

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONSTITUTION BANK : CIVIL ACTION  
 :  
 v. :  
 :  
 WILLIAM KALINOWSKI AND ANDREA :  
 KALINOWSKI : No. 95-3955

**ORDER-MEMORANDUM**

AND NOW, this 26th day of August, 1998, the petition of defendants William and Andrea Kalinowski to open the judgment confessed against them for \$291,102.51 plus interest is granted. Fed.R.Civ.P. 60(b); Pa.R.Civ.P. 2959.

Plaintiff Constitution Bank contests the opening of the judgment on two grounds - lack of a meritorious defense and untimeliness. Under Pennsylvania substantive law, which governs the first issue, a defense is meritorious "if evidence is produced which in a jury trial would require [submission] to a jury." Pa.R.Civ.P. 2959(e). Here, the matters presented by defendants raise a jury question as to the parties' intent in regard to an agreement to restructure a loan guarantee. It is undisputed that the agreement was entered into, and if defendants' position is correct, it was improper to have subsequently confessed judgment against them under the original loan documents.<sup>1</sup>

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<sup>1</sup> Defendants also assert a violation by plaintiff of Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq., which issue is not reached at this time.

As to timeliness, "the motion shall be made within a reasonable time." Fed.R.Civ.P. 60(b) (Pennsylvania law is to the same effect). While almost 30 months elapsed before defendants filed their petition, the parties during that interval had entered into a series of stand-still agreements and conducted negotiations. According to defendants, the negotiations continued until less than six weeks before the filing of the petition. Plaintiff claims the negotiations ceased 20 months earlier but has shown no prejudice from the delay. Given the circumstances, the petition will not be denied for untimeliness.

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Edmund V. Ludwig, J.

**DRAFT ONLY: SAVE FOR BACKUP IF NEEDED. IF NOT, CAN DELETE.**

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**M E M O R A N D U M**

Ludwig, J.

August \_\_\_\_, 1998

This memorandum accompanies an order entered this date granting the petition to open the confessed judgment entered June 26, 1995. In this action, the parties dispute the intended effect and enforceability of a 1992 settlement agreement and an accompanying limited release. They also dispute each others' performance under the settlement agreement. These disputes bear directly on whether defendants have a defense to the judgment confessed against them in 1995. As discussed infra, defendants have submitted evidence sufficient to open the judgment. See AmQuip Corporation v. Pearson, 101 F.R.D. 332, 334-335 (E.D. Pa. 1984) (judgment by confession should be opened if a defense to the judgment raises triable issues).

I. Background

In 1989, petitioners-defendants in this action were two of eight guarantors of the obligations of Transact Property Company

under a promissory note payable to plaintiff-bank.<sup>2</sup> Pet. to open ¶ 4. In August, 1992 disputes arose between the parties concerning the terms of the original loan. Id. ¶ 7. In December, 1992 the parties reached a settlement. Id. ¶ 9.

The 1992 settlement agreement provided that upon certain terms - disputed by the parties - the original loan would be restructured into four individual consumer loans.<sup>3</sup> Id. ¶ 10-11; defts' post-disc. br. exh. I (settlement agreement). Under the agreement, these loans were to be secured by a second-mortgage on each of the four guarantor-couples' homes.<sup>4</sup> Defts' post-disc. br. at 3-4. It further provided: "upon execution of the agreement," plaintiff "shall execute" a "limited release" of defendants' liability under the original loan. Id. exh. I.

In April, 1993 plaintiff announced its intention to close and approving the loans.<sup>5</sup> Id. ¶ 13-14; defts' post-disc. br. exh. L. Subsequently, one of the four couple-guarantors could not collateralize its loan. Pet. to open ¶ 16. Despite having approved the loans, plaintiff withheld closing until the collateral

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<sup>2</sup> Defendant William Kalinowski was a principal in the Transact Company; defendant Andrea Kalinowski is his wife.

<sup>3</sup> This was because the eight guarantors of the original loan consisted of four married couples - defendants being one of those couples.

<sup>4</sup> The security requirements for each of the four consumer loans are at paragraphs 3(c), 4(c), 5(c) and 6(c) of the settlement agreement. See defts' post-disc. br. exh. I.

<sup>5</sup> While closing was pending, defendants continued to pay interest on the original loan. Pet. to open ¶ 16.

could be resolved. Negotiations occurred and plaintiff and defendants entered into a series of limited standstill agreements during that time. Pet. to open ¶ 16-17; plaintiff's opp. ¶ 16-17.

