NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

FIRST NATIONAL COMMUNITY BANK, Appellee v. THE POWELL LAW GROUP, P.C., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1512 MDA 2012

Appeal from the Order of July 31, 2012,
in the Court of Common Pleas of Luzerne County,
Civil Division at No. 9751 L 2011

BEFORE: DONOHUE, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: **FILED SEPTEMBER 06, 2013**

This is an appeal from an order purporting to deny Appellant's petition to strike a confessed judgment and to grant in part Appellant's petition to open the same confessed judgment. In addition, Appellee has filed in this Court a motion to quash this appeal.[1] We deny the motion to quash and affirm the order.

The background underlying this matter can be summarized in the following manner. On July 26, 2011, Appellee First National Community

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[1] In its motion to quash, Appellee asks this Court to quash or dismiss this appeal due to Appellant's failure to comply with a number of the Rules of Appellate Procedure. Appellant's alleged failure to comply with the rules cited by Appellee in no way hampers our ability to review this matter. Consequently, we deny Appellee's motion.

*Retired Senior Judge assigned to the Superior Court.

Bank ("Appellee") filed a complaint in confession of judgment against Appellant The Powell Law Group, PC ("Appellant"). Appellee averred that, on or about April 28, 2004, Big Kahuna Realty, LLC ("Big Kahuna") borrowed the principal amount of $225,000.00 from Appellee. The loan was evidenced by a promissory note in the same principal amount. The term of the loan was 120 months commencing on April 28, 2004.

According to the complaint, on the same day that Big Kahuna borrowed the money, Appellant executed and delivered to Appellee a commercial guaranty whereby Appellant guarantied the indebtedness of Big Kahuna to Appellee. Appellee asserted that the guaranty contained a confession-of-judgment provision authorizing the entry of judgment by confession against Appellant for, *inter alia*, the entire principal amount of the loan and an attorney's commission of ten percent of the unpaid principal balance and accrued interest.

Appellee alleged that Big Kahuna defaulted on the terms of the note. Appellee maintained that, pursuant to the guaranty, Appellant is liable to Appellee in the total amount of $143,735.08, which includes the remaining principal amount of $117,298.94 and an attorney's commission of $12,634.28. A judgment was entered against Appellant.

On August 25, 2011, Appellant filed a petition to strike or open judgment.[2] In terms of its petition to strike, Appellant first contended that

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[2] In addition to challenging the judgment in this case, Appellant's petition addressed confessed judgments entered in favor of Appellee and against
(Footnote Continued Next Page)

the judgment should be stricken because the guaranty lacked a signature or initial requirement on the page that contained the confession of judgment clause. Appellant also maintained that the court should strike the judgment because the attorney's fee is grossly excessive.

As to its petition to open, Appellant asserted that it had "counterclaims" against Appellee, such as a claim that Appellee breached its duty of confidentiality. Appellant "proffered" these counterclaims in an exhibit attached to its petition.

In an order dated July 31, 2012, the trial court denied Appellant's petition to strike. The court, however, purported to grant in part Appellant's petition to open. Regarding the portion of the petition to open the court supposedly granted, the court modified the award of attorney's fees to five percent of the outstanding principal, *i.e.*, $5,864.95. We note that Appellant did not claim **in its petition to open** that the attorney's fees awarded to Appellee were excessive or unreasonable. On August 20, 2012, Appellant filed a notice of appeal wherein it stated its desire to appeal the order dated July 31st.

Before we address Appellant's issues, we pause to address whether this Court has jurisdiction over this appeal. Orders refusing to strike or open a judgment are immediately appealable as of right. Pa.R.A.P. 311(a)(1). An

(Footnote Continued) ———————————

Appellant in two other cases. The trial court disposed of each case in separate orders. Appellant filed separate appeals for all of the cases. Appellant's other appeals are docketed in this Court at 1513 MDA 2012 and 1514 MDA 2012.

order granting a petition to open a judgment is not immediately appealable. ***See Joseph Palermo Development Corp. v. Bowers***, 564 A.2d 996, 997 (Pa. Super. 1989) ("Although prior to the [ ] amendments to Rule 311(a)(1) an interlocutory appeal as of right was available to a litigant if the trial court had ordered a judgment opened, this is no longer the case. Under the [current version of the] Rule, . . . only an order *refusing* to open, vacate or strike off a judgment is immediately appealable.") (emphasis in original). Furthermore, when a petitioner seeks an order striking a judgment or in the alternative opening a judgment, the petitioner cannot file an appeal until the trial court disposes of each claim for relief. Pa.R.A.P. 311(a)(1).

Here, the complained-of order denied Appellant's petition to strike but granted in part Appellant's petition to open. Thus, at first glance, the order appears to be unappealable. However, the trial court's order is not typical of an order granting a petition to open a judgment. Because the court already set an amount for the attorney's fees, the parties have nothing left to litigate. Moreover, while the court did not reduce its order to judgment, it should have done so. ***Dollar Bank, Federal Sav. Bank v. Northwood Cheese Co., Inc.***, 637 A.2d 309, 314 (Pa. Super. 1994) ("[I]f the judgment as entered is for items clearly within the judgment note, but excessive in amount, the court will modify the judgment **and cause a proper judgment to be entered**.") (emphasis added). Because the trial court should have, but failed to, cause judgment to be reentered in this case, we will regard as done that which ought to have been done. ***See Zitney v. Appalachian Timber Products, Inc.***, 2013 WL 3366740, 3-4 (Pa. Super. 2013) (regarding "as done that which ought to have been done" where two parties

praeciped for the entry of judgment but the trial court's docket was unclear as to whether judgment, in fact, was entered). Because the court's order disposed of all parties and their claims, the order constitutes a final, appealable order. Pa.R.A.P. 341(a) and 341(b)(1).

