NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CONSTITUTION DRIVE LOAN BUYER ASSOCIATES, L.P. Appellee v. CONSTITUTION DRIVE PARTNERS, L.P. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1141 EDA 2013

Appeal from the Order Entered March 22, 2013
In the Court of Common Pleas of Chester County
Civil Division at No(s): 11-01386-JD

BEFORE: GANTMAN, P.J., OLSON AND PLATT,* JJ.

MEMORANDUM BY OLSON, J.: **FILED APRIL 21, 2014**

Appellant, Constitution Drive Partners, L.P., appeals from the order entered on March 22, 2013, denying its "Petition to Strike Off and/or Open Confessed Judgment." We affirm.

On March 17, 2005, VIST Bank's predecessor-in-interest (Madison Bank) extended a business loan to Appellant, in the principal amount of $1,650,000.00.[1] The loan was evidenced by a Loan Agreement (hereinafter

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[1] While this appeal was pending, VIST Bank sold its right, title, and interest in the subject loan to Appellee, Constitution Drive Loan Buyer Associates, L.P. (hereinafter "CDLBA"). In accordance with Pennsylvania Rule of Appellate Procedure 502(b), VIST Bank and CDLBA filed an unopposed application to substitute CDLBA for VIST Bank as the Appellee in this case. Unopposed Application for Substitution of Party, 11/8/13, at 1-2. We granted the application and CDLBA is now the Appellee in this case. However, for simplicity, we will not differentiate between CDLBA and VIST
(Footnote Continued Next Page)

*Retired Senior Judge assigned to the Superior Court.

"Loan Agreement") and a Secured Line of Credit Note (hereinafter "the Note"); both the Loan Agreement and the Note were executed on March 17, 2005.

The March 17, 2005 Loan Agreement and the March 17, 2005 Note contain identical warrants of attorney to confess judgment. The warrants declare:

> **BORROWER HEREBY IRREVOCABLY AUTHORIZES AND EMPOWERS ANY ATTORNEY OF RECORD, OR THE PROTHONOTARY OR CLERK OF ANY COURT IN THE COMMONWEALTH OF PENNSYLVANIA OR ELSEWHERE, TO APPEAR FOR THE BORROWER AT ANY TIME OR TIMES, AFTER THE OCCURRENCE OF AN EVENT OF DEFAULT AND EXPIRATION OF ANY APPLICABLE CURE PERIODS WITH RESPECT THERETO UNDER ANY OF THE LOAN DOCUMENTS, IN ANY SUCH COURT IN ANY ACTION BROUGHT AGAINST BORROWER BY LENDER WITH RESPECT TO THE AGGREGATE AMOUNTS PAYABLE UNDER THE LOAN DOCUMENTS, WITH OR WITHOUT DECLARATION FILED, AS OF ANY TERM, AND THEREIN TO CONFESS OR ENTER JUDGMENT AGAINST BORROWER FOR ALL SUMS PAYABLE BY BORROWER TO LENDER UNDER THE LOAN DOCUMENTS, AS EVIDENCED BY AN AFFIDAVIT SIGNED BY A DULY AUTHORIZED DESIGNEE OF LENDER SETTING FORTH SUCH AMOUNT THEN DUE FROM BORROWER TO LENDER, WITH COSTS OF SUIT, PLUS ATTORNEY'S COMMISSION EQUAL TO FIVE (5%) PERCENT OF THE AGGREGATE OF SUCH SUMS, AND BORROWER ACKNOWLEDGES THAT ATTORNEYS' FEES ARE STATED TO BE FIVE (5%) PERCENT SOLELY FOR PURPOSES OF FIXING A SUM CERTAIN FOR**

(Footnote Continued) ———————————

Bank in this memorandum. Instead, we will refer to both CDLBA and VIST Bank as simply "VIST Bank."

> **WHICH JUDGMENT CAN BE ENTERED BY CONFESSION AND AGREES THAT IN ENFORCING ANY SUCH JUDGMENT, LENDER SHALL NOT DEMAND, SOLELY WITH RESPECT TO ATTORNEYS' FEES INCURRED BY LENDER IN CONNECTION WITH SUCH INDEBTEDNESS AFTER SUCH JUDGMENT IS RENDERED, ANY AMOUNTS IN EXCESS OF THE ACTUAL AMOUNT OF REASONABLE ATTORNEYS' FEES CHARGED OR BILLED TO LENDER (WHICH ATTORNEYS' FEES SHALL BE CHARGED OR BILLED TO THE LENDER AT THE STANDARD HOURLY RATES), WITH RELEASE OF PROCEDURAL ERRORS AND WITHOUT RIGHT OF APPEAL. IF A COPY OF THIS NOTE, VERIFIED BY AN AFFIDAVIT SHALL HAVE BEEN FILED IN SUCH ACTION, IT SHALL NOT BE NECESSARY TO FILE THE ORIGINAL AS A WARRANT OF ATTORNEY. BORROWER WAIVES THE RIGHT TO ANY STAY OF EXECUTION AND THE BENEFIT OF ALL EXEMPTION LAWS NOW OR HEREAFTER IN EFFECT. NO SINGLE EXERCISE OF THE FOREGOING WARRANT AND POWER TO BRING ANY ACTION OR CONFESS JUDGMENT THEREIN SHALL BE DEEMED TO EXHAUST THE POWER, BUT THE POWER SHALL CONTINUE UNDIMINISHED AND MAY BE EXERCISED FROM TIME TO TIME AS OFTEN AS LENDER SHALL ELECT UNTIL ALL AMOUNTS PAYABLE TO LENDER UNDER THE LOAN DOCUMENTS HAVE BEEN PAID IN FULL.**

