

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

PNC BANK, NATIONAL ASSOCIATION	: JUNE TERM, 2000
v.	: No. 1342
HOWARD SNYDER and CATHY SNYDER	: Control No. 061875

O R D E R

AND NOW, this 14th day of February 2001, upon consideration of the Petition of defendants, Howard and Cathy Snyder, to Open the Confessed Judgment, the response of plaintiff PNC Bank and all relevant pleadings and documents, and after oral argument, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

- (1) The Petition is **Denied**.
- (2) The Snyders' request, in the alternative, to modify the attorney's commission is **Granted**.
- (3) The parties shall appear on the 2nd day of March 2001 at 10:30 a.m. in City Hall Room 513 for a hearing to set attorney's commission.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

PNC BANK, NATIONAL ASSOCIATION

: JUNE TERM, 2000

v.

: No. 1333

IS INDUSTRIES, INC.

: Control No. 061876

O R D E R

AND NOW, this 14th day of February 2001, upon consideration of the Petition of defendant, IS Industries, Inc., to Open the Confessed Judgment, the response of plaintiff PNC Bank and all relevant pleadings and documents, and after oral argument, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

- (1) The Petition is **Denied**.
- (2) ISI's request, in the alternative, to modify the attorney's commission is **Granted**.
- (3) The parties shall appear on the 2nd day of March 2001 at 10:30 a.m. in City Hall Room 513 for a hearing to set attorney's commission.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. February 14, 2001

This matter consists of a pair of confessed judgments -- one against the principal debtor, IS Industries, Inc. ("ISI"), and the other against the guarantors, Howard and Cathy Snyder. ISI and the Snyders filed Petitions to Open the two Judgments.

For the reasons set forth, this court **denies** the Petitions to Open. But the court **grants** the defendants' request to modify the attorney's commission.

FACTS

ISI is a garage door manufacturer and the Snyders are its only shareholders. ISI is the maker of four Notes to PNC:

	<u>Date of Note</u>	<u>Amount</u>	<u>Due Date</u>
Note 1	April 2, 1998	\$550,000	December 31, 1998
Note 2	January 9, 1998	\$640,000	January 1, 2008
Note 3	January 9, 1999	\$100,000	January 1, 2003
Note 4	August 4, 1998	\$299,180	August 15, 2003

Note 1 secures a \$550,000 line of credit. It replaces a \$500,000 Note dated January 9, 1998.

Notes 2, 3 and 4 secure term loans.

On January 9, 1998, PNC and ISI executed a Business Loan Agreement that made all of PNC's past and future loans to ISI subject to the terms of that agreement. Those terms included the following financial covenants:

TANGIBLE NET WORTH RATIO. Borrower shall maintain minimum Tangible Net Worth plus Subordinated Debt of not less than \$1,300,000.

NET WORTH RATIO. Borrower shall maintain a ratio of Total Liabilities minus Subordinated Debt to Tangible Net Worth plus Subordinated Debt of less than 2 to 1.

Business Loan Agreement, p. 4.

Each Note had a clause authorizing confession of judgment against ISI for the principal, accrued interest and attorney's commission of 10% of the principal and interest in the event of default on the Note. Each Note defined default as follows:

DEFAULT. Borrower will be in default if any of the following happens: (a) Borrower fails to make payment when due. (b) Borrower breaks any promise Borrower has made to Lender, or Borrower fails to comply with or to perform when due any other term, obligation, covenant, or condition contained in this Note or any agreement related to this Note, or in any other agreement or loan Borrower has with Lender. . . .

Notes 1, 2, 3 and 4 at p. 1. The Business Loan Agreement had a similar provision defining default. Business

Loan Agreement, p. 4-5.

On January 9, 1998, the Snyders executed an unlimited guaranty of all of ISI's then present and future debts to PNC. The guaranty contained a clause authorizing confession of judgment against the Snyders for the principal, accrued interest and attorney's commission of 10% of the principal and interest in the event of default under the guaranty. Guaranty at 3.

PNC extended the due date of Note 1 three times in writing so that the final extended deadline for payment of the Note 1 principal was September 30, 1999. ISI has not yet paid PNC the principal balance of Note 1. Forbearance Agreement, Page 3, ¶ 1; Howard Snyder dep. at 156.

