open judgment by confession filed by defendants, the response in opposition filed by plaintiff, and the respective briefs, it is **ORDERED** that the petition to open judgment by confession is **DENIED IN ITS ENTIRETY**.

BY THE COURT,

  
\_\_\_\_\_  
MCINERNEY, J.

Stabilis Master Fund li-ORDOP



16030280700012

**DOCKETED**

JUN 07 2016

J. EVERS  
JUDICIAL RECORDS

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

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<b>STABILIS MASTER FUND III, LLC</b>	:	March Term, 2016
<i>Plaintiff</i>	:	Case No. 02807
<b>v.</b>	:	Commerce Program
<b>JOHN J. KONTRA, JR., LISE A. MILLER, SOCIETY HILL, HOTEL, LP, 301 CHESTNUT, LLC, 301 LEASING, LP, and EFL PARTNERS, LP</b>	:	Control No. 16050271
<i>Defendants</i>	:	

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**MEMORANDUM OPINION**

Plaintiff, Stabilis Master Fund III, LLC (“Plaintiff”), is successor-in-interest of Royal Bank America (“Royal Bank”), a lending institution. Defendants Society Hill Hotel, LP (“SHH”), 301 Chestnut, LLC (“301 Chestnut”), 301 Leasing, LP (“301 Leasing”), and EFL Partners, IV, LP (“EFL”), are Pennsylvania entities. Individual defendants John J. Kontra, Jr. (“Kontra”) and Lise A. Miller (“Miller”), believed to be husband and wife, are residents of Pennsylvania. Whenever required hereinafter, SHH, 301 Chestnut, 301 Leasing, EFL, Kontra and Miller shall be identified as “Defendants.”

**THE SOCIETY HILL HOTEL LOAN**

On December 18, 2002, Royal Bank, a non-party in this action, loaned \$1.5 million to SHH, 301 Chestnut, and 301 Leasing (the “SHH Loan”). Kontra, as president of SHH, manager of 301 Chestnut, and president of 301 Leasing, executed a promissory

note evidencing this loan.<sup>1</sup> Also on December 18, 2002, Kontra and Miller personally executed a “GENERAL GUARANTY AND SURETYSHIP AGREEMENT” to further induce Royal Bank to provide the SHH Loan.<sup>2</sup> On the same date, December 18, 2002, EFL executed a separate “GENERAL GUARANTY AND SURETYSHIP AGREEMENT” to further induce Royal Bank to provide the SHH loan.<sup>3</sup>

On February 24, 2004, Kontra, Miller, and EFL executed a “CONFIRMATION OF GUARANTY AND SURETYSHIP AGREEMENT.” Through this document, Kontra, Miller and EFL confirmed their respective obligations under the SHH Loan.<sup>4</sup> Finally, in January 2013, SHH, 301 Chestnut and 301 Leasing executed a modification to the SHH loan (the “Allonge”), whereby the parties agreed to extend the maturity date of the original promissory note to February 28, 2014.<sup>5</sup>

#### THE LINE OF CREDIT

On November 14, 2006, Royal Bank extended a \$700,000.00 line of credit to Kontra and Miller, as evidenced by a promissory note (the “Original Promissory Note”).<sup>6</sup> On January 23, 2013, Kontra and Miller executed an amended promissory note (the “Line-of-Credit Allonge”), whereby the parties agreed to extend the maturity date of the loan to February 28, 2014.<sup>7</sup>

#### THE GREEN ST. LOAN

On September 17, 1997, Royal Bank’s predecessor loaned \$131,250.00 to

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<sup>1</sup> Promissory note, Exhibit A to the complaint-in-confession-of-judgment.

<sup>2</sup> GENERAL GUARANTY AND SURETYSHIP AGREEMENT, Exhibit C to the complaint-in-confession-of-judgment.

<sup>3</sup> GENERAL GUARANTY AND SURETYSHIP AGREEMENT, Exhibit D to the complaint-in-confession-of-judgment

<sup>4</sup> CONFIRMATION OF GUARANTY AND SURETYSHIP AGREEMENT, EXHIBIT E to the complaint-in-confession-of-judgment.

