

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

NICK LYKON,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
JILL AND TIMOTHY WYMORE,	:	
Appellants	:	No. 3412 EDA 2012

Appeal from the Order entered on November 8, 2012  
in the Court of Common Pleas of Montgomery County,  
Civil Division, No. 2011-29464

NICK LYKON,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
SPUDS, INC., LLC,	:	
Appellant	:	No. 3413 EDA 2012

Appeal from the Order entered on November 8, 2012  
in the Court of Common Pleas of Montgomery County,  
Civil Division, No. 2011-29495

NICK LYKON,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
LEANN R. AND STEVEN BRUNER,	:	
Appellants	:	No. 3414 EDA 2012

Appeal from the Order entered on November 8, 2012  
in the Court of Common Pleas of Montgomery County,  
Civil Division, No. 2011-29503

NICK LYKON,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MAURICE BIRT,	:	
	:	
Appellant	:	No. 3416 EDA 2012

Appeal from the Order entered on November 8, 2012  
in the Court of Common Pleas of Montgomery County,  
Civil Division, No. 2011-29506

BEFORE: BENDER, P.J., DONOHUE and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 23, 2013**

In these consolidated appeals, Jill Wymore, Timothy Wymore, Spuds Inc., LLC ("Spuds"), Leann R. Bruner, Steven Bruner, and Maurice Birt (collectively "the Defendants") appeal from the Order that denied their Petitions to Strike and/or Open the judgment confessed against them and in favor of Nick Lykon ("Lykon"). We affirm.

The trial court summarized the history underlying this appeal as follows:

This is an action by [Lykon] to collect a commercial loan made to Spuds [], said loan being personally guaranteed by the other five defendants. On October 3, 2011, [Lykon] confessed judgment against all [of the D]efendants, attaching copies of the notarized Promissory Note, evidencing the loan, and the notarized Guaranty and Suretyship Agreements, evidencing the personal guarantees. The Montgomery County Prothonotary entered judgment [against the Defendants] in the amount of \$1,072,337.57.

On November 18, 2011[,] and November 23, 2011, the [D]efendants filed substantially identical [P]etitions to strike and/or open the confessed judgments,<sup>1</sup> all represented by the same legal counsel. [T]he [D]efendants alleged that the loan was part of a financing arrangement by which [Lykon] sold his pre-existing business. The sole ground for relief alleged was that the business, now under new ownership, could not afford to repay the loan out of earnings because [Lykon] "violated a non-comp[ete] clause and interfered with business relationship[s]." [Petition to Open/Strike, 11/18/11, at ¶ 3.] On December 23, 2011, [Lykon] timely filed [A]nswers effectively denying the [D]efendants' allegations. ... All four cases were consolidated ...

On November 8, 2012, the matter came [] before the [trial court] for oral argument. The [D]efendants' counsel failed to appear, and failed to file briefs[. Additionally,] the [D]efendants' [Petition to Open/Strike was] wholly without evidentiary support, as the [D]efendants had filed no deposition transcript, affidavit, document or admission in support of [the Petition]. Accordingly, the [trial] court entered an [O]rder denying the [Petition] on the express ground that the [D]efendants [had] failed to appear.

On November 21, 2012, the [D]efendants filed a [M]otion for reconsideration[,] attributing counsel's failure to appear wholly to a "scheduling error." Apart from that, the [D]efendants argued that their [Petition] should be granted because they adequately alleged that [Lykon] committed misconduct and that [Lykon] failed to proffer evidence to rebut their allegations. The [trial] court denied the [D]efendants' [M]otion for reconsideration by [an O]rder entered [on] December 4, 2012.

Trial Court Opinion, 2/4/13, at 1-2 (citations omitted, footnote added).

The Defendants timely filed an appeal, presenting the following issue for our review: "When presented with silence in the face of allegations of

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<sup>1</sup> Because the Defendants' separate Petitions to Open/Strike are essentially identical, we will hereinafter refer to them as a single Petition, in the interest of clarity.

misconduct, must the lower court refer a confession of judgment action to a jury?" Brief for the Defendants at 3 (capitalization omitted).