Loan Agreement, dated 3/17/05, at ¶ 11 (emphasis in original); Secured Line of Credit Note, dated 3/17/05, at ¶ 18 (emphasis in original).

The Loan Agreement defines the term "Loan Document" as "any Loan Agreement, Note, Security Agreement, Mortgage, Surety Agreement, or any other document heretofore, now or hereafter executed by Borrower to Bank in connection with the Loan, together with all modifications, extensions and/or renewals thereof." Loan Agreement, dated 3/17/05, at ¶ 1.7. The Note defines the term "Loan Documents" in a similar manner. ***See*** Secured

Line of Credit Note, dated 3/17/05, at ¶ 4. Further, the Note specifically declares:

> FOR VALUE RECEIVED, [Appellant] promises to pay to the order of MADISON BANK . . . the principal sum of up to [$1,650,000.00] . . .
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> . . .
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> [2(b)] Unless due earlier by virtue of an Event of Default, the entire unpaid principal sum then outstanding together with all accrued and unpaid interest and other charges shall become due and payable without further notice or demand on February 28, 2007 (the "Maturity Date").

Secured Line of Credit Note, dated 3/17/05, at 1 (internal emphasis omitted).

From April 1, 2008 to September 1, 2010, the parties executed ten modifications to the Note and, within these modifications, the parties extended the Maturity Date of the loan. The last modification was titled "Allonge to Note" (hereinafter "the September 1, 2010 Allonge" or "the Allonge") and was dated September 1, 2010. The September 1, 2010 Allonge extended the loan's maturity date to January 1, 2011. Specifically, the Allonge declared:

> **Extension of Term**. The reference to "February 28, 2007" contained in **Section 2(b)** of the Note (as the same was most recently extended to July 1, 2010) is hereby deleted and replaced with "January 1, 2011."

Allonge to Note, dated 9/1/10, at ¶ 1 (emphasis in original).

Further, and as was true with the prior nine modifications to the Note, the September 1, 2010 Allonge contained the same warrant of attorney to

confess judgment that was found in the original, March 17, 2005 Note. ***Id.*** at ¶ 6.

Also on September 1, 2010, VIST Bank and Appellant executed an "Amendment and Modification to Loan Agreement" (hereinafter "Amendment to the Loan Agreement"). True to its name, the short, four-page Amendment to the Loan Agreement simply amended the March 17, 2005 Loan Agreement in accordance with its terms. Amendment and Modification to Loan Agreement, dated 9/1/10, at ¶ 3. Further, the Amendment to the Loan Agreement declared:

> 2. **Allonge**. Currently with the execution of this Agreement, Borrower will execute an Allonge to the Note evidencing, *inter alia*, the new Maturity Date.
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> 3. **Amendment/References**. The Loan Agreement and the Loan Documents are hereby amended to be consistent with the terms of this Amendment. All references in the Loan Agreement and the Loan Documents to (a) the "Loan Agreement" shall mean the Loan Agreement as amended hereby; and (b) the "Loan Documents" shall include the Note Modifications, this Amendment, the Allonge and all other instruments or agreements executed or delivered pursuant to or in connection with the terms hereof.
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> . . .
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> 9. **Inconsistencies**. To the extent of any inconsistencies between the terms and conditions of this Amendment and the terms and conditions of the Loan Agreement or the other Loan Documents, the terms and conditions of this Amendment shall prevail. All terms and conditions of the Loan Agreement and other Loan Documents not inconsistent herewith shall remain in full force and effect and are hereby ratified and confirmed by Borrower.

Amendment and Modification to Loan Agreement, dated 9/1/10, at ¶ 2-3 and 9.

The Amendment to the Loan Agreement did not contain a warrant of attorney to confess judgment. However, the Amendment to the Loan Agreement also did not contain any language that renounced, eliminated, or otherwise altered the warrant of attorney to confess judgment that was contained in the March 17, 2005 Loan Agreement. Moreover, within the Amendment to the Loan Agreement, Appellant specifically "ratified and confirmed . . . [a]ll terms and conditions of the Loan Agreement and other Loan Documents not inconsistent" with the Amendment to the Loan Agreement. Amendment and Modification to Loan Agreement, dated 9/1/10, at ¶ 9.

