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R. POSTELL
COMMERCE PROGRAM

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

<p>SANTANDER BANK, N.A.</p> <p style="text-align: center;"><i>Plaintiff</i></p> <p style="text-align: center;">v.</p> <p>LMT ASSOCIATES, LLC</p> <p style="text-align: center;"><i>Defendant</i></p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>November Term, 2015</p> <p>Case No. 01436</p> <p>Commerce Program</p> <p>Control No. 15121689</p>
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ORDER and MEMORANDUM OPINION

AND NOW, this 13th day of January, 2016, upon consideration of defendant's petition to open judgment by confession and for stay of execution, the response of plaintiff, and the respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED**.

BY THE COURT,



GLAZER, J.

Santander Bank, N.A. Vs-ORDRC



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

SANTANDER BANK, N.A.	:	November Term, 2015
	:	
<i>Plaintiff</i>	:	Case No. 01436
	:	
v.	:	Commerce Program
	:	
LMT ASSOCIATES, LLC	:	
	:	Control No. 15121689
<i>Defendant</i>	:	

MEMORANDUM OPINION

On June 27, 2013, plaintiff Santander Bank (“Lender”), provided a business loan to defendant LMT Associates, LLC (“Borrower”), in the amount of \$2,350,000.00 (the “Loan Amount”), a portion of which, in the amount of \$380,000.00, was designated as a “Construction Loan,” to be held in escrow and to be disbursed periodically to Borrower.¹ Evidence of the loan is provided by a number of agreements which include a Commercial Mortgage Note Agreement with a confessed-judgment provision (the “Note”), a “Mortgage,” a Loan Security Agreement (the “L&S Agreement”), and a “Security Agreement” (collectively, the “Loan Documents”).² An entity named Bronzino, Inc. (“Bronzino”), and two individuals, Dorian Tota and Luan Tota (the “Totas”), provided guarantees to the loan.³ Evidence of these guarantees are in the form of two “Guaranty Agreements” executed by Bronzino (corporate guarantor), and by the

¹ Loan and Security Agreement, Exhibit D to the petition to open judgment by confession, ¶ 2.1.

² Exhibits B, C, D and E to Borrower’s petition to open confessed judgment. The afore-mentioned confessed-judgment provision is found at article 7 of the Note.

³ Santander Bank v. Bronzino, Inc., case No. 1511-01460; Santander Bank v. Luan Tota and Dorian Tota, case No. 1511-01491.

Totas (personal guarantors.)⁴ Whenever mentioned collectively, Bronzino and the Totas shall be referred to as “Guarantors.”

On August 25, 2014, Lender sent to Borrower and Guarantors a letter captioned Notice of Default and Reservation of Rights (“Notice of Default”). The Notice of Default stated as follows:

The Borrower is in default under the Loan Documents as a result of the following (the “Defaults”):

1. The imposition of sales tax liens against [guarantor Bronzino] by the Pennsylvania Department of Revenue for the tax period ending October 31, 2012, November 30, 2012, December 31, 2012, and January 31, 2013.
2. The Borrower failing to Timely deliver to the Bank:
 - a. 2103 Personal Tax returns or proof of filed extension of the Individual Guarantors [the Totas];
 - b. Updated Personal Financial Statement ... for the Individual Guarantors;
 - c. 2013 filed corporate tax returns, or proof of filed extension for the Borrower and Corporate Guarantor;
 - d. Rent roll for the premises as of 12/31/13; and
 - e. Management prepared financial statements [of] Corporate guarantor for [the] quarters ending 3/31/14 and 6/30/14.

This letter constitutes formal notice to the Borrower and Guarantor of the occurrence of the Defaults. Pursuant to the terms of the Loan Documents, the Bank may exercise any of its rights and remedies under the Loan Documents ... including ... declaring the entire unpaid balance of the Note immediately due and payable....⁵

On November 10, 2015, Lender entered judgment by confession against Borrower in the instant case. Lender also entered separate judgments by confession against

⁴ Id. respectively at Exhibits C., article 14.

⁵ Notice of Default and reservations of Rights, Ex. A to the complaint-in-confession-of-judgment.

corporate guarantor Bronzino and the Totas as individual guarantors.⁶ On December 14, 2015, Borrower filed its petition to open the confessed judgment and to stay execution thereof. On the same day, Bronzino and the Totas also filed their respective petitions to open the confessed judgment and to stay execution. On January 4, 2016, Lender filed its responses in opposition to the three separately asserted petitions to open the three related confessions of judgment.

