

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

**PNC BANK, NATIONAL ASSOCIATION, :
SUCCESSOR IN INTEREST TO :
NATIONAL CITY BANK, :

Plaintiff, :

vs. :

WHISPERING MEADOWS, LLC, :

Defendant. :**

**JUNE TERM, 2013

NO. 3250

COMMERCE PROGRAM**

PROF. COURT REPORTER
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**PNC BANK, NATIONAL ASSOCIATION, :
SUCCESSOR IN INTEREST TO :
NATIONAL CITY BANK, :

Plaintiff, :

vs. :

DONALD J. WILLIS and PATRICIA A. :
WILLIS, :

Defendants. :**

**JUNE TERM, 2013

NO. 3251

COMMERCE PROGRAM**

OPINION

BY: Patricia A. McInerney, J. February 26, 2014

The defendants appeal from this court's orders denying their motions to open and strike confessed judgments. Because the defendants failed to present sufficient evidence of a meritorious defense, the orders denying their motions to open and strike the confessed judgments should be affirmed.



I. FACTUAL AND PROCEDURAL HISTORY

On April 30, 2007, Donald and Patricia Willis, as the borrowers, executed a promissory note with National City Bank, as the lender, in the principal amount of \$1,280,000.00. (Willis Compl. ¶ 3.) On July 1, 2012, Donald and Patricia Willis executed an “Amended and Restated Forbearance Agreement” that amended the payment terms of the promissory note, (Willis Compl. ¶ 4), and caused Whispering Meadows, LLC (a limited liability company in which the Willis’ were members) to execute a guaranty and suretyship agreement whereby it became a guarantor and surety for the Willis’ above-referenced obligations, (Whispering Meadows Compl. ¶ 3).

On June 25, 2013, PNC Bank, National Association, as a successor in interest to National City Bank (“Plaintiff” or “PNC Bank”), filed a complaint in confession of judgment against Donald and Patricia Willis based on their alleged failure to make payments due under the terms of the promissory note as amended by the forbearance agreement. (Willis Compl. ¶ 5.) That day, PNC Bank also filed a complaint in confession of judgment against Whispering Meadows for its alleged failure to make payments due under the terms of the guaranty and surety agreement. (Whispering Meadows Compl. ¶ 8.) Plaintiff asserted it was owed \$710,411.96 as of that date. (Whispering Meadows Compl. ¶ 6; Willis Compl. ¶ 7.)

Plaintiff and the defendants (collectively, “Defendants”) agreed to extend the time to file petitions to strike off or open the judgment so that the parties could attempt to negotiate a settlement of their issues. Those discussions were unsuccessful, and in September 2013 the Willis’ and Whispering Meadows separately filed nearly identical motions to “Open and Strike Confessed Judgment.”

In their motions, Defendants argued they “set[] forth three meritorious defenses with sufficient evidence to raise questions for [a] jury.” (Whispering Meadows Mot. (Memo.) p. 2; Willis Mot. (Memo.) p. 2.) First, pointing to payments of \$2,500 made on March 30, 2011 and April 12, 2011, Defendants asserted Plaintiff “failed to properly calculate the amount outstanding on the [p]romissory [n]ote” by failing to give Defendants “proper credit for payments that were made to PNC.” (Whispering Meadows Mot. (Memo.) p. 2; Willis Mot. (Memo.) p. 2.) Next, Defendants pointed to five instances and argued the instances evidenced Plaintiff “acted in bad faith with the intent and effect of frustrating Defendant[s]’ ability to make payments on the [p]romissory [n]ote.” (Whispering Meadows Mot. (Memo.) p. 3; Willis Mot. (Memo.) p. 3.) The five instances were: (1) PNC Bank losing two executed copies of the forbearance agreement; (2) PNC Bank never providing Defendants with a countersigned copy of the forbearance agreement; (3) PNC Bank never providing Defendants with a payment schedule; (4) PNC Bank never providing Defendants with a monthly payment amount; and (5) PNC Bank never providing Defendants with a location or address to which payments could be directed. (Whispering Meadows Mot. (Memo.) p. 3; Willis Mot. (Memo.) p. 3.) As a result of these five instances of alleged bad faith, Defendants argued they “were effectively unable to make regular payments on the [p]romissory [n]ote” and it was objectively unreasonable for them “to continue to make payments that they knew would not be properly credited to the [p]romissory [n]ote.” (Whispering Meadows Mot. ¶ 2; Whispering Meadows Mot. (Memo.) p. 3; Willis Mot. ¶ 2; Willis Mot. (Memo.) p. 3.) Finally, Defendants argued “Plaintiff’s request for attorney’s fees equal to 10% of the outstanding principal, interest, and late charges bears no relationship whatsoever to the work actually performed by Plaintiff’s counsel; therefore, the attorney’s fees

provision acts as an unlawful penalty rather than a lawful liquidated damages provision.”

