

including, without limitation, Additional Interest, and any and all amounts expended, advanced or incurred by [Rait]” in the event that Corey Landings defaulted on its obligations to Rait.

The Guaranty and Suretyship Agreement executed by Shelton, Rufkahr Jankowski and Wilson contained the following confession of judgment provision:

- a. GUARANTOR, TO THE FULLEST EXTENT PERMITTED BY LAW, AND WITHOUT FURTHER CONSENT OF OR NOTICE REQUIRED, HEREBY IRREVOCABLY AND UNCONDITIONALLY AUTHORIZES AND EMPOWERS THE PROTHONOTARY, CLERK OF COURT, OR ANY ATTORNEY OF ANY COURT OF RECORD IN THE COMMONWEALTH OF PENNSYLVANIA OR ELSEWHERE, TO APPEAR FOR GUARANTOR IN SUCH COURT AS ATTORNEY FOR GUARANTOR, AND TO CONFESS JUDGMENT AGAINST GUARANTOR, AFTER AN EVENT OF DEFAULT HEREUNDER, FOR ALL OR ANY PORTION OF THE UNPAID GUARANTEE OBLIGATIONS, TOGETHER WITH UNPAID INTEREST AND ATTORNEYS’ FEES BUT IN NO EVENT LESS THAN 20% OF THE UNPAID GUARANTEED OBLIGATIONS, WITH COSTS OF SUIT AND RELEASE OF ALL ERRORS, AND WITH WAIVER BY GUARANTOR OF ANY RIGHT TO A STAY OF EXECUTION, FOR WHICH THIS GUARANTEE OR A VERIFIED COPY HEREOF SHALL BE SUFFICIENT WARRANT. THE AUTHORITY GRANTED HEREIN TO CONFESS JUDGMENT SHALL NOT BE EXHAUSTED BY ANY EXERCISE THEREOF. LENDER MAY CONFESS ONE OR MORE JUDGMENTS IN THE SAME OR DIFFERENT JURISDICTIONS FOR ALL OR ANY PART OF THE AMOUNT OWING HEREUNDER, WHETHER OR NOT JUDGMENT HAS PREVIOUSLY BEEN ENTERED FOR THE SAME AMOUNT. IF ANY JUDGMENT CONFESSED HEREUNDER IS STRICKEN OR OPENED FOR ANY REASON, LENDER IS HEREBY AUTHORIZED AND EMPOWERED TO APPEAR FOR AND CONFESS JUDGMENT AGAINST GUARANTOR IF DOING SO WILL CURE ANY ERRORS OR DEFECTS IN SUCH PRIOR PROCEEDINGS. THE FOREGOING RIGHT AND REMEDY IS IN ADDITION TO AND NOT IN LIEU OF ANY OTHER RIGHT OR REMEDY AVAILABLE TO LENDER UNDER THE GUARANTY OR OTHERWISE.

- b. GUARANTOR, BEING FULLY AWARE OF THE RIGHT TO NOTICE AND A HEARING CONCERNING THE VALIDITY OF ANY AND ALL CLAIMS THAT MAY BE ASSERTED AGAINST GUARANTOR BY LENDER BEFORE A JUDGMENT CAN BE ENTERED

HEREUNDER OR BEFORE EXECUTION MAY BE LEVIED ON SUCH JUDGMENT AGAINST ANY AND ALL PROPERTY OF GUARANTOR, HEREBY KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVES THESE RIGHTS AND AGREES AND CONSENTS TO: (i) JUDGMENT BEING ENTERED BY CONFESSION IN ACCORDANCE WITH THE TERMS HEREOF, AND (ii) EXECUTION BEING LEVIED ON SUCH JUDGMENT AGAINST ANY AND ALL PROPERTY OF GUARANTOR, IN EACH CASE WITHOUT FIRST GIVING NOTICE AND THE OPPORTUNITY TO BE HEARD ON THE VALIDITY OF THE CLAIM OR CLAIMS UPON WHICH SUCH JUDGMENT IS ENTERED.