On December 31, 1999, PNC, ISI and the Snyders executed a Forbearance Agreement, which included the following:

- C ISI confirmed the amounts due under each Note. ISI agreed that, as of December 31, 1998 and June 30, 1999, ISI was "not in compliance with the Adjusted Net Worth and Adjusted Debt to Adjusted Net Worth financial covenants contained in the Loan Agreement."
- C The parties agreed that noncompliance with the financial covenants constituted "Events of Default." ISI and the Snyders agreed "that the Events of Default remain[ed] outstanding . . . and [had] not been waived or impaired, in any way, by [PNC]." (The Forbearance Agreement did not mention that the payment of principal of Note 1 was past due.)
- C ISI and the Snyders agreed to a 1% increase in the interest rate of Note 1. The parties executed an amendment to Note 1 raising the interest rate by 1%. The Note 1 Amendment stated that the other terms of the Note remained unchanged.
- C The Snyders agreed to deliver monthly certain personal financial information and to meet monthly with PNC.

C PNC agreed to continue to make advances and forbear acceleration of the loans until the earlier of (a) ISI's breach of the Forbearance Agreement or (b) March 31, 2000.

Apparently, ISI has timely paid interest on the Notes through March 2000. ISI has not paid the principal balance of Note 1. Howard Snyder dep. at 156. ISI has made no payments of principal or interest on Note 1 since March 2000. Howard Snyder dep. at 156. It is not clear whether ISI made payments on Notes 2, 3 and 4 after March 2000.

On June 13, 2000, PNC confessed judgment against ISI and the Snyders for \$1,515,190.14 in two separate actions. That judgment included an attorney's commission of \$137,744.56. ISI and the Snyders filed petitions to open the judgments on June 30, 2000. They requested, in the alternative, modifications of the judgments to decrease the attorney's commissions.

The court issued Rules to show cause why the Petitions should not be opened. After a period of discovery, oral argument was conducted.¹ The issues are ripe for determination.

DISCUSSION

I. Standard For Opening A Confessed Judgment.

Pa.R.C.P. 2959 governs a petition to open a confessed judgment. Resolution Trust Corp. v. Copely Qu-Wayne Assoc., 546 Pa. 98, 683 A.2d 269, 273 (1996). A petition to open a confessed judgment is an appeal to the court's equitable powers. Roche v. Rankin, 406 Pa. 92, 176 A.2d 668, 672 (1962); Crum v. F.L. Shaffer Co., 693 A.2d 984, 986 (Pa.Super. 1997); First Nat'l Bank of Allentown v. Stoudt, 237 Pa.Super. 238, 352 A.2d 162, 164 (1975). The judge sits as a chancellor with wide discretion in considering

¹After the oral argument and pending the court's decision, PNC assigned its claims to Stone Investment, LLC. On January 4, 2004, Stone filed a praecipe marking the two judgments to the use of Stone. Stone is now prosecuting the action in PNC's stead. These events have no effect on the disposition of the petitions. Pa.R.C.P. 2004. Birdsboro Corp. v. Weng, 426 Pa.Super. 301, 626 A.2d 1216, 1217 (1993); Cole v. Boyd, 719 A.2d 311, 313-14 (Pa.Super. 1990).

the conflicting evidence and in making a determination. Id. The court should open a confessed judgment if the defendant (1) acts promptly in filing the petition, (2) alleges a meritorious defense, and (3) presents sufficient clear, direct, precise and believable evidence of the defense to require submission of the issues to a jury. Iron Worker's Sav. & Loan Assoc. v. IWS, Inc., 424 Pa.Super. 255, 622 A.2d 367, 370 (1993); Frankford Trust Co. v. Stainless Steel Serv., Inc., 327 Pa.Super. 159, 475 A.2d 147, 149 (1984). The court may consider evidence outside the record, e.g., testimony, depositions, admissions and other evidence. Copely Qu-Wayne, 683 A.2d at 273; Pa.R.C.P. 2959(e) (stating that court may require testimony, depositions admissions and other evidence); Pa.R.C.P. 206.7 (c) (procedure after issuance of a rule to show cause); Allied Bldg. Prods., 951 F.Supp. at 1187 (denying petition to strike off but ordering discovery on petition to open under Pa.R.C.P. 2959).

The sufficiency standard is identical to that for a directed verdict. Dollar Bank v. Northwood Cheese Co., Inc., 431 Pa.Super. 541, 637 A.2d 309, 311 (1994). The court must view the evidence in the light most favorable to the defendant, accepting as true the defendant's evidence and the reasonable inferences that flow from that evidence, while rejecting adverse allegations of the plaintiff. Id.