In April, 1995 when the parties were unable to resolve the issue, plaintiff issued another notice of default and acceleration of the obligation under the original loan to defendants. Pet. to open ¶ 17; plaintiff's opp. ¶ 17, exh. G.<sup>6</sup> In May, 1995 plaintiff "withdrew its assent" to the 1992 settlement agreement. Plaintiff's opp. ¶ 10, exh. H.

On June 26, 1995 plaintiff filed a complaint for confession of judgment under the terms of the original loan. Judgment was entered that day by the Clerk of Court. After judgment, further negotiations ensued and the parties entered into a further series of limited standstill agreements delaying execution.<sup>7</sup> Pet. to open ¶ 20; defts' post-disc. br. exh. O.

The petition to open was filed on December 17, 1997.<sup>8</sup> It raises two defenses to the judgment. The first is that the

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<sup>6</sup> According to the notice, the default was based on defendants' failure to maintain sufficient deposits at the bank and not submitting appropriate financial documentation to the bank. Plaintiff's opp. ¶ 18, exh. G.

<sup>7</sup> According to plaintiff, these negotiations ended March, 1996. Plaintiff's post-disc. mem. at 5, n.1. According to defendants, the standstill agreement lasted until November 7, 1997, less than six weeks before the petition to open was filed. Defts' post-disc. br. at 15, exh. O.

<sup>8</sup> Upon motion of defendants, a stay of execution upon the judgment was entered. See order of March 6, 1998. The parties were permitted to take discovery on the petition. After the close of discovery, each party filed a supplemental brief.

judgment was entered upon liabilities from which defendants had been released; the second is that plaintiff violated the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq., while negotiating the original loan. Plaintiff contests the meritoriousness of the defenses and the timeliness of the petition.

## II. Discussion

The law on a petition to open a confessed judgment is: "Procedurally, a motion to open or strike a judgment entered by confession in a federal court is governed by Rule 60(b)." Central W. Rental Co. v. Horizon Leasing, 967 F.2d 832, 836 (3d Cir. 1992) (citation omitted). Substantively, Pa.R.Civ.P. 2959 provides relief from a confessed judgment. The standard to determine whether a defense is sufficiently meritorious to open the judgment is "if evidence is produced which in a jury trial would require the issues to be submitted to the jury." Pa.R.Civ.P. 2959(e).<sup>9</sup> See AmQuip Corp., 101 F.R.D. at 334-335. This is the same showing required to avoid a directed verdict. See Allied Building Products Co. v. Delco Roofing Company, Inc., 951 F. Supp. 1183, 1191 (E.D. Pa. 1996) (citing Liazis v. Kosta, Inc., 421 Pa. Super. 502, 506-507, 618 A.2d 450, 452-453 (1992), alloc. denied, 536 Pa. 630, 637

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<sup>9</sup> A petition to open a judgment "offers to show that the defendant can prove a defense to all or part of the plaintiff's claim." 7 Goodrich Amram 2d § 2959(a):2. Upon the assertion of a meritorious defense, a confessed judgment must be opened to preserve the due process rights of the defendant. See AmQuip Corporation v. Pearson, 101 F.R.D. 332, 337 (E.D. Pa. 1984).

A.2d 290 (1993)). Petitioners' evidence is accepted as true and reasonable inferences are drawn in petitioners' favor. Id.

A. Allegation and Evidence of Meritorious Defenses

As noted, the first defense - concerning the settlement agreement and the release - is the primary area of dispute. According to defendants, the parties' intent was that the release and the agreement would be "executed" upon approval of the consumer loans. Pet. to open ¶ 12-14, 17, exh. 2. The evidence shows that on December 15, 1992 plaintiff approved the restructured consumer loans. Pet. to open ¶ 14, exh. D; defts' post-disc. reply br. at 8, exhs. L and M. Additionally, defendants' post-discovery brief states that the parties intended plaintiff could decline to make the consumer loans and withdraw its assent to the agreement after it had been executed - but that plaintiff did not follow that procedure. Post-disc. br. at 7 (referencing ¶ 12 of settlement agreement). For these reasons, according to defendants the settlement agreement and the release became effective and superseded the original loan and all obligations under it in April, 1993. Id. at 4.

In contrast, plaintiff's opposition asserts that the agreement was never "executed," and so the release never took effect, because the consumer loans never closed. Plaintiff's opp. at 3-5. According to plaintiff, the loans did not close because defendants did not perform under the agreement - specifically, additional security was not furnished by one of the four couple-

guarantors. According to plaintiff, this was a breach of the settlement agreement and gave plaintiff the right to refuse to close the loans. Plaintiff's opp. at 4-5.<sup>10</sup> Consequently, in May, 1995 plaintiff notified defendants that it expressly withdrew its consent from the settlement agreement. Id. at 5. For these reasons according to plaintiff the settlement agreement never superseded the original loan and all defendants remained liable under it.