The Guaranty executed by Shelton, Rufkahr, Jankowski and Wilson was to be continuing, absolute, unconditional and irrevocable and was to remain in full force and effect until all the guaranteed obligations were paid in full irrespective of any amendment to, rescission, waiver or other modification of the loan agreement.²

The Guaranty and Suretyship Agreement further provided that Shelton, Rufkahr, Jankowski and Wilson “absolutely, unconditionally and irrevocably guarantees and become surety to Lender for the prompt payment of all indebtedness ...whether now existing or hereafter arising, contracted or incurred.”³ It further provided that Shelton, Rufkahr, Jankowski and Wilson “absolutely, unconditionally and irrevocably guarantees and become surety to Lender for the prompt payment of ...all modifications, amendments, extensions and additions to, and renewals, refinancing or refunding of, any of the foregoing, whether made with or without notice to Guarantor.”⁴

² Exhibit “C” Guaranty of Non-Recourse Carveouts ¶ 2 (b)(e).

³ Exhibit “D” Guaranty and Suretyship Agreement ¶1(a)(i).

⁴ Exhibit “D” Guaranty and Suretyship Agreement ¶1(a)(iii).

Shelton, Rufkahr, Jankowski and Wilson in connection with the Guaranty of Non Recourse Carveouts and the Guaranty and Suretyship Agreement, also executed a Confession of Judgment Explanation and Disclosure of Rights/Waiver.

On March 15, 2007, Rait and Corey Landings entered into a second agreement that modified the February 2006 loan agreement titled Notice and Acknowledgement of Future Advance and Modification of Mortgage and Security Agreement (hereafter “Future Advance”). The Future Advance Agreement extended the original maturity date of the loan for a period of twelve months, from August 2, 2006 to August 2, 2007 and increased the principal amount of the loan by \$3,081,524.22, from \$33,200,000.00 to \$36,281,254.22. The Future Advance reaffirmed all representations and warranties contained in the Mortgage, original assignment and other documents executed in connection with the Note and Mortgage.⁵ Although Wilson and Jankowski signed a Reaffirmation of Obligations, Shelton and Rufkahr did not.

Corey Landings failed to make the required payments on August 2007. Rait confessed judgment against the individuals pursuant to the Guaranty and Suretyship Agreement for \$16,600,00.00, the maximum guarantee amount, together with any and all accrued interest thereon, additional interest in the amount of \$2,086,187.64 (representing “Additional Interest” on Rait’s entire \$36,218,524.22 loan to Corey Landings) and attorneys’ collection commission of \$3,737,237.52 (representing a 20% attorney’s collection commission). Presently before the court is Shelton and Rufkahr Petition to Strike or Open the judgment by Confession and to Stay the Execution Proceedings.

⁵ Exhibit “F” ¶ 3.

DISCUSSION

Defendants have filed a combined petition to strike/open the judgment. The Pennsylvania Supreme Court has stated that “a petition to strike and a petition to open are two distinct forms of relief, each with separate remedies.”⁶ A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record.⁷ A petition to strike a judgment may only be granted when there is an apparent defect on the face of the record.⁸ “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.”⁹ “The facts averred in the complaint are to be taken as true; if the factual averments are disputed, the remedy is by a proceeding to open the judgment and not by a motion to strike.”¹⁰ A court’s order that strikes a judgment “annuls the original judgment and the parties are left as if no judgment had been entered.”¹¹

In contrast to a petition to strike judgment, when determining a petition to open a confessed judgment, the court may look beyond the confession of judgment documents to testimony, depositions, admissions, and other evidence.¹² A court should open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury.¹³ The evidence

⁶ Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 546 Pa. 98, 105, 683 A.2d 269, 273 (1996); see also Manor Bldg. Corp. v. Manor Complex Assocs., 435 Pa. Super. 246, 251, 645 A.2d 843, 845 (1994) (stating that a petition to strike and a petition to open are each “intended to relieve a different type of defect in the confession of judgment proceedings”).

