COMMERCIAL EVICTIONS AND HOW TO AVOID THEM

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I. AVOIDING PROBLEMS

A. Lease Drafting – Default Provisions

1. Entity Check

2. "**Default" or "Events of Default**" – Broadly defined. Should include any default or breach of any portion of the lease.

3. "**Rent" broadly defined** – Should include any and all charges due and owing landlord under lease, including, but not limited to CAM charges, insurance, taxes, water/sewer, attorneys' fees, percentage rent, etc. Useful in acceleration of rent and confession of judgment clauses. May also prevent charges due landlord upon default to be interpreted as unenforceable "penalties."

4. Attorneys' fees and costs – Should allow for these if any efforts are used by landlord to enforce terms of lease, not simply if a lawsuit is filed or if landlord is the "prevailing party." Attorneys' fees and costs should be deemed as "Additional Rent" (along with CAM charges, taxes, etc.). Language allowing attorney fees must be included in lease to permit recovery. Trizechuan Gateway, LLC v. Titus, 601 A.2d, 637 (Pa. 2009); Bayne v. Smith, 165 A.2d, 265 (Pa. Super. 2009); Lewis v. Delp Family Powder Coatings, (WL 1230207, W.D. Pa. 2011).

5. Confession of Judgment Clause

a. Bold letters;

b. Different color ink;

c. Signature line;

d. Separate page;

e. For money damages and eviction;

f. Should allow for successive actions;

g. Should contain provisions regarding waiver of constitutional rights and notice that personal property, real property and bank accounts could be attached, opportunity for consultation with attorney, and that only way to challenge is Petition to Open or Strike;

h. Authorization for attorneys' commission – percentage of judgment, minimum amount, actual amount to be determined by Motion;

i. Should contain language that tenant earns more than $10,000.00 annually, and that the lease is not a consumer credit transaction or an installment sales contract.

6. Surrender and Termination Clause

a. Termination and acceptance of surrender only if in writing from landlord;

b. Termination or acceptance or surrender does not void remedies of landlord under lease;

c. Holdover rent clause – Make sure this cannot be construed as unenforceable liquidated damages – Amount must be reasonably proportionate to probable loss, and actual loss difficult to calculate;

7. Assignment and Subletting Clauses

a. None permitted. If permitted, at discretion of landlord, or assignment must meet certain conditions. Indemnification by tenant for third party lawsuits.

b. No "assignment," only sublease, so primary tenant will still be responsible;

c. Must be approved by landlord in writing.

8. Guarantors

a. If corporation or LLC is the tenant, try to have shareholders of corporation or members of the LLC and their spouses execute guaranty;

b. If individual is the tenant, try to have spouse execute guaranty;

c. If partnership is the tenant, have all partners sign.

d. Guarantors should execute additional guaranties for all subsequent modifications, addenda, or extension of original lease, as a material modification of the tenant's (and therefore guarantor's) obligations under the lease, will discharge a guarantor from liability. McIntyre Square Associates v. Evans, 827 A.2d 446 (Pa. Super. 2003). However, if the original suretyship agreement permits material modifications with the guarantor's prior consent, the guarantor will remain liable.

e. Greater bargaining power with smaller tenants.

9. Security Deposits

a. From one (1) to six (6) months' rent. May have a declining deposit if tenant is not in default;

b. Include clauses which applies security deposit to any monies owed by tenant to landlord, including rent;

c. No interest bearing or escrow account;

d. Allow for increase if multiple defaults;

e. Irrevocable letter of credit – can draw on even if tenant files for bankruptcy;

f. Practical Solution – Avoid providing notice prior to draw, as a tenant bankruptcy may bar notice. Accordingly, letter of credit should provide that the bank only release funds if landlord certifies that notice was provided, or unable to provide as barred by law.

10. Security Interest – UCC Financing Statement

a. In goods, equipment, inventory, accounts receivable;

b. Difficult to get, particularly if bank has prior lien and/or tenant relies on credit to operate its business;

c. Easier to get with smaller, unsophisticated tenants – exactly the type of tenant more likely to default;

d. Security interest can be placed in lease;

e. Be sure to perfect lien by filing UCC-1 Financing Statement.

11. Additional Lease Provisions

a. Chronic lease violation become "Events of Default;"

b. Tenant cannot exercise renewal option if chronic violations or if in default;

c. Requests advance rent payments (i.e., quarterly) if multiple defaults.

12. Conditions of Premises

a. Photos of premises prior to occupancy;

b. Punch list;

c. Broom clean/vanilla shell, or same conditions as when leased.