The court may open the judgment as to some notes and not as to others. See Lincoln Ave. Indus. Park v. Norley, 450 Pa.Super. 621, 677 A.2d 1219, 1222 (1996) (affirming trial court's partial striking off of confessed judgment as to one out of three leases -- each with its own warrant of attorney -- where only confession of judgment on the third lease was defective).

II. The Court Denies ISI's Petition To Open Because ISI Defaulted On All Notes By Failing To Pay The Principal And Interest Of Note 1 When Due.

A. ISI Defaulted on Note 1.

ISI defaulted on Note 1. Note 1 authorizes PNC to enter a confessed judgment against ISI upon ISI's default. The Note defines default as, among other things, failure to make payment of principal and

interest when due. PNC extended the final deadline for payment of principal on Note 1 to September 30, 1999. ISI did not pay the principal of Note 1 by that date. In fact, ISI admits that it has not yet paid that principal. Howard Snyder dep. at 156. ISI has paid no principal or interest since March 2000. Howard Snyder dep. at 156. Therefore, ISI is in default on Note 1 and has no meritorious defense to payment.

The court rejects ISI's allegation that PNC extended the expiration date of the Note "indefinitely" such that there was no deadline for payment.² There is no evidence of this indefinite extension. Howard Snyder's deposition testimony directly contradicts ISI's argument. He testified that any extension did not extend beyond March 2000. Even were the Forbearance Agreement an extension of the deadline for payment, rather than a forbearance from exercising rights upon default that had already occurred, ISI defaulted on March 31, 2000 by failing to pay the principal and interest due on Note 1 by that date.

B. ISI's Default on Note 1 Triggered Defaults On Notes 2, 3 and 4.

Notes 2, 3 and 4 define default as, among other things, failure to comply with the terms of any other agreement or loan with PNC. Note 1 is such an "other agreement or loan" and ISI's failure to pay the principal and interest of Note 1 is a failure to comply with the terms of Note 1. Therefore, the defaults on Note 1 triggered defaults on Notes 2, 3 and 4.

PNC further argues that ISI violated the tangible net worth and net worth ratio covenants of the Business Loan Agreement and that this violation was a separate event of default on all four Notes. ISI argues that it complied with the net worth ratio covenant. ISI argues that, though it technically violated the tangible net worth covenant, it substantially complied with that covenant such that there was no default. See Liazis v. Kosta, Inc., 421 Pa.Super. 502, 618 A.2d 450, 455 (1992) (stating that "[c]ourts developed the equitable doctrine of substantial performance as an instrument of justice designed to avoid forfeiture because

² ISI and the Snyders do not argue in their Petitions or their several briefs that PNC waived the defaults.

of technical, inadvertent or unimportant omissions.”); West Dev. Group v. Horizon Financial, 405 Pa.Super. 190, 592 A.2d 72, 77 (1991) (stating that “[a]bsent a willful omission, a question of substantial performance is one for the jury, not the court.” (citations omitted)); First Mortg. Co. of Pa. v. Carter, 306 Pa.Super. 498, 452 A.2d 835, 837 (1982). Because ISI’s failure to pay the balance of Note 1 when due was a default on all four Notes, the court need not decide whether ISI complied, or substantially complied, with the financial covenants.

C. Even if ISI and the Snyders Did Not Breach the Forbearance Agreement, That Agreement Expired on March 31, 2000 Giving PNC the Right to Enter a Confessed Judgment After that Date.

ISI makes several arguments based on the forbearance agreements. ISI argues that it never defaulted on the Notes, and therefore, that PNC’s promise not to exercise its rights on default was not consideration for the agreement. The court disagrees. ISI defaulted on all four Notes by not paying the principal balance of Note 1 by September 30, 1999, giving PNC the right to accelerate the loans and enter confessed judgment. PNC’s delay in exercising that right constituted sufficient consideration for the Forbearance Agreement. Third Nat’l Bank & Trust Co. of Scranton v. Rodgers, 330 Pa. 523, 198 A. 320, 321 (1938) (stating that promise to forebear from exercising a legal right is consideration); Cardomone v. University of Pittsburgh, 253 Pa.Super. 65, 384 A.2d 1228, 1232 n.6 (1978) (stating that “[v]alid ‘consideration’ confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, *forbearance* or return promise bargained for and given in exchange for the original promise.”(emphasis added)).

