NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PHILADELPHIA COMMERCIAL DEVELOPMENT CORPORATION, v. IRVING FRYAR REALTY, INC. AND IRVING D. FRYAR, SR. Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2611 EDA 2014

Appeal from the Order Entered August 5, 2014
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: May Term, 2014 No. 140501413

BEFORE: BOWES, MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 31, 2015**

Appellants, Irving D. Fryar, Sr. and Irving Fryar Realty, Inc. ("IFRI"), appeal from the order entered in the Philadelphia County Court of Common Pleas denying their petition to strike or open the confessed judgment in favor of Appellee, Philadelphia Commercial Development Corporation. Appellants argue the trial court erred in finding Appellee had standing and that the parties' surety agreement was an instrument under seal and thus subject to a twenty-year statute of limitations. We affirm.

The trial court summarized:

> In 2006, Irving D. Fryar formed [IFRI] to provide opportunities for minorities in the real estate field. On June 20, 2007, [IFRI] borrowed [$60,000] from Minority

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* Former Justice specially assigned to the Superior Court.

> Ventures Partners, LTD ("MVP")[.] Fryar, individually as the surety and in his corporate capacity as the principal, executed an Indemnity and Suretyship Agreement in connection with the Promissory Note. In 2007, [IFRI] defaulted on the Promissory Note for failing to perform its obligations under the note.[[1] Seven years later, o]n May 13, 201[4, Appellee], a limited partner of MVP, filed a complaint confessing judgment against [Appellants] in the amount of $60,000 plus interest. . . .

Trial Ct. Op., 10/10/14, at 1.

On July 1, 2014, Appellants filed the underlying petition to strike or open the confessed judgment,[2] arguing: (1) Appellee lacked standing; and (2) Appellee's claims were based in contract and thus the applicable four-year statute of limitations had expired. The trial court did not issue a rule to show cause, but Appellee filed a response to Appellants' petition on July 24th. Thereafter, the court, "upon consideration of [Appellants'] Petition to Open or Strike . . . and [Appellee's] response in opposition," issued a scheduling order for oral argument "to show cause . . . why said Petition should/and or should not be granted." Order, 7/28/14. The court heard argument on August 5, 2014, and denied Appellants' petition to strike the same day.[3] Specifically, the court found (1) Appellee had standing under 15

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[1] On appeal, Appellants concede IFRI "defaulted on its payments under the Note shortly after the agreements were entered into." Appellants' Brief at 3.

[2] Appellants' motion requested the trial court to both open and strike the confessed judgment. For ease of discussion we henceforth refer to the petition simply as the "petition to strike."

[3] The court also awarded Appellee attorneys' fees and costs. Order, 8/5/14.

Pa.C.S. § 8579, as MVP's limited partner, to wind up the affairs of MVP after it dissolved; (2) the surety agreement was an instrument under seal and thus subject to a twenty-year statute of limitations under 42 Pa.C.S. § 5529; and (3) the promissory note, however, was not an instrument under seal.

Appellants filed a timely notice of appeal on September 4, 2014. The trial court did not order a Pa.R.A.P. 1925(b) statement, but filed an opinion on October 10, 2014, addressing the merits of Appellants' arguments.

Appellants' first claim on appeal is that the trial court erred in not striking the complaint for Appellee's alleged lack of standing. For ease of disposition, we first note the following. As stated above, on June 20, 2007, IFRI executed a promissory note with MVP, and Fryar executed an indemnity and suretyship agreement with MVP. Appellee's May 13, 2014 complaint in confession of judgment averred its relationship to MVP as follows:

> 1. [Appellee] is . . . a Pennsylvania non-profit corporation[.]
>
> 2. [Appellee] is the sole limited partner of [MVP], a Pennsylvania limited partnership, whose general partner was Curtis Jones.
>
> 3. Subsequent to the formation of the partnership, Curtis Jones resigned as the sole general partner.
>
> 4. In accordance with 15 Pa.C.S. 8753, [Appellee] brings this action as the limited partner of MVP charged with winding up the affairs of MVP with the aforesaid statute.