⁷ Resolution Trust Corp., 683 A.2d at 273.

⁸ Germantown Savings Bank v. Talacki, 441 Pa. Super. 513, 519, 657 A.2d 1285, 1288 (1995).

⁹ Resolution Trust Corp., 683 A.2d at 273.

¹⁰ Manor Bldg. Corp. v. Manor Complex Assoc., 435 Pa. Super. 246, 252, 645 A.2d 843, 846 (1994).

¹¹ Resolution Trust Corp., 683 A.2d at 273.

¹² Sovereign Bank v. Mintzer, 2000 Phila. Ct. Com. Pl. Lexis 88, *3, Commerce Program (2000).

¹³ Crum v. F.L. Shaffer Co., 693 A.2d 984, 986 (Pa. Super 1997).

of a meritorious defense must be “clear, direct, precise and believable.”¹⁴ “An order of the court opening a judgment does not impair the lien of the judgment or any execution issued on it.”¹⁵

In the case *sub judice*, Petitioners argue that the confessed judgment against them should be stricken as void or opened because petitioners did not agree to guarantee the payment obligations of Corey Landings under the Future Advance Agreement or the Renewal and Future Advance Note. After reviewing all the evidence and applicable law the court finds that Petitioners have not raised a meritorious defense and the Petition to Strike or Open is denied.

A. The Petition fails to Allege a Meritorious Defense.¹⁶

The relationship between Petitioners and Rait is one of suretyship. A suretyship arrangement arises when a creditor refuses to extend credit to a debtor unless a third party agrees to provide additional security for the repayment of the debt by undertaking the debtor’s obligation to the creditor if the debtor fails to perform.¹⁷ After signing of the suretyship contract however the creditor and the principal debtor may renegotiate the terms of the debtor’s obligation to the creditor without obtaining the surety’s assent to the changed obligation. When the debtor defaults, the creditor seeks to have the surety perform the debtor’s renegotiated obligation.¹⁸ As a result of this dynamic relationship between the creditor and the debtor, Pennsylvania courts have uniformly recognized that where the creditor and the debtor materially modify the terms of their relationship without obtaining the surety’s assent thereto, the surety’s liability may be affected. A

¹⁴ Germantown Savings Bank, 441 Pa. Super. at 520, 657 A.2d at 1289.

¹⁵ Resolution Trust Corp., 683 A.2d at 273.

¹⁶ The court finds that the Petition to Open or Strike the Judgment was timely filed.

¹⁷ Continental Bank v. Axler, 353 Pa. Super. 409, 510 A.2d 726 (1986).

¹⁸ *Id.* at 729.

material modification in the creditor debtor relationship consist of a significant change in the principal debtor's obligation to the creditor that in essence substitutes an agreement substantially different from the original agreement on which the surety accepted liability.¹⁹

Here, Petitioners have not made a threshold showing of a material modification in the creditor-debtor relationship. Although the Future Advance did modify the loan amount by \$3,081,524.22, from \$33,200,000.00 to \$36,281,254.22, Petitioners' maximum guarantee amount of \$16,600,000.00 did not change. Hence, no modifications were made to the Guaranty Agreements.

Moreover, even if a modification did occur, which it clearly did not, Petitioners consented to modifications. Material modifications in the creditor-debtor relationship will not serve to discharge the surety where the surety has given prior consent to such material modifications as part of the suretyship contract. Where the surety has given such prior consent, the surety is contractually bound to accept the material modifications in the creditor-debtor relationship.²⁰ To determine "whether a surety has consented to a material modification, the suretyship contract must be given effect according to it's own expressed intention as gathered from all the words and clauses used, taken as a whole, due regard being had also to the surrounding circumstances."²¹

Here a review of the Guarantee and Suretyship Agreement clearly demonstrates that Petitioners agreed to guaranty Corey Landings obligations under the February loan agreement as well **as any subsequent modifications** of the loan.²²

¹⁹ Id. at 729.