Second, it does not matter at this stage whether ISI or the Snyders breached that agreement. Accepting that there was no breach, the requirement that PNC delay from exercising its rights on default lasted only until on March 31, 2000. PNC properly exercised those rights upon expiration of the agreement.

II. The Court Denies The Snyder's Petition To Open The Confessed Judgment.

The Snyders' offer two defenses to liability on their Guaranty: (1) ISI did not default on the underlying Notes, and (2) PNC fraudulently induced the Snyders to sign the guaranty.³

The first defense must fail. The Snyders are liable under the Guaranty if ISI defaulted on the Notes. Since ISI defaulted on the Notes, the Snyders are liable on their Guaranty.

The second defense is also without merit. Fraud is generally a ground for opening a confessed judgment. Germantown Mfg. Co. v. Rawlinson, 341 Pa.Super. 42, 491 A.2d 138, 141 (1985) (noting that fraud is a meritorious defense); Owens v. McCurdy, 304 Pa.Super. 510, 450 A.2d 1028, 1029 n. 1 (1982) (referring to fraud in the inducement as a meritorious defense). Fraud is not a meritorious defense to the judgment against the Snyders, however, because the parol evidence rule bars that defense. 1726 Cherry St. Partnership v. Bell Atl. Properties, Inc., 439 Pa.Super. 141, 653 A.2d 663, 670 (1995). See Answer to Snyder's Petition ¶ 30.

The Guaranty provides that the Snyders waive "any right to require [PNC] . . . to resort for payment or to proceed directly or at once against any person, including [ISI] or any other guarantor" Guaranty, at 2. The Guaranty provides that the "Guaranty together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in the Guaranty." Guaranty, at 2-3. In spite of these provisions, the Snyders allege that, before they signed the Guaranty, PNC unequivocally assured them that PNC would not sue the Snyders or enforce the Guaranty before suing ISI or exhausting ISI's assets. Snyder Petition ¶ 17; Howard Snyder aff. ¶¶12, 13; Cathy Snyder aff. ¶ 5; Howard Snyder dep. at 65-68; Cathy Snyder dep. at 35-36, 48. The Snyders allege that without this

³Mrs. Snyder raised a third defense in the Petition: PNC violated the Equal Credit Opportunity Act, 15 U.S.C. § 1691, by requiring her to sign the guaranty. At the hearing on the Petition, Mrs. Snyder's attorney withdrew that defense. (N.T. 23-24.)

assurance, they would not have signed the Guaranty. Snyder Petition ¶ 18; Howard Snyder aff. ¶13; Cathy Snyder aff. ¶6, Howard Snyder dep. at 65-68.

Since the express terms of the written Guaranty contradict the alleged prior assurances on which the Snyders base the defense, the parol evidence rule bars admission of evidence of those assurances. HCB Contractors v. Liberty Place Hotel Assocs., 539 Pa. 395, 652 A.2d 1278, 1279-80 (1995).

[W]here prior fraudulent oral representations are alleged regarding a subject that was specifically dealt with in the written contract, the party alleging such representations must, under the parol evidence rule, also aver that the representations were fraudulently or by accident or mistake omitted from the integrated written contract.

Id. at 1279, discussing Nicolella v. Palmer, 432 Pa. 502, 248 A.2d 20, 22-23 (1968); see also 1726 Cherry St. Partnership v. Bell Atl. Properties, Inc., 439 Pa.Super. 141, 653 A.2d 663, 670 (1995). Where an agreement contains an integration clause -- as does the Guaranty -- the parol evidence rule is “particularly applicable.” McGuire v. Schneider, Inc., 368 Pa.Super. 344, 534 A.2d 115, 117 (1987), aff’d, 519 Pa. 439, 548 A.2d 1223 (1988). See Guaranty, at 2-3.

The effect of the parol evidence rule is to bar admission of parol evidence to prove fraud in the inducement, but to allow admission of parol evidence to prove fraud in the execution. 1726 Cherry St. Partnership, 653 A.2d at 670. To state a claim of fraud in the execution, the plaintiff must allege that the parties agreed that certain terms would be included in the written contract, and that the terms were omitted by fraud, accident or mistake. Id. at 666. In other words, the plaintiffs must have thought that the document they signed contained the disputed terms. Id.; John E. Murray, Jr., Contracts § 95(C) at 475-76 (3d ed. 1990). The parol evidence rule does not apply to fraud in the execution, and the plaintiff may introduce evidence of the omitted terms. HCB Contractors, 652 A.2d at 1279-80 (1995); 1726 Cherry St. Partnership, 653 A.2d at 670.