Appellee's Comp. in Confession of J., 5/13/14, at ¶¶ 1-4. Attached to the complaint were two exhibits: IFRI's promissory note with MVP and Fryar's surety agreement with MVP.

Appellants filed their motion to strike, and Appellee filed a response. With respect to the standing claim, Appellee averred it was

> authorized to execute all documents and take all actions as may be required to effectuate the complete winding up of the affairs and dissolution of MVP in accordance with MVP's Plan of Complete Liquidation, as set forth in one or more Consents in Writing of the Sole Limited Partner, executed between September 10-19, 2013.

Appellee's Resp. in Opp. to Appellants' Pet. to Strike, 7/24/14, at ¶ 10.

The trial court held the above paragraphs of Appellee's **complaint** demonstrated it was "the real party in interest and was authorized to confess judgment against" Appellants. Trial Ct. Op. at 3. The court noted both the promissory note and surety agreement "contemplated the possibility of assignment to a successor or assign by providing that 'this Note shall be binding upon the undersigned and its successors and assigns[.']" ***Id.*** at 4. The court also found the "Written Consents," attached to Appellee's response to Appellants' motion to strike, "clearly authorizes it to execute all documents to take all actions required to effectuate the complete winding up of the affairs and dissolution of MVP." ***Id.*** at 4.

On appeal, Appellants assert the trial court erred "by considering documents submitted outside of the Complaint," specifically the "written consents and a plan of liquidation" attached to Appellee's response to the

petition to strike. Appellants' Brief at 7-8. Appellants maintain the proper "record" for reviewing a petition to strike—limited to Appellee's complaint and its exhibits, the promissory note and surety agreement—fail to demonstrate when MVP dissolved or that Appellee had "authority" to file the complaint, that Appellee "is truly the limited partner of MVP," and that even if it were, "that the partnership would even permit the limited partner to pursue litigation on behalf of the partnership." ***Id.*** at 7. We find no relief is due.

"In examining the denial of a petition to strike or open a confessed judgment, we review the order for an abuse of discretion or error of law." ***Ferrick v. Bianchini***, 69 A.3d 642, 647 (Pa. Super. 2013). "A petition to strike a confessed judgment and a petition to open a confessed judgment are distinct remedies[.]" ***Midwest Fin. Acceptance Corp. v. Lopez***, 78 A.3d 614, 623 (Pa. Super. 2013).

> "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."
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> **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[4] is given, *i.e.*, the complaint and the**

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[4] Elsewhere in the opinion, this Court discussed the "warrant:"

> Historically, Pennsylvania law has recognized and permitted entry of confessed judgments pursuant to 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. . . . An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.
>
> In other words, the petition to strike a confessed judgment must focus on any defects or irregularities appearing on the face of the record, as filed by the party in whose favor the warrant was given, which affect the validity of the judgment and entitle the petitioner to relief as a matter of law. "[T]he record must be sufficient to sustain the judgment." **The original record that is subject to review in a motion to strike a confessed judgment consists of the complaint in confession of judgment and the attached exhibits.**

Id. at 622-23 (citations omitted) (emphases added).

Rule 2959(e), however, provides further guidance on what a court may review when it issues a rule to show cause on the plaintiff:

> (b) If the petition [to strike of open a confessed judgment] 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. . . .
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> * * *

> authority of a warrant of attorney contained in a written agreement. "[A] warrant of attorney is a contractual agreement between the parties and the parties are free to determine the manner in which the warrant may be exercised." . . .

Midwest Fin. Acceptance Corp., 78 A.3d at 623 (citations omitted).

> (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(b), (e).

Finally, we note that in its complaint, Appellee cited 15 Pa.C.S. § 8573, "Winding up," which states:

> Except as otherwise provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, or a person approved by the limited partners or, if there is more than one class or group of limited partners, by each class or group of limited partners, in either case by a majority in interest of the limited partners in each class or group, **may wind up the affairs of the limited partnership**, but the court may wind up the affairs of the limited partnership upon application of any partner, his legal representative or assignee, and in connection therewith, may appoint a liquidating trustee. ***See*** section 139(b) (relating to tax clearance in judicial proceedings).

