

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY,
PENNSYLVANIA**

CIVIL DIVISION

BETHLEHEM MEDICAL ARTS, L.P.,	:	
Plaintiff	:	
v.	:	NO. C-0048-CV-2009-6077
	:	
ABDULHAY ASSOCIATES, L.P.,	:	
Defendant.	:	
BETHLEHEM MEDICAL ARTS, L.P.,	:	
Plaintiff	:	
v.	:	NO. C-0048-CV-2009-6078
	:	
ABDULHAY ASSOCIATES, L.P. , GAZI:	:	
ABDULHAY and WACHOVIA BANK,	:	
Garnishee	:	
Defendants.	:	

ORDER OF COURT

AND NOW, this _____ day of February 2010, Defendant’s Petitions to Strike Confessed Judgment and to Open Confessed Judgment are **DENIED**, as set forth more fully in the attached Statement of Reasons.

STATEMENT OF REASONS

Statement of Facts

Presently before the Court are Defendant’s Petitions to Strike and/or Open Confessed Judgment, filed July 12, 2009 in the above-captioned cases. On April 23, 2001 Plaintiff Bethlehem Medical Arts, L.P. (“Plaintiff”) and Defendant Abdulhay Associates, L.P. (“Defendant”) executed an agreement whereby Defendant agreed to lease from Plaintiff a portion of property located at 5325 Northgate Drive in Bethlehem, Northampton County

(“Agreement”). On June 15, 2009 Plaintiff filed Complaints for Confession of Judgment Money against Defendants Abdulhay Associates and Gazi Abdulhay at both docket numbers, alleging a default on the underlying Agreement in the amount of EIGHT HUNDRED FORTY-THREE THOUSAND EIGHT HUNDRED EIGHT DOLLARS AND NINETY-SIX CENTS (\$843,808.96) and seeking damages in that amount plus interest and costs. Pursuant to a confession of judgment clause at Section 17.2.8(A) of the Agreement, signed by Gazi Abdulhay on behalf of Defendants, Confessions of Judgment executed by Attorney for Plaintiffs were attached to each of the Complaints, and judgment was entered accordingly.

On July 20, 2009 Defendant Abdulhay Associates filed the Petitions to Strike or Open Confessed Judgment presently before the Court.¹ The matter was then praeciped to the Argument Court List of November 12, 2009 and assigned to the Honorable Anthony S. Beltrami.

On that date, Judge Beltrami entered an Order issuing a Rule to Show Cause on Plaintiff to show why relief should not be granted. By that Order, Plaintiff was granted leave to file amended answers to the petitions; and Defendants were granted thirty (30) days within which to take depositions as to any issues of fact. The matter was praeciped to the January 5, 2010 Argument List and assigned to the undersigned on that date. Argument was heard, and briefs having been received, this matter is now ready for disposition.

¹ Defendant Abdulhay Associates, L.P. is a defendant to both actions filed by Plaintiff, and has filed Petitions to Strike and/or Open Confessed Judgment at both docket numbers. However, the petitions are substantively identical and will therefore be discussed herein as “the petition” and disposed of simultaneously. The Court notes that Gazi Abdulhay, an individual Defendant to the action captioned at 0048-CV-2009-6078 neither joined in Defendant Abdulhay Associates’ petition, nor did he file a petition on his own behalf. Accordingly, the only issue before the Court is Defendant Abdulhay Associates’ petition to Strike and/or Open Confessed Judgment as filed at both docket numbers.

Standard of Law: Petition to Strike Off Confessed Judgment

Petitions to strike and petitions to open confessed judgments are separate forms of relief with separate remedies. As such, different standards of proof are applicable. A petition to strike off a confessed judgment operates as a demurrer to the record in support of the judgment. Resolution Trust Corp. v. Copley Ou-Wayne Assoc., 683 A.2d 269, 273 (Pa. 1996). In making a ruling on a petition to strike, the Court is limited to a review of the record “as filed by the party in whose favor the warrant is given.i.e., the complaint and the documents which contain the confession of judgment clauses.” Id. A petition should only be granted when some fatal defect appears therein. Id. If there is some dispute as to the veracity of the factual averments contained in the record, the proper remedy is the opening of the judgment. Manor Building Corporation v. Manor Complex Assoc., Ltd., 645 A.2d 843 (1994).

