



John A. Nicholas and Brett Strothers, a Pennsylvania partnership against Drew M. Hoffman, individually and as Executor of the Estate of Conrad Hoffman.

### **FACTUAL HISTORY**

On November 8, 2010, Hofmann executed a mortgage<sup>1</sup> in favor of the Partnership in the amount of \$195,000.00, said mortgage being accompanied by a promissory note of even date and of the same amount. The mortgage encumbered a parcel of real estate in Philadelphia County having been recorded there on November 16, 2010. Both the mortgage and note contained similar confession of judgment language in the event of a default by Hofmann. Plaintiff avers that Hofmann, beginning with the first due date of December 1, 2010, defaulted on payments, thus allowing the Partnership to confess judgment against Hofmann which it did on September 27, 2011, in the amount of \$217,245.35. On February 9, 2012, Hofmann filed the Motion and Petition referenced herein and they are now ripe for disposition.

### **LEGAL DISCUSSION**

Initially, we will address Hofmann's Petition to strike the

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<sup>1</sup>The execution of this mortgage and all related documents are alleged by Plaintiffs to have been executed in the Offices of Plaintiff's counsel, which is located at 56 Broadway, Jim Thorpe, Carbon County, PA.

Judgment<sup>2</sup>. In that Motion, Hofmann raises the issue of Carbon County not being the proper venue for the confessing of the judgment in this case. Hofmann requests this Court to either transfer this matter to Philadelphia County or alternatively, grant the Petition to Strike the Judgment in its entirety.

A prerequisite to the determination of whether or not to address a Petition to Open or Strike a Judgment is that of timeliness. Pursuant to PA.R.C.P. 2959(a)(3) and 2958.1 such a Petition must be filed "within thirty days after service" of the notice and Petition. Absent compelling reasons for a delay in filing a timely Petition, it will be denied.

In this case, Plaintiff's filings suggest only that the notice regarding the confession of judgment and execution was mailed to Hofmann at the Philadelphia property. Nowhere in the record is there any evidence or indication that Hofmann was actually served with this notice. Absent such proof, Hofmann's otherwise untimely filing will be excused.<sup>3</sup>

A Petition to Strike must be granted where there appears to

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<sup>2</sup> While it would appear that the Motion to Dismiss for Lack of Venue or Change of Venue should logically be addressed first, this issue is intertwined with the Motion to Strike the Judgment and will be addressed there instead.

<sup>3</sup> According to the record, Plaintiff's counsel mailed the notice of the confession of judgment pursuant to PA.R.C.P. 2958.1(b)(1)(ii) on September 27, 2011, by certified mail as evidenced by the certificate of mailing. This Rule permitted Plaintiff to provide notice by certified mail pursuant to PA.R.C.P. 403. Under that Rule, "service is complete upon delivery of the mail." However, there is no evidence that Hofmann ever received it. Therefore, despite the fact that the Petition to Open or Strike was filed on February 9, 2012, we will address the merits of it.

be a fatal defect on the face of the record "as filed by the party in whose favor the warrant is given." *Germanstown Savings Bank v. Talacki*, 657 A.2d 1285, 1288 (Pa.Super. 1995); *Resolution Trust Corp. v. Copley Qu-Wayne Associates*, 683 A.2d 269, 273 (Pa. 1966). Hofmann argues that the issue of improper venue is a fatal defect appearing on the face of the record warranting the grant of the Petition to Strike.

Pennsylvania Rule of Civil Procedure 2982 addresses the issue of venue in certain confession of judgment cases. This rule reads as follows:

(a) The action required by Act No. 6 of 1974 shall be commenced only in the county in which the confessed judgment, whether entered originally or by transfer, constitutes a lien upon residential real estate of the defendant.

(b) The action required by Act No. 7 of 1966 (Special Session No. 1) shall be commenced in the county in which the contract was in fact signed by the buyer, in the county in which the buyer resided at the time the contract was entered into, in the county in which the buyer resides at the commencement of the action, or in the county in which the goods purchases pursuant to such contract have been so affixed to real property as to become a part of such real property.

Under this rule, cases commenced pursuant to Act No. 6 of 1974<sup>4</sup> deal with residential mortgage foreclosures and those commenced pursuant to Act No. 7 of 1966<sup>5</sup> (Special Session No. 1) deal with retail installment contracts. Plaintiff argues that

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<sup>4</sup>41 P.S. §403.

<sup>5</sup>69 P.S. §2102.