See 15 Pa.C.S. § 8573 (emphasis added).

We agree with Appellants that the exhibits attached to Appellee's complaint—the 2006 promissory note and surety agreement—fail to support the claims in the complaint that Appellee was a limited partner of MVP, MVP dissolved, and thus Appellee had standing or authority to seek confessed judgment. Although, as the trial court notes, the promissory note and surety agreement "contemplated the possibility of assignment to a successor

or assign," they do not identify Appellee as a successor or assignee. ***See*** Trial Ct. Op. at 4.

Instead, as noted by the trial court, it was the written consents attached to Appellee's response to the petition to strike which supported the complaint's averments. Appellants' argument that the court's review was limited to the complaint and its exhibits ignores Rule 2959(e), which allows the court to consider the "petition **and answer, and** . . . any testimony, depositions, admissions **and other evidence**." ***See*** Pa.R.C.P. 2959(e) (emphasis added). Although the court did not issue rule to show cause prior to Appellee's filing a response to Appellants' petition, it subsequently directed the parties to appear for argument "to show cause . . . why [Appellants'] petition should and/or should not be granted." ***See*** Order, 7/28/14. Thus, the court could "dispose of the rule on" Appellants' petition to strike, Appellee's response, "and any other evidence." ***See*** Pa.R.C.P. 2959(e). We thus find no relief due on Appellants' claim that the court erred in considering documents attached to Appellee's response. We further agree with the trial court that the "Written Consents clearly authorizes [Appellee] to execute all documents to take all actions required to effectuate the complete winding up of the affairs and dissolution of MVP." ***See*** Trial Ct. Op. at 5. Accordingly, we conclude no relief is due on Appellants' standing claim.

Appellants' second claim on appeal is that the court erred in denying their petition to open the confessed judgment based on the statute of

limitations. Appellants challenge the court's finding that Fryar's surety agreement is an instrument under seal and thus a twenty-year statute of limitations under 42 Pa.C.S. § 5529 applied.[5] Appellants first contend the surety agreement was not under seal.[6] Appellants' Brief at 11. They aver that although the word "sealed" appears above the signature line, there is no "actual seal as required by Pennsylvania law," no inclusion of the word "SEAL" or "L.S." in the signature line, and "no printed seal or impression." ***Id.*** at 13. Appellants also point out the terms of the promissory note were only for four years, and allege public policy "weigh in favor of this not being an instrument under seal," where Section 5529 will expire in 2018. Appellants' second argument is that even if the surety agreement were an instrument under seal, it "is collateral to and dependent upon the obligations of the Note," and "since any action on the Note is indisputably time-barred, any obligations under the Surety Agreement are unenforceable." ***Id.*** at 14, 15 (citing 68 Tex. Jur. 3d Suretysip & Guaranty § 206; ***Stan Weber & Assoc., Inc. v. Goodlett***, 402 So.2d 745, 746 (La. App. 4th Cir. 1981)). Appellant's third contention is a challenge to Appellee's invocation of the "acknowledgment doctrine," under which "a statute of limitations may be tolled or its bar removed by a promise to pay the debt." Appellants' Brief at

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[5] As stated above, the trial court found the promissory note was not an instrument under seal. Trial Ct. Op. at 4 n.7.

[6] Appellants concede the surety agreement is an "instrument" under Section 5529. Appellants' Brief at 10.

15-16. Appellants maintain that Appellee concedes that when Fryar met with Appellee's counsel and others in August of 2013, he "acknowledged . . . that he owed the debt . . . but he just did not want to pay back the full amount claimed by" Appellee. ***Id.*** at 17. Appellants assert Fryar's refusal to repay the entire debt was "not an unequivocal and unqualified statement required by" the acknowledgment doctrine. ***Id.*** We find no relief is due.