On February 8, 2011, VIST Bank filed a "Complaint for Confession of Judgment" against Appellant. Within the complaint, VIST Bank averred that Appellant had defaulted upon the terms of the Loan Documents by failing "to pay all sums due and owing under the Note upon its maturity on January 1, 2011." VIST Bank's Complaint for Confession of Judgment, 2/8/11, at ¶ 9. As a result, VIST Bank sought "to confess judgment against [Appellant] on the Note, as authorized by the warrant of attorney contained in the Note and executed by [Appellant]," in the amount of $1,760,081.37. ***Id.*** at ¶ 11.

VIST Bank calculated the total amount due in the following manner:

Principal (as of 1/24/2011)	$1,645,063.18
Interest Due (as of 1/24/2011)	$29,105.55

Late Charge (as of 1/24/2011)	$2,099.24
Attorneys Fees (the 5% of the Amounts due under the Loan Documents)	$83,813.40
Total	$1,760,081.37

Id. at ¶ 10.

On February 8, 2011, the prothonotary entered judgment in favor of VIST Bank and against Appellant in the amount of $1,760,081.37. Judgment by Confession, 2/8/11, at 1.

On February 14, 2011, VIST Bank served Appellant with "Notice Under [Pennsylvania Rule of Civil Procedure] 2958.1 of Judgment and Execution Thereon" (hereinafter "Rule 2958.1 Notice"). The Rule 2958.1 Notice substantially tracked the form notice, as stated in Pennsylvania Rule of Civil Procedure 2964.[2] ***See*** Pa.R.C.P. 2964 (titled: "Notice of Judgment and Execution Required by Rule 2958.1. Form").

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[2] Amongst other things, the Rule 2958.1 Notice informed Appellant that: 1) "[a] judgment in the amount of $1,760,081.37 . . . has been entered against [Appellant] in favor of [VIST Bank] without any prior notice or hearing based on a confession of judgment contained in a written agreement or other paper allegedly signed by [Appellant];" 2) "[t]he sheriff may take [Appellant's] money or other property to pay the judgment at any time after thirty (30) days after the date on which this notice is served on [Appellant];" and, 3) Appellant "must file a petition seeking relief from the judgment and present it to a judge within [30] days after the date on which this notice is served on [Appellant] or [Appellant] may lose [its] rights." Rule 2958.1 Notice, 2/14/11, at 1 (some internal capitalization omitted).

On March 23, 2011, Appellant filed a "Petition to Strike Off and/or Open Confessed Judgment" (hereinafter "Appellant's Petition" or "Petition to Strike or Open Judgment").[3] Within Appellant's Petition, Appellant claimed that the trial court must strike the February 8, 2011 judgment because: 1) "there is no self-sustaining warrant of attorney . . . in an agreement relied upon by [VIST Bank] to obtain the [c]onfessed [j]udgment;" 2) VIST Bank "failed to allege in the [c]omplaint that it strictly complied with applicable warrant of attorney clauses when it obtained the judgment;" 3) "the confession of judgment clauses in the agreements between the parties are a nullity under Pennsylvania law;" and, 4) the attorneys' fees are grossly excessive. Appellant's Petition to Strike Off and/or Open Confessed Judgment, 3/28/11, at 2. In the alternative, Appellant claimed that, if any of the "issues raised require a determination by the trier of fact, the [c]onfessed [j]udgment should be opened by the [trial c]ourt." ***Id.***

On March 29, 2011, the trial court issued a rule to show cause upon VIST Bank, as to why Appellant was not entitled to the requested relief. The trial court's rule to show cause order also declared: within 20 days, VIST

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[3] We note that the trial court specifically concluded that Appellant's Petition to Strike or Open Judgment was timely filed. Trial Court Opinion, 6/28/13, at 7-8; ***see also*** Pa.R.C.P. 2959(a)(3). We will not disturb this factual conclusion, especially since the successor-in-interest to VIST Bank has failed to file a brief in this case and, thus, has not made any argument as to how the trial court's factual conclusion could be considered incorrect.

Bank must file an answer to the Appellant's Petition; within 45 days, the parties must complete depositions on the issues; and, all execution proceedings relating to the confessed judgment were stayed pending the disposition of Appellant's Petition. Trial Court Order, 3/29/11, at 1. On February 15, 2012, the trial court issued a further order in the matter and, within this order, the trial court declared that the parties were entitled to engage in other forms of discovery and that such discovery must be completed within 45 days of the date of the order. Trial Court Order, 2/15/12, at 1.