Discussion: Petition to Strike Off Confessed Judgment

As noted above, Judge Beltrami issued an Order of Court and Rule to Show Cause in this matter on November 12, 2009. As a threshold matter, Plaintiff asserts that Defendant’s failure to take depositions in accordance with that Order necessitates a dismissal of Defendant’s Petition to Strike and/or Open Judgment without consideration on the merits. PA.R.CIV.P. 206.7 sets forth the procedure to be followed upon the issuance of a rule to show cause, stating in pertinent part that where, as in the present case, an answer is filed to the underlying petition raising issues of material fact, “the petitioner *may* take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court.” PA.R.CIV.P. 206.7(c) (emphasis added). The rule further provides that when a petitioner does not avail himself of the

opportunity to take depositions on factual issues as permitted by the Court, “the petition shall be decided on petition and answer, and averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted” Id.

PA.R.CIV.P. 2959 and local rule N.C.R.CIV.P. 2959 set forth the procedures for striking off or opening a judgment. The Commonwealth Rule provides that where “a petition states a *prima facie* grounds for relief, the court shall issue a rule to show cause.” PA.R.CIV.P. 2959(b). Subsection (e) of the Rule sets forth the procedure for disposition of petitions to strike or open, stating that “the court shall dispose of the rule on petition and answer, and on any testimony, depositions or other evidence.” PA.R.CIV.P. 2959(e).

The local Rule mirrors the Commonwealth Rule, stating that:

Where a petition is filed to open a judgment, the petitioner shall within thirty (30) days from the time the rule to show cause issues proceed to the taking of depositions where the allegations raise questions of fact which make such steps necessary. . .

N.C.R.CIV.P. 2959 (2009).

The Rule further provides that:

[U]nless the petitioner within thirty (30) days makes such application for the taking of depositions, the petition to open judgment shall be stricken from the record upon a written motion to the Court setting forth such fact.

Id.

Neither the local Rule, the Commonwealth Rule or Judge Beltrami’s Order require the dismissal of Defendant’s petition without consideration on the merits. Accordingly, the Court rejects Plaintiff’s assertion and moves to an analysis of the merits of the petitions.

As set forth above, a petition to strike a confessed judgment operates as a demurrer to a judgment and it shall only be granted in the face of a fatal defect or irregularity in the record. US Bank, N.A. v. Mallory, 982 A.2d 986, 991 (Pa. Super. Ct. 2009). By the present petitions, Defendant requests that the judgment at issue be stricken on the bases that (1) the confession of judgment entered into with Plaintiff was

effectuated by Defendant Gazi Abdulhay without the consent of the other limited partners, and is therefore unenforceable; (2) Defendant is entitled to a credit for pre-paid rent paid during a period of constructive eviction; and (3) because Plaintiff Bethlehem Medical Arts, as a partnership in which Defendant Abdulhay Associates is a limited partner, owed and breached a fiduciary duty to the latter in connection with the execution of the confession of judgment.

In ruling on a petition to strike a confessed judgment, the Court is “limited to a review only of 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. Matters dehors the record . . . will not be considered.” Atlantic National Trust, LLC v. Stivala Investments, Inc., 922 A.2d 919, 922 (Pa. Super. Ct. 2007) *quoting* Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 683 A.2d 269, 273 (Pa. 1996).

The only defense raised in support of Defendant’s petition to strike alleging a fatal defect in the record is the assertion that they are entitled to a rental credit pursuant to a theory of constructive eviction, and that therefore, the amount owing set forth in the judgment is in error. However, upon review of the record, the Court notes Defendant’s failure to set forth any evidence in support of the same. With respect to Defendant’s argument that Gazi Abdulhay, as the general partner of the limited partnership and the party who executed the Lease Agreement containing the confession of judgment clause lacked authority to bind the partnership, it is well settled that such an assertion, while a viable defense to the entry of a confessed judgment, is properly raised by a motion to open the judgment, rather than a motion to strike, as it does not constitute a fatal defect

apparent from the face of the record. Finally, Defendant's contention that the entry of judgment against the limited partnership should be stricken for breach of fiduciary duty is not based on an allegation of any error in the record, but rather, raises issues dehors the record. In light of the foregoing, the Court finds that Defendant has failed to demonstrate the existence of a fatal defect or irregularity in the record upon which judgment was entered, and as such, Defendant's petition to strike is hereby **DENIED**. The Court now moves to consideration of Defendant's petition to open the confessed judgment.