As stated above, we review the denial of a petition to open a confessed judgment for an abuse of discretion or error of law. ***Ferrick***, 69 A.3d at 647. "A petition to open a confessed judgment is an appeal to the equitable powers of the court." ***Midwest Fin. Acceptance Corp.***, 78 A.3d at 623. "To open a judgment, a party must allege a meritorious defense." ***Hazer v. Zabala***, 26 A.3d 1166, 1169 (Pa. Super. 2011).

The Judicial Code provides that generally, "[a]n action upon a contract, obligation or liability founded upon a writing" "must be commenced within four years." 42 Pa.C.S. § 5525(a)(8). "[A]n action upon an instrument in writing under seal," however, "must be commenced within 20 years."[7] 42 Pa.C.S. § 5529(b)(1).

"[T]his [C]ourt has held, in accord with many cases written by our Supreme Court, that when a party signs [an instrument] which contains a pre-printed word 'SEAL,' that party has presumptively signed [an

[7] "This subsection shall expire June 27, 2018." 42 Pa.C.S. § 5529(b)(2).

instrument] under seal." ***In re Estate of Snyder***, 13 A.3d 509, 513 (Pa. Super. 2011). In ***Estate of Snyder***, this Court held that where mortgage documents "categorically specify that each instrument was signed under seal," the twenty-year statute of limitations under Section 5529(b)(1) applied. ***Id.***

In the instant matter, the last page of the surety agreement states:

> *IN WITNESS WHEREOF,* the *PRINCIPAL* and *SURETY* have caused this *INDEMNITY AND SURETYSHIP* to be duly executed and **sealed** as of this Twentieth day of June, 2007.
>
> [**IFRI**]
>
> *Attest* [signed] *Witness* — *By:* [signed]. *(PRINCIPAL) Irving D. Fryar, Sr. CEO*
>
> *Date:* 6/20/97 — *By:* [signed]. *(SURETY)*
>
> [**MVP**]
>
> *Attest* [signed] *Witness* — *By:* [signed] 6/20/07 *Date*

Indemnity & Suretyship, exec. 6/20/07, at 6 (emphasis added). The trial court held the surety agreement was "signed under seal," quoting the language above the signature lines. Trial Ct. Op. at 5.

We note Appellants' brief cites to authority from our sister states and

the federal courts.[8] These decisions, however, are not binding on this Court. Instead, we find ***Estate of Snyder*** is instructive. Here, the passage above the signature line states the parties "have caused" the agreement "to be duly executed and **sealed**." Indemnity & Suretyship at 6. Pursuant to ***Estate of Snyder***, we agree with the trial court that this language suffices to cause the agreement to be under seal. Accordingly, we do not disturb its holding that the twenty-year statute of limitations of Section 5529(b)(1) applied.

Furthermore, Appellants' sole authority for their reasoning—that the surety agreement is not enforceable because the underlying promissory note is no longer enforceable—is a Louisiana decision. In the absence of any binding Pennsylvania authority, we find no relief is due. ***See Commonwealth v. Plante***, 914 A.2d 916, 924 (Pa. Super. 2006) (noting failure to develop argument with citation to and analysis of relevant authority waives issue on review). Because Appellants failed to raise a meritorious statute of limitations defense, the trial court did not abuse its discretion or err in denying their motion to open. ***See Hazer***, 26 A.3d at 1169. Finding no basis for relief, we affirm the order of the trial court denying Appellants' motion to strike or open the confessed judgment.

Order affirmed.

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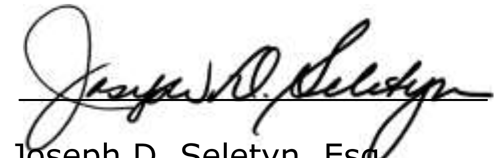
[8] ***See*** Appellants' Brief at 11, 12, 13, 14 (citing decisions from federal Third Circuit, bankruptcy court of Maryland, and states of Delaware and Louisiana, as well as Texas statute).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015