Here, petitioners have presented "clear, direct, precise and 'believable' evidence" of a meritorious defense. Iron Workers S&L Association v. IWS, Inc., 424 Pa. Super. 255, 262, 622 A.2d 367, 370 (1993). "Defendant does not have to prove every element of its defense.... [T]he particularity required in averring a meritorious defense is not tantamount to trying a case on the merits." Allied Building, 951 F. Supp at 1194, n.5 (citations omitted). Defendants have met that burden. The evidence presented by defendants supports their position that the settlement agreement and release were "executed" prior to closing on the loans. See defts' post-disc. br. exh. K (counsel for plaintiff bank stating that execution of the settlement agreement occurred upon signature of all parties to it, which occurred in December, 1992). Resolution of these disputes "would require the issues to be submitted to the jury." Pa.R.Civ.P. 2959(e); see also AmQuip

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<sup>10</sup> Defendants maintain, however, that plaintiff's refusal to close on any of the loans because of this was a breach of the settlement agreement. Post-disc. br. at 11-12.

Corp., 101 F.R.D. at 334-335. Therefore the judgment should be opened absent a determination of untimeliness.<sup>11</sup>

### B. Timeliness

The standard for determining timeliness is "reasonableness" under either Pennsylvania law or Fed.R.Civ.P. 60(b) ("the motion shall be made within a reasonable time").<sup>12</sup> See AmQuip Corporation, 101 F.R.D. at 336; see also Allied Building, 951 F. Supp. at 1194 ("the crucial factor in determining whether a petition is timely is not the specific time which has elapsed but rather the reasonableness of the explanation given for the delay") (citation omitted). The extent of, explanation for, and nature of harm resulting from the delay are to be weighed. First Seneca Bank & Trust Co., 324 Pa. Super. 352, 357, 471 A.2d 875, 877 (1984). "There is no time limit on the exercise of a power of a court to open a judgment by confession." Lincoln Bank v. C & H Agency, Inc., 500 Pa. 294, 302, 456 A.2d 136, 140 (1982) (citation omitted). Absent some prejudice to the adverse party, laches will not bar a petition to open. Id., 500 Pa. at 302, 302 A.2d at 140

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<sup>11</sup> Because defendants have met their burden to open the judgment, the second defense of plaintiff's liability under E.C.O.A. need not be addressed at this stage.

<sup>12</sup> The petition is not brought under Fed.R.Civ.P. 60(b)(1)-(3) (mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; misconduct of the adverse party), which impose a one-year time limit. Defts' post-disc. br. at 14.

(finding a delay of twelve years reasonable absent prejudice to the bank).

Here, the extent of the delay is thirty months.<sup>13</sup> Defendants' explanation is after judgment was entered, the parties continued negotiations, and for that reason, plaintiff did not move toward execution on the judgment. Defts' post-disc. br. at 15, exhs. O and P. Additionally, the memorandum in opposition to the petition does not allege harm or prejudice to plaintiff; rather, it argues that defendants knew about any defenses they might have had at the time of the entry of judgment and are therefore not entitled to a delay of thirty months. Plaintiff's opp. at 7.<sup>14</sup>

The caselaw is instructive on the issue of timeliness. The "mere desire to avoid litigation" was not found to constitute a sufficient explanation for the delay of eighteen months in First Seneca Bank, 324 Pa. Super. at 358. However, when the parties continued conducting business after the judgment was entered, and the bank made no attempt to execute, a delay of nearly thirty-five months was found to be reasonable in Citizens National Bank of Evans City v. E.H. Bilowich Construction, 303 Pa. Super. 193, 198, 449 A.2d 644, 647 (1982). The situation in this action is

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<sup>13</sup> Judgment was entered on June 26, 1995; the petition to open was filed on December 17, 1997.

<sup>14</sup> The case referred to in plaintiff's opposition, Landis v. Richmond, 249 Pa. Super. 418, 419, 378 A.2d 365, 366 (1977) for the proposition that a delay of fifteen to seventeen months is unacceptable does not support its position. In that case, there was no reason for the delay. Here, defendants have given a substantial explanation.

analogous to that in Citizens Bank. Therefore, the explanation offered by defendants - ongoing negotiations between the parties and non-execution on the judgment - sufficiently explains the delay.

The petition to open the judgment is granted.

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Edmund V. Ludwig, J.