

Fabrications Inc.], plus costs, expenses and attorney's fees . . .” (Id.). On or about May 5, 2000, ELR entered into a lease agreement (“Lease #1”) with Plaintiff in the original amount of \$479,484.00, pursuant to which Plaintiff leased equipment (“Leased Equipment #1”) to ELR. (Plf. Ex. A). ELR granted Plaintiff a security interest in the Leased Equipment #1, as well as in any and all goods, inventory, equipment, accounts, accounts receivable, chattel paper, contract rights, general intangibles, investment property, securities entitlements, fixtures and other property, including after-acquired property (“Additional Collateral #1”). Plaintiff delivered the Leased Equipment #1 to ELR and perfected its security interest in the Leased Equipment #1 by filing Financing Statements with the proper Pennsylvania authorities. (Plf. Ex. B-C). On or about October 30, 2002, Plaintiff and ELR entered into a lease extension agreement (“Lease Extension #1”) in the original amount of \$179,235.95. (Plf. Ex. D).

On or about May 4, 2000, ELR entered into a lease agreement (“Lease #2”) with Plaintiff Financial Federal Credit in the original amount of \$337,968.00, pursuant to which Plaintiff leased equipment (“Leased Equipment #2”) to ELR. (Plf. Ex. E). ELR granted Plaintiff a security interest in the Leased Equipment #2, as well as in any and all goods, inventory, equipment, accounts, accounts receivable, chattel paper, contract rights, general intangibles, investment property, securities entitlements, fixtures and other

property, including after-acquired property ("Additional Collateral #2"). Plaintiff delivered the Leased Equipment #2 to ELR and perfected its security interest in the Leased Equipment #2 by filing a Financing Statement with the proper New Jersey authorities. (Plf. Ex. F-G). On or about October 30, 2002, ELR and Plaintiff entered into a lease extension agreement ("Lease Extension #2") in the original amount of \$174,220.44. (Plf. Ex. H). In addition to the Leased Equipment #1 and Leased Equipment #2, Plaintiff holds perfected security interests in other collateral of ELR ("Additional Collateral #3").

In or around December 2002, ELR defaulted upon its obligations to Plaintiff under the above-listed loan documents. On June 9, 2003, Plaintiff filed civil action number 03-3544 in this Court against ELR for breach of contract, replevin, and attachment.¹ In or about July 2003, Defendants and ELR turned over to Plaintiff some of the collateral described above.² On August 14, 2003, Plaintiff filed the instant action for Confession of Judgment against Defendants. (Plf. Ex. FFCI 1). On September 2, 2003, this Court entered a Final Judgment by Confession against Defendants, jointly and severally, in the amount of \$372,945.39, plus continuing late

¹ On November 3, 2003, this Court entered an Order referring civil action number 03-3544 to Magistrate Judge Charles B. Smith for any and all further proceedings in the case. ELR is not a party to the instant action before this Court.

² Specifically, Plaintiff was able to recover 19 of the 42 pieces of equipment covered by the lease agreements.

charges, attorney's fees, and costs. On September 4, 2003, Plaintiff received a \$117,000 bid for the repossessed collateral at a public sale.

Both Defendants now move to open the confessed judgment against them. They set forth three common arguments for opening the judgment in this case. First, Defendants argue that Plaintiff's sale of the repossessed collateral for only \$117,000 was commercially unreasonable under Pennsylvania law. Second, Defendants contend that the judgment entered in this case does not reflect a credit for the amount that Plaintiff received at the public sale of the repossessed collateral. Third, Defendants allege that Plaintiff, through its agents, released them from the terms of the personal guaranty on which judgment was confessed. In addition, Defendant Callender argues that Plaintiff's failure to provide him notice of the disposition of the repossessed collateral or an explanation of the deficiency balance owed thereafter was commercially unreasonable under Pennsylvania law.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60 provides the procedure for attacking a federal judgment entered on a confession of judgment. Minnesota Corn Processors, Inc. v. McCormick, No. CIV.A. 99-5932, 1998 WL 948659, at *4 (E.D. Pa. July 7, 2000). Rule 60(b) states, in pertinent part, that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment

[for six substantive reasons]." Fed. R. Civ. P. 60(b). State law governs the substantive aspects of Rule 60(b) motions to open confessed judgments. F.D.I.C. v. Deglau, 207 F.3d 153, 166-67 (3d Cir. 2000). Under Pennsylvania law, a motion to open is to be granted "[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury." Pa. R. Civ.P. 2959(e); see also First Seneca Bank v. Laurel Mt. Development Corp., 485 A.2d 1086, 1088 (Pa. 1984) ("A judgment taken by confession will be opened in only a limited number of circumstances, and only when the person seeking to have it opened acts promptly, alleges a meritorious defense and presents sufficient evidence of that defense to require submission of the issues to the jury."). Thus, the standard of sufficiency is that of a directed verdict. Deglau, 207 F.3d at 168 (citing Suburban Mechanical Contractors, Inc. v. Leo, 502 A.2d 230, 232 (Pa. Super. Ct. 1985)). The court is to view all the evidence in the light most favorable to the movants and to accept as true all evidence and proper inferences from it which support the defense while rejecting adverse allegations of the party obtaining the judgment. Id. Pennsylvania law also requires the movant to offer "clear, direct, precise and 'believable' evidence of his meritorious defenses." Id. (quoting Leo, 502 A.2d at 232).