The Defendants argue that the trial court abused its discretion when it denied their Petition to Open/Strike the confessed judgment. *Id.* at 5.<sup>2</sup> "In examining the denial of a petition to ... 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); *see also Stahl Oil Co. v. Helsel*, 860 A.2d 508, 512 (Pa. Super. 2004) (stating that a trial court's ruling on a petition to open a confessed judgment may not be disturbed absent a manifest abuse of discretion).

Pennsylvania Rule of Civil Procedure 2959 prescribes the petition process for relief from a judgment by confession. A petition to open a confessed judgment is an appeal to the equitable powers of the court; as such, a judgment may only be opened where the petitioner (1) acts promptly; (2) alleges a meritorious defense; and (3) produces sufficient evidence to require submission of the case to a jury. *Hazer v. Zabala*, 26 A.3d 1166, 1169 (Pa. Super. 2011); *see also Iron Worker's Sav. & Loan Ass'n v. IWS, Inc.*, 622 A.2d 367, 370 (Pa. Super. 1993) (observing that,

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<sup>2</sup> In their brief, the Defendants allege that the trial court erred in failing to open, rather than strike, the confessed judgment. *See* Brief for the Defendants at 5; *see also Resolution Trust Corp. v. Copley Qu-Wayne Assocs.*, 683 A.2d 269, 273 (Pa. 1996) (stating that "[a]lthough a petition to strike and a petition to open are properly brought in the same petition, ... a petition to strike and a petition to open are two distinct forms of relief, each with separate remedies."). Accordingly, we will consider the Defendants' Petition as a Petition to Open.

“[t]raditionally, a confessed judgment will be opened in only a limited number of circumstances ....”). In determining whether the petitioner presented a meritorious defense, the petition requires clear, direct, precise and believable evidence. **Stahl Oil Co.**, 860 A.2d at 512. Additionally, “[w]hen determining a petition to open a judgment, matters *dehors* [or outside of] 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 Corp.**, 683 A.2d at 273.

In the instant case, the Defendants neither demonstrated the existence of a meritorious defense, nor produced clear, direct, precise or believable evidence sufficient to warrant the opening of the confessed judgment. The Defendants’ Petition to Open baldly asserted that the confessed judgment must be opened because Lykon “violated a non-comp[lete] clause and interfered with business relationship[s].” Petition to Open, 11/18/11, at ¶ 3. The Defendants failed to present *any* evidence in support of this allegation.<sup>3</sup> Likewise, the Defendants’ Motion for Reconsideration merely offers an excuse for the failure of the Defendants’ counsel to attend the November 8, 2012 hearing, without setting forth any evidence or argument that would have been raised at the hearing.

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<sup>3</sup> The Defendants failed to attach to their Petition to Open any affidavits or other documents to support their claim, choosing instead to rely solely upon conclusory statements. The record further reveals that the Defendants failed to conduct any discovery, despite being offered the opportunity.

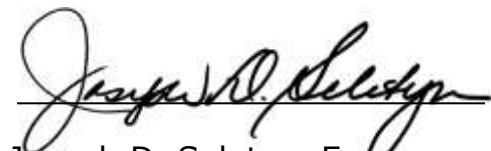
The Defendants argue that they are entitled to relief because Lykon allegedly failed to rebut their claim in the Petition to Open that Lykon had violated a non-compete clause and interfered with the Defendants' business relationships. **See** Brief for the Defendants at 5 (arguing that "Pennsylvania law is clear[] [that] silence is an admission. **Chambers v. Montgomery**, 192 A.2d 3[55, 357] ([Pa.] 1963)[.] [Lykon's] silence created a fact issue, which must be examined by a Jury."). We disagree.

Lykon filed a response in opposition to the Defendants' Petition to Open, asserting, *inter alia*, that the Defendants' failure to present a meritorious defense (or any evidence in support of such defense) was fatal to their request that the judgment be opened. Contrary to the Defendants' assertion on appeal, Lykon was not required to specifically deny their conclusory, unsupported claim in the Petition to Open.

Accordingly, because the Defendants failed to meet their burden in demonstrating evidence required to open the confessed judgment, the trial court properly exercised its discretion in denying their Petition to Open.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/23/2013