

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

BOOKETED

NOV 6 2013

C. HART
CIVIL ADMINISTRATION

: APRIL TERM, 2013
SCIMECA FOUNDATION, INC. by :
Gary Seitz as Trustee :
v. : NO. 01038
: :
: COMMERCE PROGRAM
SONCERA IKEKE: TAX TIME :
: CONTROL NO. 13075370

ORDER

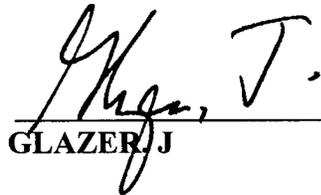
AND NOW, on this 5th day of November, 2013, upon

consideration of the petition to strike and/or open confessed judgment of defendant, Socera
Ikeke: Tax Time, and any response thereto, it is hereby

ORDERED

that the petition is **DENIED**.

BY THE COURT:



GLAZER, J

Seitz Vs Likeke-ORDOP



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OPINION

GLAZER, J.

November 5, 2013

Before the court is the petition to strike and/or open confessed judgment of defendant Soncera Ikeke: Tax Time. For the reasons set forth below, the petition is denied.

FACTS AND PROCEDURAL BACKGROUND

Soncera Ikeke (hereinafter “petitioner”) leased a commercial space located at 517-529 S. 4th Street, Philadelphia, PA (hereinafter “the property”) from Scimeca Foundation, Inc. (hereinafter “debtor”). Petitioner has rented the property from the debtor since 2009 under a 10 year lease. Petitioner alleges that throughout the leasehold she, “has encountered numerous problems with the premises and negotiated numerous rent offsets and credits with the” debtor. See petitioner’s memorandum in support of petition to strike and/or open confessed judgment, pp. 1. Moreover, petitioner alleges that with the consent of the debtor, she has made numerous repairs to the property. Further, petitioner asserts that the debtor “submitted amended and altered leases for [petitioner] signature.” Id.

In 2010, the debtor filed for protection under Chapter 11 of the United States Bankruptcy Code. On November 6, 2012, Gary F. Seitz, Esquire (hereinafter “trustee”) was appointed by the United States Trustee as Chapter 7 Trustee for the debtor. The trustee alleges that the petitioner has not paid rent to the debtor since February 2011. The terms of the lease provide for a late fee

of \$200 per month for each month rent was not paid under the commercial lease. In February 2013, the trustee filed a claim for rental arrears in the landlord tenant court of Philadelphia Municipal Court under docket number LT-13-02-083967 (hereinafter “Municipal Court proceeding”) to collect the arrears from the time the trustee was appointed on November 6, 2012 through February 2013. The parties settled the matter and petitioner agreed to pay \$11,500 and that amount was paid by petitioner on the date of judgment, March 1, 2013.

Trustee now alleges that the parties specifically reserved the right to proceed with the remaining arrears from February 2011 to October 2012. Moreover, trustee states, “[w]hen it became apparent that defendant was unwilling to negotiate or pay any amount toward any further arrears due and owing toward her obligations under the lease, in April 2013, the trustee moved forward with the confession of judgment action in the court of common pleas.” See memorandum of law of trustee in opposition to petition to strike and/or open confession of judgment, pp. 2-3.

The trustee filed a writ of execution and affidavit of service on June 18, 2013 against petitioner. The trustee has received \$5,727.28 and alleges that it is still owed \$46,901.54 to satisfy the confessed judgment. Petitioner filed the instant petition to strike and/or open confessed judgment. In response to the petition to strike and/or open confessed judgment, the trustee filed a suggestion of bankruptcy. The suggestion of bankruptcy states that pursuant to 11 U.S.C. § 362 the automatic stay operates as a stay, essentially as an injunction, to all entities against the commencement of any judicial action or administrative action against the debtor. This court then ordered the trustee to respond to the petition to strike and/or open confessed judgment. On October 15, 2013, the trustee responded to the petition.