Standard of Law: Petition to Open Confessed Judgment

A petition to open a judgment of confession is an appeal to the equitable powers and discretion of the court. Fidelity Bank v. Act of America, Inc., 392 A.2d 784, 785 (Pa. Super. Ct. 1978). As with a petition to strike, the court, as a threshold matter, must first evaluate the substance of the petition to determine whether or not the petitioner has set forth *prima facie* grounds for relief. Ohio Pure Foods, Inc. v. Barbe, 697 A.2d 252, 253 (Pa. 1997). Upon a finding that the petitioner has met that burden, the Court shall enter a rule to show cause and order the responding party to file an answer to the petition. Sams Corp. v. Garin, 507 A.2d 402, 403 (Pa. Super. Ct. 1986). Ultimately, a petitioner must set forth a meritorious defense supported by sufficient evidence to raise a jury question. Id. Such evidence shall be deemed sufficient if it would preclude the entry of a directed verdict against the defendant. Lincoln Bank v. Kelly, 422 A.2d 1106, 1110 (Pa. Super. Ct. 1980). In evaluating the evidence, the Court must view it in the light most favorable to the movant and draw all reasonable inferences therefrom. Id.

Discussion: Petition to Open Confessed Judgment

As noted above, Defendant filed the underlying Petition to Open on July 20, 2009. The Court, the Honorable Anthony S. Beltrami presiding entered an Order and Rule to Show Cause in the matter on November 12, 2009 granting Plaintiff leave to file Amended Answer to the Petition, and Plaintiff filed the same on November 18, 2009. Accordingly, the matter is now before the Court to determine whether Defendant's petition sets forth a meritorious defense and whether such defense or defenses are supported by sufficient evidence to raise a jury question. If the Court finds that it does, the judgment shall be opened.

Pursuant to statute, no partner may confess judgment on behalf of all partners unless authorized to do so. 15 PA.CON.S.TAT.ANN. § 8321(c). As with the petition to strike, Defendant's first contention in support of the present Petition to Open is that Defendant Gazi Abdulhay, as general partner of Defendant Abdulhay Associates' and signatory to the lease with Plaintiff containing the confession of judgment clause, was without the authority of the limited partners to confess judgment against them, and that therefore, such judgment is void. Defendant's second basis for the present petition to open is one of constructive eviction, and their entitlement to a rental credit in support of the same. Defendant's final basis for their petition to open is an assertion that Plaintiff Bethlehem Medical Arts, as a partnership in which Defendant Abdulhay Associates is a limited partner, owed and breached a fiduciary duty to the latter via the execution of the confession of judgment. See Scott Factors, Inc. v. Hartley, 228 A.2d 887 (Pa. 1967) (“[C]ourts strictly construe the language of a warrant of attorney, and a valid judgment by confession may be entered only by rigid adherence to the provisions of the warrant of attorney.”). Defendant's Brief in Support of Petition to Strike and/or Open Judgment at 3.

In response to Defendant's petition, Plaintiff alleges a lack of evidence in support of such defenses and argues that therefore, the petition to open must fail. Again, the Court notes that no depositions were taken in support of Defendant's petition, nor was any documentation attached to the initial petition. Given that fact, Plaintiff argues that this matter is properly decided on petition and answer and that all the averments of fact set forth in the latter shall be deemed admitted by Defendant pursuant to PA.R.Civ.P. 206.7.