To state a claim of fraud in the inducement, the plaintiff might allege that the defendant made representations contrary to the express terms of the integrated written contract, and that -- but for the

representations -- the plaintiff would never have signed the contract. 1726 Cherry St. Partnership, 653 A.2d at 666. For example, the defendant might have promised not to exercise a certain right that the written agreement granted him. The parol evidence rule applies, and the plaintiff may not introduce parol evidence of such representations to vary the terms of the written agreement.⁴ HCB Contractors, 652 A.2d at 1279-80; 1726 Cherry St. Partnership, 653 A.2d at 670.

The Snyders' allegation of fraud must fail as a matter of law. The express terms of the Guaranty provide that PNC need not exhaust other remedies before proceeding directly against the Snyders. In spite of this provision, the Snyders allege that PNC assured them that PNC would exhaust ISI's assets before proceeding against them. The Snyders do not allege that PNC fraudulently or by accident or through mistake omitted this assurance from the agreement. Therefore, the Snyders defense sounds in fraudulent inducement, and the parol evidence rule bars the introduction of evidence of the assurances.

In summary, the Snyders have not set forth a meritorious defense. Accordingly, their Petition to Open must be denied.

III. The Court Will Reduce The Attorney's Fees.

As an alternative form of relief should the court deny their petitions, ISI and the Snyders ask the court to modify the attorney's commission in the confessed judgment. Each judgment includes a 10% attorney's commission of \$137,744.56. The confession of judgment clauses in the Notes and the Guaranty authorize "an attorney's commission of ten percent (10%) of the unpaid principal balance and accrued interest for collection, but in any event not less than five hundred dollars (\$500)" ISI and the Snyders argue that the attorney's commissions are excessive. The court agrees.

⁴ In this respect, Pennsylvania's parol evidence rule conflicts with the Restatement (Second) of Contracts § 214, which courts have interpreted as allowing admission of parol evidence to prove fraud in the execution and fraud in the inducement. 1726 Cherry St. Partnership, 653 A.2d at 670 & n. 7.

The court may exercise its equitable powers to reduce the commission without opening the judgment if \$137,744.56 is clearly excessive or blatantly unreasonable. PNC Bank v. Bolus, 440 Pa.Super. 372, 655 A.2d 997, 1000 (1995); Dollar Bank v. Northwood Cheese Co., 431 Pa.Super. 541, 637 A.2d 309, 314 (1994). This court submits that the attorney's commission here is excessive. In PNC Bank, the Superior Court affirmed the trial court's reduction of an attorney's commission from \$70,000 to \$10,000. PNC Bank, 655 A.2d at 1000. Though the Superior Court reversed the trial court on other grounds, the court stated:

[W]e express our approval of this aspect the trial court's decision. To charge more than \$70,000 as an attorney's fee for what in most cases amounts to filing a single document with the Prothonotary is blatantly unreasonable. We do not specifically endorse the trial court's chosen amount as appropriate nor offer guidelines for this or future cases, since the issue is not directly before us. We would merely encourage trial courts to monitor the amounts charged in such circumstances, and to reduce clearly excessive fees.

PNC Bank, 655 A.2d at 1000 (citations and footnotes omitted).

PNC cites Dollar Bank as support for its argument that a 10% commission is not excessive. (N.T. 25.) In Dollar Bank, the Superior Court held that a 15% commission was not excessive, but the holding is of limited use because the opinion did not state the amount of the debt or the total commission charged. Dollar Bank, 637 A.2d at 313-14.

Given the current record the court does not feel comfortable stating a reasonable attorney's commission. The court's Order will set a date for a hearing on this issue.

CONCLUSION

ISI's failure to pay the principal balance and interest on Note 1 when due was a default on all four Notes. That default gave PNC the right to confess judgment against ISI on those Notes and against the Snyders on their Guaranty. Because ISI and the Snyders have failed to set forth sufficient evidence of

a meritorious defense to liability, the court must deny their petitions to open. The court will, however, grant their petition in the alternative to modify the attorney's commission. The court will enter a contemporaneous Orders consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.