DISCUSSION

Under Pennsylvania law, a petition to strike judgment operates as a demurrer to the record. Bethlehem Steel Corporation v. Tri State Industries, Inc., 290 Pa. Super. 461, 434 A.2d 1236 (1981). Further, a petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. Franklin Interiors v. Wall of Fame Management Company, Inc., 510 Pa. 597, 511 A.2d 761 (1986). Moreover, it is well settled that, “[o]ne who petitions to open a confessed judgment must act promptly and aver a meritorious defense.” Wenger v. Ziegler, 424 Pa. 268, 272, 226 A.2d 653 (1967). Pursuant to Pennsylvania Rules of Civil Procedure 2959(e), “[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.” Moreover, “[i]n testing the sufficiency of the evidence, the facts as alleged must be viewed by the court in the exercise of its discretion in the light most favorable to the moving party and further, the ... court must accept as true all evidence and reasonable and proper inferences flowing therefrom.” Lincoln Bank v. Kelly, 282 Pa. Super. 261, 268, 422 A.2d 1106, 1110 (1980).

As a preliminary matter, this court will address the suggestion of bankruptcy. The trustee would like this court to stay the petition to strike and/or open confessed judgment alleging that 11 U.S.C. § 362 disallows petitioner to file a claim against debtor. However, this argument would lead to an inequitable outcome. The trustee is in fact the one that filed the confession of judgment against the petitioner. Essentially, the trustee is requesting this court to leave the petitioner without recourse. Moreover, the trustee is choosing to use the suggestion of bankruptcy when it sees fit. This court finds the argument to be inequitable.

That being said, the court is unable to grant the petition to strike and/or open the confessed judgment. Petitioner first alleges that because the trustee is not a party to the lease

instrument and has alleged no authority to bring an action on behalf of the named lessor that the record defective and thus a motion to strike is warranted. Pursuant to Pa.R.C.P. 2952(a)(4), the complaint shall contain a “statement of any assignment of instrument.” However, the confession of judgment states in its first paragraph, “[p]laintiff Gary F. Seitz, solely in his capacity, as chapter 7 Trustee for Scimeca Foundation, Inc... is duly appointed Chapter 7 Trustee for the Chapter 7 bankruptcy estate of Scimeca Foundation, Inc.” See complaint for confession of judgment.

Additionally petitioner alleges that its petition to open should be granted because it presents the court with meritorious defenses. Petitioner alleges that the confession of judgment is barred by the doctrine of collateral estoppel. The doctrine of collateral estoppel, also known as issue preclusion, “operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated ... in a court of competent jurisdiction from being re-litigated in a subsequent suit.” Keller’s Inc. v. John J. Spencer Roofing, Inc., 565 A.2d 794, 796 (Pa. Super. 1989). Collateral estoppel may be applied when the following requirements are met:

- (1) the issue decided in the prior case is identical to one presented in the later case;
- (2) there was a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
- (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and
- (5) the determination in the prior proceeding was essential to the judgment.

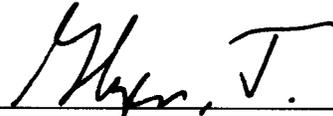
Spisak v. Edelstein, 786 A.2d, 877 (Pa. Super. 2001) (quotation omitted). This argument is meritless as the issue decided in the prior case was for four months rent (November 2012, December 2012, January 2013, and February 2013) that are not subject to this current confession of judgment. See trustee’s opposition to petition to strike and/or open, Exhibit A. Petitioner has not provided any evidence to the contrary.

Further, petitioner alleges that during the lease period, the landlord presented numerous leases to petitioner for approval and that credits were promised to petitioner. However, petitioner again does not provide any evidence to support such assertions and thus this court is unable to grant relief.

CONCLUSION

Based on the foregoing, petitioner's motion to strike and/or open confessed judgment is denied.

BY THE COURT:



GLAZER, J.