III. DISCUSSION

A. The Defendants' Common Arguments

Defendants first argue that the confessed judgment should be opened because Plaintiff's sale of the repossessed collateral for only \$117,000³ was commercially unreasonable under Pennsylvania law. Specifically, they point to an Affidavit of Value signed by Andrew G. Remias, Plaintiff's Administrative Vice President, that approximated the value of the property at \$350,000. (Plf. Callender Ex. C, Plf. Daly Ex. D). By selling the repossessed property for roughly one-third of its appraised value, Defendants argue that

³ In the papers submitted in connection with the instant motions, Defendants did not question whether \$117,000 was the actual amount received by Plaintiff at the public sale, much less whether the September 4, 2003 public sale of the repossessed collateral took place at all. To the contrary, the briefs of both Defendants explicitly relied on the \$117,000 figure from the September 4, 2003 public sale in crafting arguments in support of the opening of the judgment. Nevertheless, at a subsequent hearing held in open court on November 25, 2003, Defendants took issue with whether \$117,000 was the actual amount received by Plaintiff at the public sale, as the bill of sale has allegedly never been produced to them by Plaintiff. Defendants also expressed doubt at the hearing as to whether the September 4, 2003 public sale ever occurred, alleging that they subsequently received a notice in the mail advising that the repossessed collateral was scheduled to be sold on November 5, 2003.

Statements by parties in their briefs are treated as binding judicial admissions. Zapach v. Dismuke, 134 F. Supp. 2d 682, 693 (E.D. Pa. 2001). Accordingly, Defendants' attempts to disavow prior admissions in their briefs that Plaintiff received \$117,000 at the September 4, 2003 public sale are unavailing. Even if Defendants were not bound by these admissions, unsupported factual allegations regarding a sale of the repossessed collateral on November 5, 2003 do not justify the opening of the judgment. See, e.g., Germantown Savings Bank v. Talacki, 657 A.2d 1285, 1289-90 (Pa. Super Ct. 1995) (rejecting motion to open judgment based on unsupported factual allegations).

Plaintiff acted in a commercially unreasonable manner. They assert that the confessed judgment should be opened to determine whether Plaintiff acted in a commercially reasonable manner.

Review of the Affidavit of Value reveals, however, that Mr. Remias's valuation was based on all of the equipment leased by ELR, not merely the repossessed equipment. Indeed, the Remias valuation was conducted in June 2003, prior to Plaintiff's repossession of selected collateral in July 2003. Notably, Plaintiff was only able to repossess 19 of 42 pieces of equipment leased to ELR. Defendants have failed, therefore, to identify any evidence of the aggregate value of the 19 pieces of equipment actually repossessed.⁴ Without "believable evidence of [a] meritorious defense," Defendants' motion to open the confessed judgment on this ground must be denied.

Defendants Daly and Callender next argue that the \$117,000 bid received by Plaintiff at the public sale of the repossessed collateral was not reflected in the amount of the confessed judgment against them. The Court notes that its confessed judgment Order was entered against Defendants two days before the public sale of the repossessed collateral. Thus, the damages assessed against

⁴ At a hearing held in open court on November 25, 2003, counsel for Defendant Daly alleged that the repossessed collateral had been appraised by an auction agency, which valued the collateral at \$247,800. Counsel did not, however, submit any evidence in support of this allegation. Unsupported factual allegations cannot justify the opening of the judgment. See, e.g., Talacki, 657 A.2d at 1289-90 (rejecting motion to open judgment based on unsupported factual allegations).

Defendants in the confessed judgment do not account for the bid obtained by Plaintiff at the public sale. Plaintiff asserts that there is no need to open the judgment because it consents to reducing the amount of the confessed judgment by \$117,000.

The fact that the judgment entered by this Court does not take into account the bid subsequently received at the public sale of the repossessed collateral does not require opening the confessed judgment. Indeed, such evidence would not need to be submitted to a trier of fact for consideration, as the parties are in agreement that the \$117,000 received at the public sale is not reflected in this Court's final judgment. Accordingly, Defendants' motion to open the confessed judgment on the ground that the judgment does not reflect the amount subsequently received by Plaintiff at the public sale of the repossessed collateral is denied. However, the Court does conclude that the Defendants are both entitled to a credit in the amount of \$117,000, which shall be deducted from the total judgment entered in this case. See Walter E. Heller & Co. v. Lombard Corp., 223 A.2d 716, 717-18 (Pa. 1966) (holding that party was entitled to credit, but not opening of confessed judgment, where sale of collateral occurred subsequent to entry of judgment).

