

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

BLUEWATER FUNDING, LLC	:	DECEMBER 2007
Plaintiff,	:	
	:	No. 0429
v.	:	
	:	COMMERCE PROGRAM
2ND CHANCE REALTY, LLC, KEITH	:	
OXNER, and WESTBROOK ARMS, INC.	:	Control No. 010239
Defendants.	:	

**ORDER**

**AND NOW**, this 31<sup>ST</sup> day of March 2008, upon consideration of Defendants' Petition to Open/Strike Confession of Judgment, the response thereto, all other matters of record, and in accordance with the Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** that the Petition to Strike Confession of Judgment is **GRANTED** and the judgment entered in favor of Plaintiff on December 12, 2007 is hereby **STRICKEN**.

**BY THE COURT:**

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**MARK I. BERNSTEIN, J.**

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**OPINION**

Presently before the Court is the Petition to Strike/Open Confession of Judgment by Defendants 2<sup>nd</sup> Chance Realty, LLC, Keith Oxner, and Westbrook Arms, Inc. (“defendants”). For the reasons set forth in this Opinion, the Petition to Strike the Confession of Judgment is granted.

**BACKGROUND**

Plaintiff BlueWater Funding, LLC filed a Complaint in Confession of Judgment against defendants on December 5, 2007. In its Complaint, plaintiff alleged that an entity named BWF Capital, LLC made a loan to defendant 2<sup>nd</sup> Chance Realty, LLC in the amount of \$450,000.00 on November 28, 2006, which was evidenced by a promissory note. The Note contained a Confession of Judgment clause empowering any attorney designated by the lender or any clerk of any court of record in Maryland to enter judgment against the borrower in the event of a default. The Loan was secured by a certain guaranty and a certain mortgage. Plaintiff’s Complaint further alleged as follows:

8. On or about November 28, 2006, the Loan, and the Note, Guaranty and Mortgage were assigned.

9. Further on or about November 28, 2006, the assignee of the Loan, Note, Guaranty and Mortgage entered into a certain Loan Servicing Agreement with Plaintiff with respect to the Loan.

Plaintiff's Complaint in Confession of Judgment contends that defendants defaulted under the terms of the Note and Guaranty by failing to make payments thereunder and are liable to plaintiff for a total of \$646,465.31. On January 8, 2008, defendants filed a Petition to Strike/Open the Confession of Judgment.

### **DISCUSSION**

Defendants have filed a combined petition to strike/open the judgment. A petition to strike and a petition to open are two distinct forms of relief, each with separate remedies. A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. A petition to strike a judgment may only be granted when there is an apparent defect on the face of the record. In considering the merits of a petition to strike, the court is limited to a review of only the record as filed by the party in whose favor the warrant is given, the complaint and the documents which contain confession of judgment clauses. A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.<sup>1</sup>

In their Petition to Strike, defendants claim that the judgment should be stricken because plaintiff had no authority to confess judgment. Defendants contend that the judgment was entered in favor of plaintiff, not a party to the loan agreement, and that the Complaint fails to state that plaintiff is an assignee or successor to BWF Capital, LLC. Defendants also argue that the caption identifies the plaintiff as "BlueWater Funding,

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<sup>1</sup> Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 546 Pa. 98, 105-06, 683 A.2d 269, 273 (1996).

LLC, as Servicer” and fails to contain any allegations which would authorize plaintiff to confess judgment.

A judgment by confession may be entered only in the name of a holder or in favor of an assignee or other transferee. Pennsylvania Rule of Civil Procedure 2952(a)(4) requires that a complaint in confession of judgment include a statement of any assignment of the instrument. While the rule does not require that an executed assignment be attached to the complaint in confession of judgment, a recital of the assignment is necessary. Although a judgment by confession may be entered in favor of an assignee, the facts which entitle a real party in interest, other than the original payee of the instrument, to confess judgment must appear in the complaint. If the facts which entitle a party to confess judgment as the real party in interest are not of record, the judgment should be stricken.<sup>2</sup>

Here, there is no evidence on the record that plaintiff is any real party in interest or in any way authorized to confess judgment. The Complaint simply states that the Loan, Note, Guaranty, and Mortgage were assigned and that the assignee entered into a Loan Servicing Agreement with plaintiff. The Complaint fails to identify who the assignee is or what is meant by “servicer.” The Complaint alleges no assignment to the plaintiff. “When suit is brought against the defendant by a stranger to his contract, he is entitled to proof that the plaintiff is the owner of the claim against him...Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event that there was no actual assignment.”<sup>3</sup>

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<sup>2</sup> Manor Bldg. Corp. v. Manor Complex Assocs., 435 Pa. Super. 246, 253-54, 645 A.2d 843, 846-47 (1994); see also Fourtees Co. v. Sterling Equipment Corp., 242 Pa. Super. 199, 206-07, 363 A.2d 1229, 1232-33 (1976).

<sup>3</sup> Brown v. Esposito, 157 Pa. Super. 147, 149, 42 A.2d 93, 94 (1945).

Since the record does not establish that plaintiff was entitled to confess judgment, a defect appears on the face of the record. The judgment is stricken. Since the judgment is stricken, it is unnecessary to address defendants' remaining arguments in their Petition to Open/Strike Confession of Judgment.

### **CONCLUSION**

For the foregoing reasons, defendants' Petition to Strike Confession of Judgment is granted and the judgment entered on December 12, 2007 is stricken.

**BY THE COURT,**

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**MARK I. BERNSTEIN, J.**