Discussion

In Pennsylvania,

A petition to open is an appeal to the court's equitable powers and is addressed to the sound discretion of the court.... However, the discretion exercised by the lower court must be guided by Rule 2959(e), Pa.R.C.P. which states [that] [i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury the Court shall open judgment.⁷

The petitioning party bears the burden of producing sufficient evidence to substantiate its alleged defenses.... The defenses raised must be valid ones.⁸

[I]n the context of a judgment confessed on a judgment note, the hearing required to comport with due process means simply an opportunity to be heard; it does not require a proceeding comparable to a full trial, but may be satisfied by other procedural opportunities to be heard, such as a petition to open judgment.⁹

In the petition to open, Borrower alleges several defenses. First, Borrower avers that Lender “failed and refused to disburse” construction funds in breach of the Loan Documents, on the improper basis that Borrower’s corporate guarantor, Bronzino, was

⁶ Santander Bank v. Bronzino, Inc., case No. 1511-01460; Santander Bank v. Luan Tota and Dorian Tota, case No. 1511-01491.

⁷ Indus. Valley Bank & Trust Co. v. Lawrence Voluck Associates, Inc., 428 A.2d 156, 158 (Pa. Super. 1981).

⁸ Haggerty v. Fetner, 481 A.2d 641, 644 (Pa. Super. 984).

⁹ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994).

the object of an audit by the Internal Revenue Service.¹⁰ The court is not persuaded by this argument because Borrower has failed to sustain its burden of proving with sufficient evidence the alleged defense. Specifically, Borrower has failed to indicate whether Lender's breach, if any, occurred before or after Borrower's own breach. Instead, Borrower merely asserts that "[a]s the project was being completed by [Borrower, Lender] refused to disburse the requested portion of the Construction Loan," and this refusal "made it impossible for [Borrower] to ... complete the Project."¹¹ These allegations alone, without any supporting evidence, are insufficient to overcome the burden of proof which rests solely upon the party petitioning to open the confessed judgment.¹² For this reason, Borrower's first argument is rejected.

Second, Borrower argues that Lender agreed to reduce Borrower's monthly obligations under the Note by applying the unused, escrowed balance of the Construction Loan to the Loan Amount. Borrower vaguely hints that Lender misrepresented its true intentions: even though Lender did apply the balance of the Construction Loan to the Loan Amount, Borrower did not reap the benefits of reduced monthly payments as expected. The court rejects this argument because Borrower has not sustained its burden of proof. First, Borrower has offered no evidence that Lender and Borrower entered into a separate agreement specifically designed to reduce Borrower's monthly payments; and second, Borrower has failed to offer sufficient evidence in support of its vague allegations of fraud. In Pennsylvania, the mere pleading

¹⁰ Petition to open the confessed judgment, ¶¶ 24–32.

¹¹ *Id.* at ¶¶ 35–36.

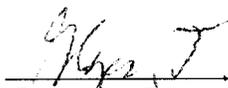
¹² Borrower also asserts in its petition that Lender's refusal to disburse certain funds constituted a breach of Lender's duty of good faith and fair dealing. *See* petition to open at ¶ 38. As stated above, Borrower has provided no evidence to substantiate its defense based on Lender's breach of the loan Documents, and no evidence that lender breached, if any, its duty of good faith and fair dealing.

of fraud is insufficient. A party seeking to open judgment by confession through the defense of fraud “must also establish that it set forth sufficient evidence in support of [that defense as] to give rise to a question that would require submission of the case to a jury.”¹³ In this case, Borrower cryptically alleges that Lender perpetrated a fraud, yet fails to specifically set forth evidence thereof capable of being presented to a jury. For this reason, Borrower’s second argument is rejected.

Third, Borrower asserts that the confessed judgment should be opened because the attorney’s fees therein are not reasonable under the circumstances. However, Pennsylvania courts have found as reasonable “attorney’s fees in the amount of fifteen percent [if] ... specifically authorized by the warrant of attorney.”¹⁴ In this case, the warrant of attorney specifically authorizes attorney’s fees of ten percent of the total, and Borrower’s third argument is rejected.

For the reasons stated above, the petition to open judgment by confession and for stay of execution is denied.¹⁵

BY THE COURT,



GLAZER, J.

¹³ PNC Bank, Nat. Ass'n v. Bluestream Tech., Inc., 14 A.3d 831, 840 (Pa. Super. 2010).

¹⁴ Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co., 637 A.2d 309, 314 (Pa. Super. 1994).

¹⁵ Borrower also appears to argue that Lender failed to plead the basis for the amounts in confession of judgment. See petition to open, ¶ 52. However, Pa. R.C.P. 2952(a)(7) states that the complaint-in-confession of judgment “shall contain ... an itemized computation of the amount then due....” After reviewing the complaint-in-confession-of-judgment, this court is satisfied that Lender provided an adequate itemized computation of the amount due.