(Whispering Meadows Mot. (Memo.) p. 3; Willis Mot. (Memo.) p. 3.)

In response, PNC Bank asserted Defendants failed to present the requisite evidence of a meritorious defense necessary to open a confessed judgment. (Resp. to Whispering Meadows Mot. (Memo.) p. 3.) First, regarding the alleged failure to credit the account for \$2,500 payments in March and April of 2011, Plaintiff attached the transaction history for the account that showed the payments were in fact credited. (Resp. to Whispering Meadows Mot. (Memo.) p. 3.) Next, regarding Defendants claim that Plaintiff frustrated Defendants’ ability to make payments on the promissory note, Plaintiff argued Defendants again “have offered no factual support for this baseless allegation.” (Resp. to Whispering Meadows Mot. (Memo.) p. 4 (emphasis original).) Rather, Plaintiff asserted “[t]he record clearly demonstrates that ... Defendants successfully made payments on the [p]romissory [n]ote, as is evidenced by the checks Defendants themselves allege were submitted in March and April of 2011.” (Resp. to Whispering Meadows Mot. (Memo.) p. 4.) Plaintiff argued “[g]iven the undisputed fact that ... Defendants successfully made payments to Plaintiff[] on the account in the past, it is absurd for ... Defendants to now claim that Plaintiff’s conduct somehow prevented them from doing so after the [f]orebearance [a]greement was executed.” (Resp. to Whispering Meadows Mot. (Memo.) p. 4.) Plaintiff further argued “the other allegations asserted by Defendants as justifications for nonpayment are immaterial, as none of them effect[ed] Defendants’ ability to make payments to Plaintiff when due.” (Resp. to Whispering Meadows Mot. (Memo.) p. 4.) Finally, regarding the requested attorney’s fees of 10%, Plaintiff asserted that they are consistent with Pennsylvania law, and this court did not need to specifically assess their reasonableness as

they were specifically authorized by the warrant of attorney. (Resp. to Whispering Meadows Mot. (Memo.) p. 5.)

On November 14, 2013, this court heard oral argument on Defendants' motions. At the argument, Defendants conceded that the two \$2,500 payments were credited to their account. (N.T. p. 4.) Plaintiff, on the other hand, noted that not only did the transaction history show that these two \$2,500 payments were received, but that:

throughout 2011 the Willis['] continued to make payments on a monthly basis. And, in fact, on December 13th, 2011, they made a principal reduction payment of \$732,625.23. So to make a payment that large, they certainly knew where to make it and they, in fact, made it. And to say that you have to accept our allegation that the bank acted in bad faith because they didn't tell us where to make the payments isn't evidence and doesn't ring true in terms of what actually happened here. And, therefore, I think that they really haven't submitted credible evidence, any evidence of any kind that the amount isn't correct.

(N.T. p. 7.)

By orders dated November 18, 2013, this court denied the motions, to which Defendants filed timely notices of appeal. Now, we issue this opinion in support of the above-referenced orders, which were properly entered for the following reasons.

II. DISCUSSION

"A petition to strike a judgment raises a question of law and relief thereon will only be granted if a fatal defect appears on the face of the record." *RAIT P'ship, LP v. E Pointe Properties I, Ltd.*, 957 A.2d 1275, 1277 (Pa. Super. Ct. 2008). Accordingly, "[i]n 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." *Resolution Trust Corp. v. Copley Qu-Wayne Associates*, 683 A.2d 269, 273 (Pa. 1996) (emphasis original). "Alternatively, a petition to open rests within the discretion of the trial court, and may be granted if the petitioner (1) acts

promptly, (2) alleges a meritorious defense, and (3) can produce sufficient evidence to require submission of the case to a jury.” *RAIT P’ship*, 957 A.2d at 1277. Thus, “matters dehors the record filed by the party in whose favor the warrant is given, i.e., testimony, depositions, admissions, and other evidence, may be considered by the court.” *Resolution Trust*, 683 A.2d at 273. In determining whether sufficient evidence has been presented, the court employs “the same standard as in a directed verdict: viewing all the evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense while rejecting adverse allegations of the party obtaining the judgment.” *Crum v. F.L. Shaffer Co.*, 693 A.2d 984, 986 (Pa. Super. Ct. 1997) (quotations omitted). “The decision of the trial court on a petition to strike or open judgment will not be disturbed unless there is an error of law or a manifest abuse of discretion. *RAIT P’ship*, 957 A.2d at 1277.

