

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

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<b>OGONTZ PROPERTY HOLDINGS, LLC</b>	:	March Term, 2016
<i>Plaintiff</i>	:	Case No. 01889
<b>v.</b>	:	Commerce Program
<b>PHILI EQUITIES, LLC</b>	:	
<i>Defendants</i>	:	Control No. 16052609

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ORDER

AND NOW, this 20<sup>th</sup> day of July, 2016, upon consideration of the petition to strike or open judgment by confession filed by defendant Phili Equities, LLC, plaintiff's response in opposition, and the respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED** in its **ENTIRETY**.

BY THE COURT,

  
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RAMY I. DJERASSI, J.

Ogontz Property Holding-ORDRC



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R. POSTELL  
COMMERCE PROGRAM

## MEMORANDUM OPINION

Defendant (hereinafter “Borrower”), seeks a Court Order striking or opening the confessed judgment entered by plaintiff (hereinafter “Lender”). The judgment entered by Lender arose out of Borrower’s default of a Loan Agreement, which in turn is backed by a Promissory Note and Mortgage, also executed by Borrower.<sup>1</sup> The Promissory Note contains a warrant-of-attorney provision typed in bold, capitalized print. Pursuant to this warrant-of-attorney, Borrower empowered Lender to confess judgment against Borrower upon the occurrence of a default for any amounts due under the Loan Agreement, including costs of suit and attorney’s fees of 5% of the unpaid principal.<sup>2</sup> The Promissory Note also has an integration clause stating that “[t]his Note and other Loan Documents contain the entire agreement of the parties....”<sup>3</sup> A warrant-of-attorney is also included in the Mortgage executed by Borrower. Pursuant to this warrant-of-attorney, Borrower empowered Lender to confess judgment for possession of the mortgaged property.<sup>4</sup> The Loan Agreement, Promissory Note, and Mortgage were executed pursuant to an “Agreement of Sale” under whose terms Lender sold certain real properties to Borrower, and simultaneously loaned to Borrower the funds necessary to finance the transaction.<sup>5</sup> The Agreement of Sale contains an integration clause titled “Entire Agreement; Amendments.” The integration clause states that—

[t]his Agreement and the Exhibits hereto set forth all of the promises, covenants, agreements, conditions and undertakings between the parties ... and supersede all prior and contemporaneous agreements.... This Agreement may

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<sup>1</sup> Exhibits A–C to Lender’s complaint-in-confession-of-judgment.

<sup>2</sup> Secured Promissory Note, Exhibit B to Lender’s complaint-in-confession-of-judgment.

<sup>3</sup> Promissory Note, Exhibit B to the complaint-in-confession-of-judgment, p. 4, last paragraph thereof.

<sup>4</sup> Mortgage, Exhibit C to Lender’s complaint-in-confession-of-judgment.

<sup>5</sup> Agreement of Sale, Exhibit A to the response of Lender in opposition to Borrower’s petition to strike or open the confessed judgment.

not be changed orally but only by an agreement in writing....<sup>6</sup>

### **Discussion**

In Pennsylvania, a “motion to strike a confessed judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. If the record is self-sustaining, the judgment will not be stricken.”<sup>7</sup> In this case, Borrower has not pointed to any fatal flaw on the record: for this reason, the petition to strike is denied.

To open a confessed judgment, “[t]he petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.... The defenses raised must be valid ones.”<sup>8</sup> In this case, the petition to open judgment by confession avers that Borrower, after receiving notice of default on the loan, orally re-negotiated a one-year extension of the maturity date by paying Lender two additional amounts of \$100,000 and \$30,000 respectively.<sup>9</sup> However, Borrower has offered no evidence that the parties orally re-negotiated the terms of their Loan Agreement, or that the two aforementioned, additional payments were actually made. Borrower has offered no evidence that Lender breached the Loan Agreement, Mortgage and Promissory Note, all of which, with the inclusion of the Agreement of Sale, describe and define the terms of the business relationship between Lender and Borrower.

Borrower also avers that Lender breached the terms of a Jewish religious business agreement called “*Heter Iska*” to which the parties are allegedly bound.<sup>10</sup>

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<sup>6</sup> Id. at ¶ 18.7.