In accordance with the trial court's February 15, 2012 order, Appellant served VIST Bank with a "Request for Production of Documents" and directed VIST Bank to produce a number of documents, including "[d]ocuments concerning [VIST] Bank's attorneys' fees for this action." Appellant's Request for Production of Documents, dated 2/23/12, at 8. VIST Bank objected to the request for production of its attorneys' fees documentation on various bases, including that the documents were privileged. VIST Bank's Responses to Appellant's Requests for Production of Documents, dated 3/26/12, at 7. The certified record does not contain any evidence that, in response to Appellant's Request for Production of Documents, VIST Bank produced "[d]ocuments concerning [VIST] Bank's attorneys' fees for this action." ***See*** Appellant's Request for Production of Documents, dated 2/23/12, at 8.

VIST Bank's objections caused Appellant to file a motion to compel discovery. Within the motion, Appellant demanded that the trial court order VIST Bank to comply with the discovery requests. The trial court denied Appellant's motion to compel on June 18, 2012. Trial Court Order, 6/18/12, at 1. Therefore, the certified record contains no document or other evidence that would demonstrate the actual amount of attorneys' fees that VIST Bank incurred in this case.

The trial court did not hold a hearing on Appellant's Petition to Strike or Open Judgment. Instead, the court heard oral argument on Appellant's Petition and then denied Appellant's Petition by order entered on March 22, 2013.

Appellant filed a timely notice of appeal and the trial court ordered Appellant to file and serve a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In relevant part, Appellant's Rule 1925(b) Statement reads:

> 1. The trial court committed reversible error by failing to determine – in a proceeding that was instituted by confession of judgment – the validity, propriety, enforceability, ambiguity and meaning of the warrant of attorney provision in the parties' original note. . . . The trial court erred by, among other things, failing to grant the Petition to Strike when the [trial c]ourt determined that [VIST Bank] can (and did) properly confess judgment on a hypothetical "stated" attorneys' fees amount and that [VIST Bank] can simply assure the [trial c]ourt in an opposition brief that the "only amounts" [VIST Bank] will execute upon against [Appellant] "will be the actual and unknown reasonable attorneys' fees involved . . ." in the confessed judgment proceeding.

2. The trial court committed reversible error by finding that [Appellant] "has not met its burden" to show that its Petition to Open was "timely, averred a meritorious defense and presented sufficient evidence to require a factual issue to be determined by a jury." The trial court erred by, among other things, failing to grant the Petition to Open where the parties' last loan amendment, the Amendment and Modification to Loan Agreement, dated September 1, 2010 []: (i) does not contain a warrant of attorney unambiguously permitting judgment by confession; (ii) expressly amended the Loan Documents to be "consistent" with it; and (iii) expressly stated that the terms and conditions of the Amendment "shall prevail" "to the extent of any inconsistencies between the Amendment and the other Loan Documents."

3. The trial court committed reversible error by determining – without hearing testimony – the following disputed facts:

(i) whether [VIST Bank] established an unbroken chain of [Appellant's] continued, clear and express agreement to a warrant of attorney clause;

(ii) whether [VIST Bank] satisfied certain loan conditions – *e.g.*, that [VIST Bank] made a demand for reasonable costs and expenses inclusive of attorney's fees incurred and [Appellant] failed to promptly pay after such demand before [VIST Bank] confessed judgment for any such alleged amounts; that [VIST Bank] made a demand for payment of "reasonable" attorneys' fees when it sought the grossly excessive amount of $83,813.40 in [attorneys' fees] for a boilerplate confession of judgment complaint; and that [VIST Bank] ensured any applicable cure periods had expired prior to confessing judgment after [Appellant's] default;

(iii) whether the attorneys' fees amount that [VIST Bank] confessed judgment for was actually then due and payable as [VIST Bank] represented; and

(iv) whether [VIST Bank] confessed judgment by relying on . . . the [September 1, 2010 Amendment to Loan Agreement] which was the parties' last loan amendment

> and which, as [VIST Bank] admits, "did not 'include or incorporate by reference' the confession of judgment/warrant of attorney clause."

Appellant's Rule 1925(b) Statement, 5/6/13, at 1-3 (internal citations and corrections omitted) (emphasis in original).

Appellant now raises the following four claims on appeal:

> [1.] Must a confessed judgment be stricken where [VIST Bank] failed to plead the occurrence of the express conditions precedent to exercise of the warrant of attorney?
>
> [2.] Must a confessed judgment be stricken where the loan documents are ambiguous as to whether a warrant of attorney is present?
>
> [3.] Must a confessed judgment be stricken where [VIST Bank] included $83,813.40 in attorneys' fees not then due to [it] in the judgment obtained by confession?
>
> [4.] Should a confessed judgment be opened where [Appellant] has timely raised the defenses that the amount of the confessed judgment is grossly inflated by inclusion of sums [Appellant] does not owe to [VIST Bank] and that the instrument relied upon by [VIST Bank] is ambiguous as to whether a warrant of attorney is included at all, and [Appellant] has produced sufficient evidence of each such defense to raise a jury question and/or was denied access to such evidence?