In this case, while Defendants caption their motions as motions to “open and strike,” their exclusive focus on matters outside the record as filed by Plaintiff and supposed “meritorious defenses” makes clear that they were only petitioning to open the confessed judgments. Defendants, however, failed to present sufficient evidence of a meritorious defense. Thus, this court properly denied their motions and should be affirmed.

Regarding their first allegedly meritorious defense—Plaintiff’s failure to properly calculate the amount outstanding on the promissory note by failing to give Defendants credit for two \$2,500 payments—Plaintiff presented documentary evidence that the payments were in fact credited to the account, which Defendants conceded at oral argument. Here, it was beyond doubt the payments were credited to the account. As such, Defendants failed to present sufficient evidence of this defense.

Next, regarding the five instances of PNC Bank's alleged bad faith, no two reasonable minds could disagree Defendants were not thereby effectively unable to make regular payments on the promissory note. Preliminarily, their first two instances (losing and not providing a countersigned copy of the forbearance agreement) had nothing to do with their ability to make payments. As for their last three instances, the asserted effect of these is belied by the record. As the record clearly demonstrated, Defendants successfully made payments on the promissory note, evidenced in part by the checks Defendants themselves alleged were submitted in March and April of 2011, but not credited. Given the undisputed fact that Defendants successfully made payments to Plaintiff on the account in the past (and even when they asserted the payments were not being credited), we agreed it was absurd for Defendants to now claim Plaintiff's conduct somehow prevented them from doing so after the forbearance agreement was executed, particularly as to the allegation regarding the location or address as to which payments could be directed. No doubt that is why Defendants carefully alleged only the hollow accusation that they were "effectively" unable to make regular payments on the promissory note, not that they were actually precluded from doing so.¹

¹ Moreover, this court would also note there is a level of disingenuousness in Defendants claiming bad faith on Plaintiff's part for allegedly not providing Defendants with a monthly payment amount after they entered into the forbearance agreement when thereafter Defendants had an equal obligation to make payment, but failed to make any payment on the account. In addition to explicitly stating payments were due "on the last day of each consecutive calendar month" until the June 30, 2013 maturity date (which is essentially a payment schedule, something Defendants also averred they were never provided with in bad faith), Exhibit A to the forbearance agreement includes the interest rate and payment terms for the loan going forward. This court is hard pressed to believe that if Defendants really were not being told what they were supposed to be paying on a monthly basis going forward, they could not have attempted to calculate the expected payment (that appears to be approximately \$6,900 a month) or at least make some kind of payment on the account, which in all certainty would have been properly credited to the account like all the other payments they made. Of course, there is no evidence Defendants attempted to make a payment of any kind after the forbearance agreement was

Finally, Defendants' last allegedly meritorious defense—Plaintiff's request for attorney's fees the equal of 10% not bearing a reasonable relationship to the work actually performed by Plaintiff's counsel—failed as a matter of law. As noted by Plaintiff, our Superior Court "has previously approved of the inclusion of similar collection commission provisions in contracts." *RAIT P'ship*, 957 A.2d at 1279 (upholding a 15% attorney's collection commission as part of a confessed judgment). And as noted by Plaintiff, the court need not assess the reasonableness of such a commission where the commission is explicitly set forth in a provision of the contract and the provision does not specifically call for the imposition of a "reasonable" fee. *See id.* at 1279 n.3 (distinguishing a case, *PNC Bank v. Bolus*, where the provision "specifically called for the imposition of a 'reasonable' fee, thus justifying the trial court's inquiry into the reasonableness of the fee."). *See also PNC Bank v. Bolus*, 655 A.2d 997, 1000 n.4 (stating the note at issue only authorized the collection of "a reasonable attorney's commission," which was not to exceed ten percent of the amount of the loan in default.). Here, the requested attorney's commission of 10% appeared in four separate places in the contracts between the parties and did not call on the court to inquire into the reasonableness of the commission. Accordingly, Defendants' last defense failed as a matter of law.²

entered into, but were refused. In any event, the issue now also appears to be moot as the maturity date has been reached and payment in full on the account has not been made.

² While the provisions did not call on the court to inquire into the reasonableness of the commission, and allowed Plaintiff to establish a sum certain and confess judgment in the amount of \$63,715.94 for attorney's fees, the court would note the guaranty and forbearance agreements will only allow PNC Bank to actually recover from Defendants the actual attorney's fees it incurs, which may end up being less than \$63,000 in the absence of further litigation. (*See, e.g., Whispering Meadows Compl., Ex. C (forbearance agreement) at § 10.*)

Without any defenses justifying the opening of the confessed judgments, the court properly denied Defendants' motions and should be affirmed.

BY THE COURT:


McINERNEY, J