Subsection (b) of this Rule is applicable insofar as the mortgage and related closing documents were signed in Plaintiff's attorney's office located at 56 Broadway, Jim Thorpe, Carbon County, PA and the mortgage is not a residential loan, but rather a commercial loan. In support of this proposition, Plaintiff points to the mortgage document itself and the language which states "this is a commercial loan for commercial purposes." However, a closer look suggests that the \$195,000.00 was used for a variety of reasons including: personal mortgage payments on a house of the decedent, Conrad Hofmann in New Jersey; to repay another mortgage owed to a John H. Marg in the amount of \$29,500.00; to pay other obligations of Keehof Bar, Inc.; and to repay advances made to Conrad Hofmann during his lifetime for two New Jersey businesses known as Con Hof Music, LLC and Roselane Music, LLC. Notwithstanding what may be substantially a commercial loan, as stated earlier, Subsection (b) of Rule 2982 deals with retail installment contracts. That term is defined in 69 P.S. §1201(6) as follows:

(6) "**Retail installment contract**" or "**contract**" means any contract for a retail installment sale between a buyer and a seller which provides for repayment in installments, whether or not such contract contains a title retention provision, and in which a time price differential is computed upon and added to the unpaid balance at the time of sale or where no time price differential is added but the goods or services are available at a lesser price if paid by cash or where the buyer, if he had paid cash, would have received any additional goods or services or any higher quality

goods or services at no added cost over the total amount he pays in installments. When taken or given in connection with a retail installment sale, the term includes but is not limited to a security agreement and a contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of their value and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of the goods upon full compliance with the terms of the contract. The term also includes any contract, obligation or agreement in the form of bailment or lease if the bailee or lessee has the option to renew the contract by making the payments specified in the contract, the contract obligates the bailor or lessor to transfer ownership of the property to the bailee or lessee upon full compliance by the bailee or lessee with his obligations under the contract, including any obligation incurred with respect to the exercise of an option by the bailee or lessee to renew the contract, and the payments contracted for by bailee or lessee, including those payments pursuant to the exercise of an option by the bailee or lessee to renew the contract, are substantially equivalent to or in excess of the aggregate value of the property and services involved. With respect to a sale described in the previous sentence, the disclosures required under this title shall be calculated on the assumption that the bailee or lessee will exercise all of his options to renew the contract, make all payments specified in the contract, and become the owner of the property involved.

Clearly, the obligation alleged to be owed by Defendant to Plaintiff is not a retail installment contract as defined above. Therefore, Rule 2982(b) is inapplicable to vest venue in Carbon County.

Neither is venue proper pursuant to Subsection (a) as the property encumbered is admittedly a commercial piece of real

estate and not residential, and the loan is purportedly a commercial loan, not a residential one.

Hofmann has requested that this action be transferred to Philadelphia County, as that county is the county of proper venue, or alternatively, that we strike the judgment due to Carbon County not being the county of proper venue. A petition to strike a confessed judgment is proper only when the defect in judgment appears on the face of the record. *P.N.C. Bank, N.A. v. Balsamo*, 634 A.2d 645 (Pa.Super. 1993). Clearly, when an action is brought in a county which has no right to exercise venue (this is apparent from the pleadings), maintaining the action there is improper. Further, since the documents submitted by the Partnership suggesting its right to confess judgment does not place venue in any particular county, no venue exists in Carbon County under any other rule and the confessed judgment shall be stricken.<sup>6</sup> Accordingly, we enter the following Order:

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<sup>6</sup> Defendant has raised other issues as reasons to strike the judgment, however, since this Court addressed the priority issue of venue we need not address these other issues, which had we, had merit to strike the judgment as well.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION

JOHN J. NICHOLAS and	:	
BRETT STROTHERS, a	:	
Pennsylvania partnership,	:	
Plaintiff	:	
	:	
vs.	:	No. 11-2312
	:	
DREW M. HOFMANN, individually	:	
and as Executor of THE ESTATE	:	
OF CONRAD HOFMANN,	:	
Defendant	:	
	:	
Anthony Roberti, Esquire		Counsel for Plaintiff
Stephen Cristal, Esquire		Co-Counsel for Defendant
Michael P. Forbes, Esquire		Co-Counsel for Defendant

AMENDED ORDER

AND NOW, this 24<sup>th</sup> day of July, 2012, upon consideration of the "Motion to Dismiss for Lack of Venue or Change of Venue" and a "Petition to Strike or Open Judgment", and after the issues having been briefed and argued, it is hereby **ORDERED** and **DECREED** that the Petition to Strike the Confessed Judgment filed by Plaintiffs, John T. Nicholas and Brett Strothers, a Pennsylvania partnership against Defendant, Drew M. Hofmann, individually and as Executor of the Estate of Conrad J. Hofmann, deceased, is **GRANTED** and the accompanying Complaint is **DISMISSED** without prejudice to refile the matter in Philadelphia County. All other relief sought by Defendant is **DENIED** as moot.

BY THE COURT:

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Joseph J. Matika, Judge

[FM-39-12]