Appellant's Brief at 4.[4]

Our Supreme Court has explained the differences between a petition to strike a judgment and a petition to open a judgment:

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[4] For ease of discussion, we have re-numbered Appellant's claims on appeal.

> A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. In 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. Matters dehors the record filed by the party in whose favor the warrant is given will not be considered. If the record is self-sustaining, the judgment will not be stricken. However, if the truth of the factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike. An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.
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> A petition to open a confessed judgment is governed by Pa.R.C.P. 2959. A party is entitled to have a judgment entered by confession opened if evidence is produced which in a jury trial would require the issues to be submitted to the jury. When determining a petition to open a judgment, 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. An order of the court opening a judgment does not impair the lien of the judgment or any execution issued on it.

Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 683 A.2d 269, 273 (Pa. 1996) (internal citations omitted).

"In reviewing an appeal from a denial of a petition to strike[,] we are limited to determining whether the record as filed by the confessing party is adequate to sustain the judgment." ***Germantown Sav. Bank v. Talacki***, 657 A.2d 1285, 1288 (Pa. Super. 1995). With respect to an appeal from the denial of a petition to open a confessed judgment, "[w]e may not disturb the

lower court's [order] unless there was a manifest abuse of discretion or error of law." ***Id.*** at 1289.

As Justice Musmanno declared, a "warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law. . . . The signing of a warrant of attorney is equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword. For that reason the law jealously insists on proof that this helplessness and impoverishment was voluntarily accepted and consciously assumed." ***Cutler Corp. v. Latshaw***, 97 A.2d 234, 236 (Pa. 1953). Moreover (and because a warrant of attorney to confess judgment is such a powerful and drastic tool), "special rules have been developed regarding" the warrant of attorney; these special rules include the fact that a warrant of attorney "will be construed strictly against the party to be benefited by it, rather than against the party having drafted it." ***Egyptian Sands Real Estate, Inc. v. Polony***, 294 A.2d 799, 803 (Pa. Super. 1972) (*en banc*). Therefore, "any ambiguities [must be] resolved against the party in whose favor the warrant is given." ***Dollar Bank, Fed. Sav. Bank v. Northwood Cheese Co.***, 637 A.2d 309, 311-312 (Pa. Super. 1994).

Notwithstanding the above, Pennsylvania has historically "recognized and permitted entry of confessed judgments pursuant to the authority of a warrant of attorney contained in a written agreement." ***Midwest Fin. Acceptance Corp. v. Lopez***, 78 A.3d 614, 623 (Pa. Super. 2013). Our courts thus acknowledge that "a warrant of attorney is a contractual

agreement between the parties and [that] the parties are free to determine the manner in which the warrant may be exercised." ***Atl. Nat'l Trust, LLC v. Stivala Invs., Inc.***, 922 A.2d 919, 924 (Pa. Super. 2007).

On appeal, Appellant first claims that trial court erred when it refused to strike the confessed judgment, as VIST Bank "failed to plead the occurrence of the express conditions precedent to exercise of the warrant of attorney." Appellant's Brief at 13-16. Appellant did not include this claim in its court-ordered Rule 1925(b) Statement. Therefore, Appellant has waived its first claim on appeal. Pa.R.A.P. 1925(b)(4)(vii) ("[i]ssues not included in the [Rule 1925(b)] Statement . . . are waived").

For Appellant's second claim on appeal, Appellant contends that the trial court erred in refusing to strike the judgment because "the loan documents are ambiguous as to whether a warrant of attorney is present." Appellant's Brief at 4. This claim is meritless.

Within Appellant's brief to this Court, Appellant acknowledges that the March 17, 2005 Note and the ten modifications to the Note – including the September 1, 2010 Allonge – contain a valid warrant of attorney to confess judgment. ***See*** Appellant's Brief at 25. Moreover, Appellant acknowledges that the March 17, 2005 Loan Agreement contains a valid warrant of attorney to confess judgment. ***See id.*** at 24. Appellant, however, claims that, since the September 1, 2010 **Amendment to the Loan Agreement** does not restate the warrant of attorney that is contained in the original Loan Agreement, "the ultimate contract between [Appellant] and VIST

[Bank] contains no warrant of attorney and the [c]onfessed [j]udgment must be stricken." ***Id.*** at 25.

Appellant's claim is meritless, as VIST Bank did not confess judgment upon the warrant of attorney contained in the Loan Agreement. Rather, within VIST Bank's complaint for confession of judgment, VIST Bank specifically declared that it sought "to confess judgment against [Appellant] **on the Note**, as authorized **by the warrant of attorney contained in the Note** and executed by [Appellant]," in the amount of $1,760,081.37. VIST Bank's Complaint for Confession of Judgment, 2/8/11, at ¶ 11 (emphasis added).