Under its first issue, Appellant argues that the trial court erred by denying its motion to strike the judgment.[3] Appellant essentially maintains that, when all of the attorney's fees from all of the judgments entered against Appellant and in favor of Appellee are added up, those fees are grossly excessive. Thus, in Appellant's view, the trial court should have stricken the judgments.

As an initial matter, only one judgment is the subject of this appeal; the judgment that originally included an attorney's commission of $12,634.28. The other judgments entered against Appellant and in favor of Appellee are not involved in this appeal. Secondly, the confession-of-judgment provision of the guaranty signed by Appellant, a law firm, clearly allowed Appellee to confess judgment in an amount to include "AN ATTORNEY'S COMMISSION OF TEN PERCENT (10%) OF THE UNPAID PRINCIPAL AND ACCRUED INTEREST[.]" Complaint, 07/26/11, Exhibit B, at

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[3] "Our standard of review from the denial of a petition to strike a judgment is limited to whether the trial court manifestly abused its discretion or committed an error of law." ***Vogt v. Liberty Mut. Fire Ins. Co.***, 900 A.2d 912, 915 (Pa. Super. 2006) (citation and quotation marks omitted). "A petition to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. Matters outside of the record will not be considered, and if the record is self-sustaining, the judgment will not be stricken." ***Id.*** at 915-16 (citation and quotation marks omitted).

2 (emphasis in original). The unpaid principal was $117,298.94, and the accrued interest was $9,034.83. The sum of these two numbers is $126,342.77, and ten percent of that sum is $12,634.28.

Appellant is correct that a court must strike a judgment entered in an amount that was grossly excessive. ***Dollar Bank***, 637 A.2d at 314. Yet, the face of the record clearly permitted Appellee to confess judgment in an amount that included the $12,634.28 attorney's commission. Appellant's poorly crafted argument fails to convince us that the trial court erred by refusing to strike the judgment due to the allegedly grossly excessive attorney's commission, especially in light of the fact that the court reduced the attorney's commission by over fifty percent despite the fact that Appellant failed to seek such relief in its petition to open.

Under its second issue, Appellant asserts that, if this Court refuses to reverse the trial court's order denying the petition to strike, then the Court should further reduce the attorney's fees included in the judgments. Again, only one judgment is subject to this appeal. In any event, Appellant has waived its issue by failing to offer a developed argument in support thereof. ***See Burgoyne v. Pinecrest Community Ass'n***, 924 A.2d 675, 680 n.4 (Pa. Super. 2007) (finding an issue waived due to the appellant's failure to develop a relevant argument).

Under its last issue, Appellant contends that the trial court erred by denying its motion to strike because all of the confession-of-judgment provisions, including the provisions that are irrelevant to this appeal, are not sufficient under Pennsylvania law. Appellant once again fails to focus on the

judgment and documents in question in this appeal. The only complaint Appellant lodges that is specific to the relevant confession-of-judgment provision is as follows:

> In case number 9751 the confession of judgment provision comes at the very bottom of page 2 – a page without a signature – in barely readable fine print with a signature on the next page.

Appellant's Brief at 12.

> We have noted the need for strict adherence to rules governing confessed judgments.[ ] As a matter of public policy, Pennsylvania applies a similar strict standard to establish the validity of a cognovit clause. This is so because a warrant of attorney to confess judgment confers such plenary power on the donee in respect of the adjudication of his own claims that certain specific formalities are to be observed in order to effectuate the granting of such a power. Accordingly, [a] Pennsylvania warrant of attorney must be signed. And it will be construed strictly against the party to be benefited by it, rather than against the party having drafted it. A warrant of attorney to confess judgment must be self-sustaining and to be self-sustaining the warrant must be in writing and signed by the person to be bound by it. The requisite signature must bear a direct relation to the warrant of attorney and may not be implied.

Graystone Bank v. Grove Estates, LP., 58 A.3d 1277, 1282 (Pa. Super. 2012) (citations and quotation marks omitted).

Here, the guaranty is just over two pages long. The confession-of-judgment provision comes at the very bottom of page two. In other words, the confession-of-judgment provision of the guaranty appears immediately before Robert J. Powell's (President of The Powell Law Group) and Jill Moran's (Secretary of The Powell Law Group) signatures. Moreover, the confession-of-judgment provision of the guaranty is the only substantive

provision of the entire document that is presented in all capital letters, making it the most easily readable portion of the document.

These circumstances are nearly identical to those in ***Graystone Bank***. In that case, this Court stated as follows.

> [T]he warrant of attorney appeared conspicuously in all caps on the very bottom of the penultimate page of the agreement and immediately *preceded* where the executor (Mr. Pasch) signed at the top of the following, final page. Evidence of this location of a conspicuous cognovit contained within the body of the agreement sufficed to establish that Mr. Pasch effectively signed his name to the warrant of attorney.
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> We therefore distinguish the present matter from precedent cited above invalidating warrants of attorney located either altogether outside the body of the agreement, too remote from the signature, or on pages subsequent to the signature. Because the location of the warrant of attorney related directly to the signature that immediately followed it, albeit on the next page, we concur with the trial court that a valid, signed, and self-sustaining warrant of attorney resulted. Accordingly, we reject [the a]ppellants' contention that a signature must appear on the same page as the cognovit in order to validate it.

Id. at 1283 (emphasis in original).

Appellant has failed to convince us that the confession-of-judgment provision in this case is anything less than valid and enforceable. For these reasons, we affirm the trial court's order.

Motion to quash denied. Order affirmed.

Judgment Entered.

Mary A. Shaybell

Deputy Prothonotary

Date: 9/6/2013