<sup>5</sup> Allonge, Exhibit B to the complaint-in-confession-of-judgment.

<sup>6</sup> Promissory note, Exhibit F to the complaint-in-confession-of-judgment.

<sup>7</sup> Line-of-Credit Allonge, Exhibit G to the complaint-in-confession-of-judgment.

defendant Miller, as evidenced by the terms of a promissory note (the “Original Green St. Note”).<sup>8</sup> In connection with this loan, individual defendant Kontra executed a “Commercial Guaranty.” Under the terms of the Commercial Guaranty, Kontra agreed to act as a guarantor for the entire amount of the loan under the Green St. Note.<sup>9</sup>

On September 5, 2008, defendant Miller executed a CHANGE IN TERMS AGREEMENT which amended certain terms contained in the Original Green St. Note.<sup>10</sup> In connection with this amendment, individual defendant Kontra executed a “Second” Commercial Guaranty, whereby Kontra agreed to continue as a guarantor to the Original Green St. Note and amendments thereto, and to assure full and timely payment of all the obligations thereunder.<sup>11</sup>

On October 21, 2009, Kontra, SHH and EFL executed an “Amendment to Loan Documents.”<sup>12</sup> Pursuant to this document, Kontra, SHH and EFL agreed to be obligors of the Green St. Loan which had been originally advanced by Royal Bank to Miller.

On January 23, 2013, defendant Miller executed an “Allonge” to the original and amended Green St. Loan. Pursuant to the Allonge, the maturity date of the Green St. Loan was extended to February 28, 2014.<sup>13</sup>

#### THE SECOND LOAN FORBEARANCE AGREEMENT

On January 23, 2013, all defendants herein, Miller, Kontra, SHH, 301 Chestnut, and 301 Leasing, executed a “Second Loan Forbearance Agreement.” Under this agreement, all the defendants agreed that they were debtors jointly and severally liable

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<sup>8</sup> Promissory note, Exhibit H to the complaint-in-confession-of-judgment.

<sup>9</sup> Commercial Guaranty of John J. Kontra, Exhibit L to the complaint-in-confession-of-judgment.

<sup>10</sup> CHANGE IN TERMS AGREEMENT, Exhibit I to the complaint-in-confession-of-judgment.

<sup>11</sup> “Second” Commercial Guaranty, Exhibit M to the complaint-in-confession-of-judgment.

<sup>12</sup> Amendment to Loan Documents, Exhibit J to the complaint-in-confession-of-judgment.

<sup>13</sup> Allonge, Exhibit K to the complaint-in-confession-of-judgment.

for the obligations under the SHH Loan, the Line-of-Credit Loan, and the Green St. Loan.<sup>14</sup> In addition, this document contained a cognovit clause empowering Royal Bank to confess judgment against all defendants, and to include in the judgment a reasonable amount of attorney's fees.

On February 18, 2014, Royal Bank assigned its rights to all of the aforementioned loans to Stabilis, Plaintiff herein.<sup>15</sup> On March 29, 2016, Plaintiff filed its complaint-in-confession-of-judgment against all Defendants. The complaint asserts that defendants defaulted on their obligations as debtors and guarantors by failing to pay all amounts due under the Second Loan Forbearance Agreement.<sup>16</sup>

### **Discussion**

Defendants' petition challenges the confessed judgment on three separate grounds. First, Defendants assert that Plaintiff may not claim certain retrospective amounts of interest because it had previously agreed verbally, and in "follow-up ... written ... pay-off statements," to forgo such charges.<sup>17</sup> This argument is rejected. In Pennsylvania, "[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses [necessary to open a judgment by confession].... The defenses raised must be valid...."<sup>18</sup> In this case, Defendants have produced no evidence of an oral modification of any terms contemplated under the various written agreements. In addition, the Court has reviewed the "follow-up ... written ... pay-off statements" to determine whether Plaintiff had agreed in writing to forego the interests amounts which are challenged by Defendants. The documents in question state as

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<sup>14</sup> Second Loan Forbearance Agreement, Exhibit N to the complaint-in-confession-of-judgment.