The Court notes that while Defendant failed to attach any documentation to the instant petition at the time of filing, certain documents in support thereof were made part of the record on July 30, 2009, inclusive of: Abdulhay Associates' Limited Partnership Agreement, signed by Gazi Abdulhay as general partner and Suzanne Abdulhay as limited partner; a first amendment to the Limited Partnership Agreement maintaining Suzanne Abdulhay as a limited partner with a forty-two percent (42%) interest in the partnership and apportioning equal eight percent (8%) interests among six trusts in the names of various members of the Abdulhay family and identifying Defendant Gazi Abdulhay and a Mr. Donald R. Auten as trustees of the same; and a second amendment to the Agreement, eliminating Suzanne Abdulhay as a limited partner and re-apportioning the ninety percent (90%) interest of the limited partners equally among the remaining six partners, the trusts identified in the first amendment.

Taken together, Plaintiff argues not only that such evidence fails to provide support for Defendant's asserted defenses, but Plaintiff further asserts that certain provisions of the Limited Partnership Agreement evidence the limited partners' authorization of Defendant Abdulhay to consent to judgment against the members of the limited partnership, and Plaintiff's justification in relying on the same. Paragraph Ten (10)(a) of the Agreement provides that "[m]anagement

and control of the operations of the Partnership and all decisions with respect to . . . the Partnership shall rest exclusively with and be made exclusively by the General Partner.” Pursuant to Paragraph 10(c) of the Agreement, “[t]he General Partner is . . . authorized and empowered to carry out and implement the purposes of the Partnership. . . .” Finally, the Agreement provides that “[t]hird parties dealing with the Partnership shall be entitled to rely conclusively upon the power of and authority of the General Partner in any partnership matter.” Agreement, ¶ 10(e).

The law provides that the authority to bind all members of a partnership to confession of judgment must be express. Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 683 A.2d 269 (Pa. 1996). Upon review and consideration of the evidence, the Court finds the language of the aforementioned provisions of the Partnership Agreement, as entered into by Gazi and Suzanne Abdulhay, and ratified and affirmed by the present limited partners, sufficient to establish Defendant Abdulhay’s authority to bind the partnership to the subject confession of judgment.

Moving to Defendant’s constructive eviction defense, Plaintiff asserts Defendant’s failure to present any evidence in support of the same, and argues that therefore, Defendant is deemed to have admitted Plaintiff’s averment, contained in their Answer to the petition, wherein they state that Defendant was never subject to a period of constructive eviction. Additionally, Plaintiff contends that the constructive eviction claim is barred by the doctrine of collateral estoppel. Pursuant to the doctrine of collateral estoppel, a party is barred from litigating issues raised in a prior action between the same parties or parties in privity, if the issue was decided on the merits after a full and fair opportunity to litigate the matter. Nelson v. Heslin, 806 A.2d 873, 876-77

(Pa. Super. Ct. 2002).

Upon examination of the record, the Court notes that Plaintiff is correct, in that the record is absent any evidence in support of Defendant's constructive eviction defense. The only assertions set forth in support thereof are certain averments contained in the petition to strike. Therein, Defendant refers to a prior ruling of this Court, the Honorable Leonard N. Zito presiding, in a separately captioned case, involving a claim by Defendant that Plaintiff had breached the underlying lease pursuant to a theory of constructive eviction, entitling Defendant to an abatement of rent. Irrespective of the collateral estoppel argument, the Court finds such averments insufficient to support Defendant's constructive eviction claim, and therefore deems Defendant to have admitted Plaintiff's averment that there never was a period during which Defendant was constructively evicted from the subject premises. Accordingly, the Court finds that Defendant has failed to raise a jury question with respect to the constructive eviction defense raised in the present petition.

Defendant's final defense in support of the petition to open is that Plaintiff, as general partner to Defendant's limited partnership status in Plaintiff, owed a fiduciary duty to Defendant, but breached the same in connection with the underlying Lease Agreement. Upon review of the record, the Court finds that none of the evidence presented by Defendant speaks to such defense. In fact, the only reference to the defense at all appears in Defendant's petition and brief. Absent any evidence in support of their claim, the Court finds that Defendant has failed to raise a jury issue with respect to such defense.

In light of the foregoing, and in the absence of evidence in support of their defenses sufficient to bring the matter before a jury, Defendant's Petition to Open Confessed Judgment is