Moreover, the warrant of attorney to confess judgment contained in the Note was triggered when Appellant breached its obligations under the Note. Specifically, Appellant breached its "promise[] to pay [VIST Bank] . . . the principal sum of [$1,650,000.00]," with the "entire unpaid principal sum . . . due and payable without further notice or demand" by January 1, 2011. Secured Line of Credit Note, dated 3/17/05, at 1; Allonge to Note, dated 9/1/10, at ¶ 1.

Therefore, since the instrument upon which VIST Bank confessed judgment does, in fact, contain a valid warrant of attorney to confess judgment – and since the confession of judgment clause contained in the

Note was triggered by Appellant's default under the terms of the Note – Appellant's claim on appeal necessarily fails.[5]

We will consider Appellant's final two claims together. Within these claims, Appellant contends that the trial court erred in refusing to either strike or open the judgment, as the judgment improperly includes $83,813.40 in attorneys' fees. Specifically, Appellant claims that the trial court erred in refusing to strike the judgment because the amount of attorneys' fees was grossly excessive.[6] Appellant also claims that the trial

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[5] As has already been explained, even though the September 1, 2010 Amendment to the Loan Agreement did not contain a warrant of attorney to confess judgment, the Amendment to the Loan agreement also did not contain any language that renounced, eliminated, or otherwise altered the warrant of attorney to confess judgment that was contained in the March 17, 2005 Loan Agreement. Moreover, the Amendment to the Loan Agreement essentially amended only the maturity date on the original Loan Agreement – and, within the Amendment to the Loan Agreement, Appellant "ratified and confirmed . . . [a]ll terms and conditions of the Loan Agreement and other Loan Documents not inconsistent" with the Amendment to the Loan Agreement. Amendment and Modification to Loan Agreement, dated 9/1/10, at ¶ 9. We observe (without holding) that, under these circumstances, it appears as though VIST Bank could have also confessed judgment under the warrant of attorney contained in the Loan Agreement. ***See Graystone Bank v. Grove Estates, L.P.***, 58 A.3d 1277 (Pa. Super. 2012), *aff'd* 81 A.3d 880 (Pa. 2013).

[6] On appeal, Appellant also claims that the attorneys' fees constitute an "unenforceable penalty." ***See*** Appellant's Brief at 16, 19-20. This claim was not included in Appellant's Petition to Strike or Open Judgment or in Appellant's Rule 1925(b) Statement. Therefore, the claim is waived. Pa.R.C.P. 2959(c) ("[a] party waives all defenses and objections which are not contained in the petition [to strike or open a confessed judgment] or [the] answer"); Pa.R.A.P. 1925(b)(4)(vii) ("[i]ssues not included in the [Rule 1925(b)] Statement . . . are waived").

court erred in refusing to open the judgment, as Appellant produced evidence that VIST Bank's actual attorneys' fees did not "even remotely approach the $83,813.40 included in the [c]onfessed [j]udgment." Appellant's Brief at 29. Both claims fail.

"In cases where the judgment was grossly excessive or unauthorized by the instrument . . . a motion to strike will be granted." ***Talacki***, 657 A.2d at 1291. However, "[a] challenge to the accuracy of the amounts allegedly due under the instrument, or an error in computation, should be resolved in a petition to open." ***Id.***

Here, Appellant agreed that, if it defaulted upon the Loan Documents, it authorized and empowered:

> any attorney of record, or the prothonotary . . . to confess or enter judgment against [Appellant] for all sums payable by [Appellant] to [VIST Bank] under the Loan Documents, as evidenced by an affidavit signed by a duly authorized designee of [VIST Bank] setting forth such amount then due from [Appellant] to [VIST Bank], with costs of suit, plus attorney's commission equal to five (5%) percent of the aggregate of such sums, and [Appellant] acknowledges that attorneys' fees are stated to be five (5%) percent solely for purposes of fixing a sum certain for which judgment can be entered by confession and agrees that in enforcing any such judgment, [VIST Bank] shall not demand, solely with respect to attorneys' fees incurred by [VIST Bank] in connection with such indebtedness after such judgment is rendered, any amounts in excess of the actual amount of reasonable attorneys' fees charged or billed to [VIST Bank] (which attorneys' fees shall be charged or billed to the [VIST Bank] at the standard hourly rates), with release of procedural errors and without right of appeal.

Allonge to Note, dated 9/1/10, at ¶ 6 (internal emphasis and some internal capitalization omitted).

Under this clause, Appellant agreed that – in the event of a default – it authorized the confession of judgment against it in an amount equal to: "all sums payable by [Appellant] to [VIST Bank] under the Loan Documents," plus costs of suit, plus "attorney's commission equal to five (5%) percent of the aggregate of such sums." ***Id.*** Appellant also agreed that "attorneys' fees are stated to be five (5%) percent **solely for purposes of fixing a sum certain for which judgment can be entered by confession**" and that, "**in enforcing any such judgment**," VIST Bank shall not demand "any amounts in excess of the **actual amount of reasonable attorneys' fees** charged or billed to [VIST Bank]." ***Id.*** (emphasis added).