<sup>7</sup> Fourtees Co. v. Sterling Equip. Corp., 363 A.2d 1229, 1232 (Pa. Super. 1976).

<sup>8</sup> Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 1984).

<sup>9</sup> Petition to open confessed judgment, ¶¶ 32, 33.

<sup>10</sup> Borrower asserts that the Jewish religious business agreement named *Heter Iska* is a “joint venture where each party owes the other a fiduciary duty of honesty and good faith.” Petition to open confessed judgment, ¶ 5. The Court notes that typically in Pennsylvania, an arms—length contract precludes the existence of a fiduciary duty owed by one party for the benefit of the other, unless some special relationship exists between them. In this case, the Loan Agreement, Promissory Note, Mortgage and Agreement of Sale indicate an arms—length relationship and not the existence of a special or confidential

Again, Borrower has not offered any evidence of the existence of a separate agreement superseding the existing Loan Agreement, Promissory Note and Mortgage agreement executed by the parties herein, nor has Borrower pointed to any existing written contractual provision in the afore-mentioned agreements requiring the parties to resolve their disputes in a religious tribunal.

Borrower also appears to argue that Lender made certain misrepresentations which induced Borrower to enter into the afore-mentioned agreements.<sup>11</sup> However in Pennsylvania—

[w]here the parties to an agreement adopt a writing as the final and complete expression of their agreement, alleged prior or contemporaneous oral representations or agreements concerning subjects that are specifically covered by the written contract are merged in or superseded by that contract.<sup>12</sup>

In this case, the Agreement of Sale contains an integration clause which fixes the document into a final and complete expression of the parties' intent. For this reason, any argument asserting fraud in the inducement must fail because no prior or contemporaneous representations could be brought forth to sustain such a claim.<sup>13</sup>

Finally, Borrower avers that its principal and sole member is Mr. Chaim Landau, a “devoutly religious” man who was “born in Germany and has limited proficiency in the

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relationship. eToll, Inc. v. Elias/Savion Advert., Inc., 811 A.2d 10, 22 (Pa. Super. 2002).

<sup>11</sup> Petition to open confessed judgment, ¶¶ 24–30. This type of fraud is called “fraud-in-the-inducement” which, “[i]n real estate transactions ... arises when a seller knowingly makes a misrepresentation, undertakes a concealment calculated to deceive, or commits non-privileged failure to disclose.” Blumenstock v. Gibson, 811 A.2d 1029, 1034 (Pa. Super. 2002).

<sup>12</sup> Youndt v. First Nat. Bank of Port Allegany, 868 A.2d 539, 545-46 (Pa. Super. 2005).

<sup>13</sup> After a careful review of the petition to strike or open, this court could not find any averment indicting that the type of fraud involved in this case was “fraud-in-the-execution.” Fraud-in-the-execution, unlike fraud-in-the-inducement, could allow the introduction of parol evidence: “the parol evidence rule is not applied to a fraud in the execution of a contract claim.” Toy v. Metro. Life Ins. Co., 928 A.2d 186, 206 (Pa. 2007).

English language.”<sup>14</sup> Borrower appears to imply that Mr. Landau did not knowingly and intelligently waive Borrower’s due process rights when he executed the promissory Note containing the warrant-of-attorney provision. The Court rejects this argument because in Pennsylvania, “[t]here is ... no merit to appellants’ assertion that their purported lack of knowledge and/or understanding of the warrant of attorney provisions in the note ... requires that the judgment be stricken or opened. The failure to read a confession of judgment clause will not justify avoidance of it.”<sup>15</sup> In conclusion, Borrower has failed to meet its burden of producing sufficient evidence capable of substantiating its alleged defenses. For the reasons above, the petition to strike or open the judgment by confession is denied.

**BY THE COURT,**



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**RAMY I. DJERASSI, J.**

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<sup>14</sup> Petition to open confessed judgment, ¶ 3.

<sup>15</sup> Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994). In addition, the Court notes that Borrower and its principal, Mr. Landau, “were represented by prior counsel” during the transactions involving the Loan Agreement, Promissory Note and Mortgage. Petition to open confessed judgment, ¶ 23.