Defendants next argue that the judgment should be opened because Plaintiff released them from their personal guaranties on the equipment leased by ELR. Defendant Callender contends that, during the negotiations between ELR and Plaintiff over the leasing

of the equipment, Robert Hodge, an agent of Plaintiff, represented to Callender that the equipment would not be subject to any personal guarantees on the part of either Defendant. Defendant Daly asserts that Bill Flaherty, Vice President of Plaintiff's Machine Tool division, enticed ELR to lease the equipment at issue from Plaintiff by refinancing ELR's existing lease, waiving all personal guaranties on both the new and refinanced leases, and by providing a good interest rate to ELR.

The Court observes that the personal guaranty contract signed by the Defendants unequivocally states: "This instrument reflects the entire and final expression of our . . . agreement and understanding regarding the subject matter hereof, [and] cannot be changed or terminated orally" (Plf. Ex. I). Under Pennsylvania law, "[a]n agreement that prohibits non-written modification may be modified by a subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be made in writing." Somerset Community Hospital v. Mitchell, 685 A.2d 141, 146 (Pa. Super. Ct. 1996). "An oral contract changing the terms of a written contract must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they had previously solemnized by a formal document. The oral evidence must be of such a persuasive character that it moves like an ink eradicator across the written paper, leaving it blank so that the parties in effect

start afresh in their . . . mutual commitments." Hamilton Bank v. Rulnick, 475 A.2d 134, 138-39 (Pa. Super. Ct. 1984) (quoting Gloeckner v. Baldwin Township Sch. Dist., 175 A.2d 73, 75 (Pa. 1961)). Even viewed in a light most favorable to Defendants, the bare allegations that Plaintiff orally waived the personal guaranties are inadequate, as a matter of law, to justify opening the judgment in this case. See Leasing Service Corp. v. Benson, 464 A.2d 402, 407 (Pa. Super. Ct. 1983) (declining to open judgment based on insufficient evidence of waiver of written modification clause in contract). Accordingly, Defendants' motion to open the confessed judgment on the ground that Plaintiff orally released them from their personal guaranties is denied.

B. Defendant Callender's Additional Argument

Defendant Callender separately asserts that the confessed judgment should be opened because Plaintiff acted in a commercially unreasonable manner by failing to send him notice of the disposition date of the repossessed collateral and a written explanation of the deficiency balance due and owing after the public sale. Defendant Callender contends that Plaintiff's letter of August 21, 2003, which advised of the public sale scheduled for September 4, 2003, was sent only to Defendant Daly. In addition, Defendant Callender asserts that Plaintiff's letter of September 16, 2003, which included a calculation of the deficiency due and owing after the public sale of the repossessed collateral, was only sent to Defendant Daly.

Essentially, Defendant Callender believes that Plaintiff has improperly left him "out of the loop." (Def. Callender Mot. to Open, at 4).

The Court notes that Defendant Callender has not offered any evidence, such as a personal affidavit or sworn testimony, in support of the allegations that he never received a notice of disposition or a written explanation of the outstanding deficiency balance from Plaintiff. In the absence of any evidence to support his allegations, Defendant Callender's motion to open the judgment on this ground must fail. See Talacki, 657 A.2d at 1289-90 (holding that unsupported factual allegations are insufficient to open judgment).

Even if Defendant Callender had produced sufficient evidence to support the allegations that he did not receive a notice of disposition or an explanation of the outstanding deficiency balance from Plaintiff, the opening of the judgment would not be warranted in this case. Plaintiff's submissions in connection with the instant motions include a copy of the August 21, 2003 letter, addressed to Defendant Callender, as well as a certified mail receipt indicating that the letter was delivered to ELR's business address on August 27, 2003. (Plf. Ex. FFCI 2). When questioned about the letter and the certified mail receipt at the November 25, 2003 hearing before this Court, counsel responded that Defendant Callender was no longer working at ELR in August 2003. Counsel

admitted that Defendant Callender never notified the Plaintiff of any change of address following his departure from ELR. Under Pennsylvania law, notice of the disposition of repossessed collateral "need only be sent to the debtor's last known place of business." Coy v. Ford Motor Credit Co., 618 A.2d 1024, 1027 (Pa. Super. Ct. 1993). Furthermore, while Plaintiff's submissions do not include similar evidence that its September 16, 2003 letter regarding the deficiency balance was in fact sent to Defendant Callender, such a written explanation was not required under Pennsylvania law. See 13 Pa. C.S.A. § 9616(b) (requiring written explanation of deficiency only in consumer goods transactions). As Defendant Callender has not set forth a meritorious defense based on Plaintiff's alleged failure to provide him with either a notice of disposition of the repossessed collateral or a written explanation of the deficiency balance, the motion to open the judgment on this ground must be denied.

IV. CONCLUSION

For the foregoing reasons, the Court denies in their entirety Defendants' Motions to Open the Judgment by Confession. However, the Court finds that both Defendants are entitled to a \$117,000 credit against the total judgment entered in this case. An appropriate order follows.