Thus, as written, the attorneys' fees provision in the confession of judgment clause is protective of Appellant's interests, as the provision ensures that Appellant will not pay more than "the actual amount of reasonable attorneys' fees charged or billed to [VIST Bank]." ***Id.*** Indeed, the clause contemplates the following procedure: 1) the Lender confesses judgment against the Borrower and includes, in the confessed judgment, attorneys' fees in the amount of 5% of all sums due; 2) the Lender serves the Borrower with a Rule 2958.1 Notice – and thus begins to attempt to "enforce" the judgment; 3) after being served with the Rule 2958.1 Notice, the Borrower may either do nothing – and trust that the Lender will not execute against more than "the actual amount of reasonable attorneys' fees

charged or billed to" the Lender – or the Borrower may file a petition to open the confessed judgment and challenge the "accuracy of the amounts [actually] due [for attorneys' fees] under the instrument," ***see*** Allonge to Note, dated 9/1/10, at ¶ 6; 4) if the petition to open "states prima facie grounds for relief" (for example, if it alleges that the "actual amount of reasonable attorneys' fees charged or billed to" the Lender is less than the amount contained in the confessed judgment), the trial court "shall issue a rule to show cause" as to why the petition to open should not be granted, Pa.R.C.P. 2959(b) (stating the procedure to be followed after a petition to strike or open a confessed judgment has been filed); and, 5) "[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury[, the trial] court shall open the judgment," Pa.R.C.P. 2959(e).

With respect to the denial of its petition to strike the confessed judgment, Appellant does not dispute the fact that $1,676,267.97 constitutes "all sums payable by [Appellant] to [VIST Bank] under the Loan Documents" – or that the $83,813.40 in attorneys' fees constitutes 5% of $1,676,267.97. ***See*** Appellant's Brief at 13-31; Allonge to Note, dated 9/1/10, at ¶ 6. Rather, Appellant simply claims that confessed judgment must be stricken because the $83,813.40 in attorneys' fees was grossly excessive.

Looking solely to 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," the 5% amount is not grossly excessive.[7] ***Resolution Trust Corp.***, 683 A.2d at 273. Indeed, this Court has previously held that attorneys' fees for **15%** of the amount due was not grossly excessive and that the inclusion of such an amount in the confessed judgment did not require that the judgment be stricken. ***Rait Partnership, L.P. v. E Pointe Properties I, Ltd.***, 957 A.2d 1275 (Pa. Super. 2008); ***see also Dollar Bank, Fed. Sav. Bank***, 637 A.2d at 313-314 (also holding that 15% attorneys' fee assessment was not grossly excessive). Therefore, the trial court did not err in refusing to strike the judgment.

Appellant also claims that the trial court erred in refusing to open the judgment, as Appellant produced evidence that VIST Bank's attorneys' fees "have not and will not remotely approach the $83,813.40 included in the

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[7] Within Appellant's brief to this Court, Appellant argues that – in determining whether the judgment must be stricken for inclusion of "grossly excessive" attorneys' fees – we should consider "whether the fees were excessive in relation to the legal services reasonably needed." Appellant's Brief at 18. This argument fails on its face, as it demands that this Court to consider evidence outside of "the record as filed by the party in whose favor the warrant [was] given*, i.e.*, the complaint and the documents which contain confession of judgment clauses." ***Resolution Trust Corp.***, 683 A.2d at 273. As stated above, our scope of review simply does not permit this Court to consider any such evidence. ***Id.*** Therefore, Appellant's claim fails.

[c]onfessed [j]udgment." Appellant's Brief at 29.[8] This claim fails because the certified record contains no evidence, whatsoever, of the amount of attorneys' fees VIST Bank actually incurred.

We have explained:

> A petition to open [a confessed judgment] 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.

Hazer v. Zabala, 26 A.3d 1166, 1169 (Pa. Super. 2011) (internal quotations, citations, and corrections omitted) (emphasis added).