<sup>15</sup> Assignment and Assumption Agreement, Exhibit O to the complain-in-confession-of-judgment.

<sup>16</sup> Complaint-in-confession-of-judgment, ¶ 78.

<sup>17</sup> Petition to open, ¶ 6.

<sup>18</sup> Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

follows:

**THIS PAYOFF STATEMENT IS NOT A LEGALLY BINDING INSTRUMENT OR AN OFFER TO ENTER INTO A CONTRACT AND DOES NOT MODIFY YOUR LOAN DOCUMENTS....**<sup>19</sup>

This language leaves no doubt: the written pay-off statements submitted by Defendants as evidence of a modification of certain terms of interest were not legally binding; therefore, they did not modify any of the terms contemplated under the various loan documents in existence. Defendants have offered no evidence of any modification of the terms of interest and for this reason the Court rejects their first challenge to the confessed judgment.

Second, Defendants assert that the confessed judgment should be opened because the amounts claimed by plaintiff under the SHH Loan include fees which Plaintiff and its predecessor had agreed to waive.<sup>20</sup> Again, Defendants have failed to meet their burden of producing any evidence that the fees in question had been waived. For this reason, Defendants' second argument in favor of opening the confessed judgment is similarly rejected.

Finally, Defendants argue that the confessed judgment should be opened because the cognovit clause in the Second Loan Forbearance Agreement does not specify the reasonable percentage of attorney's fees available to Plaintiff.<sup>21</sup> Defendants conclude that the un-stated percentage of attorney's fees makes it impossible to determine whether such fees are reasonable or not.<sup>22</sup> The Second Loan Forbearance Agreement states as follows:

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<sup>19</sup> Estimated Statements of Account, attached the Affidavit of John J. Kontra at Exhibit 1 of the petition to open judgment by confession. (Underlining supplied).

<sup>20</sup> Petition to open, ¶¶ 7–8.

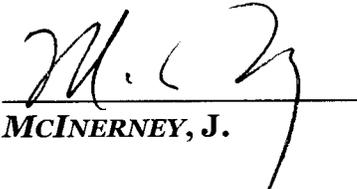
<sup>21</sup> *Id.* ¶ 9.

<sup>22</sup> *Id.*

**13. CONFESSION OF JUDGMENT. UPON DEFAULT ... DEBTORS HEREBY IRREVOCABLY AUTHORIZE ... ANY ATTORNEY FOR ANY COURT OF RECORD TO APPEAR FOR AND CONFESS JUDGMENT THEREIN AGAINST DEBTORS.... THE JUDGMENT SHALL INCLUDE ... A REASONABLE ATTORNEY'S COMMISSION, SUBJECT TO DEBTORS' RIGHT TO SEEK READJUSTMENT OF SAID FEES BASED ON AN ACTUAL TIME EXPENDITURE....<sup>23</sup>**

To determine whether the amount of attorney's fees claimed by Plaintiff is reasonable or not, this Court quickly divided the claimed attorney's fees, (\$16,077.30), by the amount of unpaid principal under the Second Loan Forbearance Agreement (\$1,785,914.82). The quotient of this calculation showed that Plaintiff claims as attorney's fees less than 1% of the unpaid principal. Next, the Court determined under Pennsylvania law that attorney's fees of up-to-fifteen percent of the principal are not excessive. Specifically, the Court found that in Pennsylvania, "attorney's fees in the amount of fifteen percent [are reasonable when] ... specifically authorized by the warrant of attorney."<sup>24</sup> In this case, though the warrant of attorney is silent about the percentage of attorney's fees available to Plaintiff, it is evident that such fees, amounting to less-than 1% of the unpaid principal, are reasonable and proper. For this reason, Defendants' final challenge to the confessed judgment is also rejected.

**BY THE COURT,**

  
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**MCINERNEY, J.**

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<sup>23</sup> Second Loan Forbearance Agreement, Exhibit N to the complaint-in-confession-of-judgment.

<sup>24</sup> Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994).