²⁰ Id.

²¹ Reliance Ins. Co. v. Penn Paving, Inc., 557 Pa. 439, 734 A.2d 833 (1999).

²² Exhibit "D" at ¶ 1(a), ¶ 3(1)(iii) and (x). See also Exhibit "C" ¶¶ 2 and 7.

It is further clear from the Guarantee and Suretyship Agreement that Petitioners waived notice of any changes even if the loan agreement was modified. The Guaranty of Non-Recourse Carveouts provides:

(a) Waiver of Notice. Guarantor hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Guaranty does not specifically and expressly provide for the giving of notice by Lender to Guarantor. No release of any security for the Loan or one or more extensions of time for payment of the Note or any installment thereof, and no alteration, amendment or waiver of any provision of this Guaranty, the Note or the other Loan Documents made by agreement between Lender or any other person, shall release, modify, amend, waive, extend, change, discharge, terminate or affect the liability of Guarantor or any other person who may become liable for the payment of all or any part of the Loan under the Note, the Guaranty or the other Loan Documents.²³

The Guaranty and Suretyship Agreement provides:

Amendments, Waivers, Etc. This Guaranty cannot be amended, modified, waived, changed, discharged or terminated except by an instrument in writing signed by the party against whom enforcement of such amendment, modification, waiver, change, discharge or termination is sought.

Accordingly, the court concludes that Petitioners have failed to offer sufficient evidence to open or strike the confessed judgment.

B. The Attorney's Fees sought by Rait are Consistent with the Agreements Signed by Defendants and are not Excessive.

Petitioners argue that the confessed judgment should be stricken because the attorney's fees of 20% are not authorized in the agreements by the parties and that the flat rate is grossly excessive. The warrant of attorney provision in the Guaranty and Suretyship Agreement and the Guaranty of Non-Recourse Carveouts clearly state that in the event of default, Rait may confess judgment against petitioners "...FOR ALL OR

²³ Exhibit "C" par 13.

ANY PORTION OF THE UNPAID GUARANTEE OBLIGATIONS, TOGETHER WITH UNPAID INTEREST AND ATTORNEYS' FEES BUT IN NO EVENT LESS THAN 20% OF THE UNPAID GUARANTEE OBLIGATIONS, WITH COSTS OF SUIT..."²⁴ Here, it is clear that attorney's fees in the amount of 20% were specifically authorized by the warrant of attorney.

Petitioners claim that the amount of attorneys' fees is excessive. In support thereof, Petitioners allege simply that the attorneys' fees are disproportionate to the amount of services reasonably required for the entry of a confession of judgment because a confessed judgment merely requires the filing of one complaint. In response, Rait argues that its action are not limited to the filing of a complaint but include defending this motion to strike and or reopening, investigating the assets of multiple defendants in numerous states, domesticating the judgment in numerous states in which the defendants hold assets, defending any proceedings in the multiple states in which the defendants hold assets, and executing on multiple judgment in numerous states. In light of the fact that the warrant of attorney permits the fee which defendants seek and the amount of work that is required and since Petitioners make only a perfunctory, unsupported argument without any evidence to show that the 20% commission is excessive, the court finds that the attorney's fees are not excessive.

²⁴ Exhibit "D" at § 10 and Exhibit "C" § 12.

CONCLUSION

For the foregoing reasons, the Petition to Strike or Open the judgment is Denied.²⁵

BY THE COURT,

HOWLAND W. ABRAMSON, J.

²⁵ The other defenses raised in the Petition, including the defense that Petitioners were completely unaware of the confession of judgment and its implications and the defense that Petitioners were represented and relied upon the advice of incompetent conflicted counsel, do not constitute meritorious defenses.