Moreover, Pennsylvania Rule of Civil Procedure 2959 sets forth the procedure for striking off or opening a confessed judgment. With respect to

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[8] On appeal, Appellant also claims that the trial court erred in refusing to open the confessed judgment because "the parties did not clearly and unambiguously agree to the inclusion of a warrant of attorney to confess judgment in the final modification to the contract between them." Appellant's Brief at 29. Yet, as stated above, VIST Bank confessed judgment against Appellant "on the Note, as authorized by the warrant of attorney contained in the Note and executed by [Appellant]." VIST Bank's Complaint for Confession of Judgment, 2/8/11, at ¶ 11. Moreover, VIST Bank confessed judgment on the Note because Appellant defaulted upon the terms of the Note. Since the Note clearly contains a warrant of attorney to confess judgment, the agreement is not ambiguous and, therefore, Appellant could not introduce parol evidence to contradict the plain terms of the Note. ***Frank v. Frank***, 587 A.2d 340, 343 (Pa. Super. 1991) ("[a]ppellant is attempting to create an ambiguity by parol evidence where the agreement is not ambiguous on its face, an effort barred by the parol evidence rule") (internal quotations and citations omitted). The trial court thus did not abuse its discretion when it refused to open the judgment on this basis.

a petition to open a confessed judgment, Rule 2959 provides in relevant part:

> (a)(1) Relief from a judgment by confession shall be sought by petition. Except as provided in subparagraph (2), all grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition. . . .
>
> . . .
>
> (b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. . . .
>
> . . .
>
> (e) The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence. The court for cause shown may stay proceedings on the petition insofar as it seeks to open the judgment pending disposition of the application to strike off the judgment. If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.

Pa.R.C.P. 2959.

In the case at bar, after Appellant filed its Petition to Strike or Open Judgment, the trial court issued a rule to show cause upon VIST Bank and ordered that discovery commence on Appellant's Petition. As recited above, during discovery, Appellant requested that VIST Bank produce "[d]ocuments concerning [VIST] Bank's attorneys' fees for this action." Request for Production of Documents, dated 2/23/12, at 8. However, VIST Bank objected to Appellant's request and the certified record contains **no**

evidence that VIST Bank ever produced **any document** relating to the attorneys' fees it actually incurred in this case.[9] Moreover, even though Appellant filed a motion to compel discovery with the trial court, the trial court denied Appellant's motion to compel by order entered on June 18, 2012.[10] Therefore, as the record now stands, there is no evidence as to the

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[9] Within Appellant's brief to this Court, Appellant complains that VIST Bank "produced only 'bottom-line' monthly invoices showing only post-judgment fees and revealing neither the rates nor the work performed." Appellant's Brief at 29. However, the certified record does not contain these alleged monthly invoices. As such, we must consider the alleged invoices to be non-existent. ***Commonwealth v. Kennedy***, 868 A.2d 582, 593 (Pa. Super. 2005) ("this Court may not consider anything that is not part of the official certified record: [a]ny document which is not part of the official certified record is considered to be non-existent") (internal quotations and citations omitted); ***Bryant v. Glazier Supermarkets, Inc.***, 823 A.2d 154, 156 (Pa. Super. 2003) ("[i]t is the obligation of the appellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal") (internal quotations, citations, and corrections omitted).

[10] Neither Appellant's Rule 1925(b) Statement nor Appellant's brief to this Court claim that the trial court erred when it denied Appellant's motion to compel discovery. Appellant's Rule 1925(b) Statement contains no such claim; Appellant's brief to this Court merely states:

> Should any doubt exist as to the sufficiency of the evidence [Appellant] has produced, [Appellant] must point out to this Court that [Appellant] requested all such time and expenses, but VIST [Bank] refused to produce them, and the trial court declined to compel VIST [Bank] to do so.

Appellant's Brief at 30.

The above statement is a factual declaration; it does not assert any claim that the trial court erred in denying Appellant's motion to compel. ***See Commonwealth v. Hallman***, 67 A.3d 1256, 1263 (Pa. Super. 2013) ("this

(Footnote Continued Next Page)

amount of attorneys' fees VIST Bank actually incurred in this case. This is fatal to Appellant's claim on appeal. Indeed, since there is no evidence that VIST Bank's actual attorneys' fees were less than the $83,813.40 contained in the confessed judgment, Appellant has failed to produce evidence "which in a jury trial would require [Appellant's] issues to be submitted to the jury." Pa.R.C.P. 2959(e); ***see also Hazer***, 26 A.3d at 1169 ("[a] petition to open . . . 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**") (emphasis added).

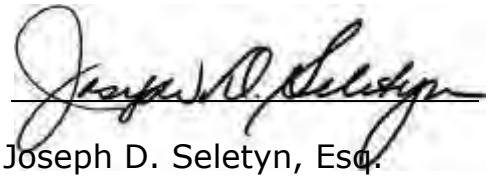
Appellant was thus not entitled to have the confessed judgment opened and the trial court was within its discretion when it denied Appellant's Petition. Appellant's claim on appeal fails.

Order affirmed.

(Footnote Continued) ———————————

Court may not act as counsel for an appellant and develop arguments on [its] behalf") (internal quotations and citations omitted). Further, even if the declaration could be read as asserting a claim of trial court error, the claim would be waived because Appellant did not include the claim in its Rule 1925(b) Statement. Pa.R.A.P. 1925(b)(4)(vii) ("[i]ssues not included in the [Rule 1925(b)] Statement . . . are waived").

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014