13. Copies of Checks

II. EVICTION ACTIONS

A. Substantive Law Considerations

1. Acceleration of Rent Clause

a. Validity – These clauses are valid in Pennsylvania, See, e.g., Byrne v. Bernicker, 700 A.2d 1021 (Pa. Super. 1997); Bell Federal Savings and Loan Association of Bellevue v. Lanes, 435 A.2d 1285 (Pa. Super. 1985). A landlord may only collect accelerated rent if there is such a clause in the lease. Pierce v. Hoffstrot, 236 A.2d 828 (Pa. Super. 1967); Onal v. Amoco Corp., 275 F. Supp. 2d 650 (E.D. Pa. 2003). Courts are not required to reduce an award of accelerated rent to present value unless that language is in the acceleration clause. Newman Development Group of Pottstown, LLC v. Genuardi's Family Market, Inc. 98 A.3d 645 (Pa. Super. 2014) Tedori v. Werner, 415 A.2d 31 (Pa. 1980); Byrne, supra.

b. No Acceleration and Possession – Upon default, landlord can obtain a judgment for either accelerated rent or possession, but not both in order to prevent double recovery, even if the lease provides for such dual remedies. Teodari v. Werner, 415 A.2d 31 (Pa. 1980); Pops PCE TT, LLC v. R&B Restaurant Group, LLC, 208 A.3d 79 (Pa. Super. 2019) (judgment opened based upon, *inter* alia, the principle of unjust enrichment); Byrne v. Bernicker, 731 A.2d 191 (Pa. Super. 1998); Homart Development Co. v. Sorenci, 662 A.2d 1092 (Pa. Super. 1995). Accordingly, upon acceleration, tenant does not forfeit all rights. He must be accorded possession upon payment of accelerated rent. Pizza Zone, LLC v. Catalinia Partners, L.P., 2023 WL 5233476; Ferrick v. Bianchini, 69 A.3d 642 (Pa. Super. 2013); Homart, supra; Teodori, supra.

If a tenant abandons the premises and landlord re-enters without entering a judgment in possession, landlord may obtain a judgment for accelerated rent. Nonetheless, landlord must account to the original tenant for rent received from a new tenant. Ferrick v. Bianchini, 69 A.2d 624 (Pa. Super. 2013); Restatement (Second) of Properly, Section 12.1, Comment k.

Practical Solution – If tenant is in possession of premises, file for judgment in possession and rent up through date of judgment. If tenant is already out of premises, file for acceleration.

However, lease must state that other breaches allow landlord to terminate or regain possession, or the breach may only allow landlord an action for damages. 202 Marketplace v. Evans Product, Inc., 593 F. Supp. 1113 (E.D. Pa. 1984); Ross v. Gulf Oil Corp., 522 A.2d 97 (Pa. Super. 1987).

2. Conduct must be Prohibited by Lease - A tenant only forfeits his right to possession if he violates a covenant in the lease regardless of the conduct. In Ross v. Gulf Oil Corp., 522 A.2d 97 (Pa. Super. 1987) (tenant drilling a hole into abandoned mine beneath the premises to discharge sewage was not grounds for eviction if such conduct was not prohibited by the lease). See also Earle v. Arbogast, 36 A. 923 (Pa. 1897) (no implied covenant that tenant must restore building destroyed by accident); 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies of Greater Philadelphia, 466 A.2d 132 (Pa. Super. 1983) (tenant under no obligation to occupy premises unless required by lease). Nonetheless, all leases have implied covenants that a tenant must pay the rent, not commit waste, and not use the property for an illegal purpose. 2401 Pennsylvania Ave. Corp., supra.

3. Mitigation of Damages – Pursuant to Stonehenge Square Limited Partnership v. Movie Merchants, Inc., 715 A.2d 1082 (Pa. 1998), the Pennsylvania Supreme Court held that a commercial landlord is under no duty to mitigate damages (i.e. use its best efforts to locate another tenant) when a tenant breaches its lease and abandons the leased property. Accord, Trizechahn Gateway, LLC v. Titus, 930 A.2d 524 (Pa. Super. 2007), rev'd on other grounds, 976 A.2d 474 (Pa. 2009); Restatement (Second) of Property, Section 12.1, Comment k. Nonetheless, it is still a good idea to include language in the lease absolving landlord of this duty. Tenant, on the other hand, may wish to include language obligating landlord to mitigate. See Newman Development, supra.

4. Condition of Premises

a. Substantive Law

i. A landlord has a cause of action for money damages against a tenant who has left the premises in a condition worse than as he received it, other than normal wear and tear. Earle v. Abrogast, supra. Crissman v. Stidd, 578 A.2d 542 (Pa. Super. 1990); U.S. Gypsom Co. v. Schiavo Bros., 450 F. Supp. 1291 (E.D. Pa. 1978).

ii. Practical Solutions – Take photographs of premises prior to tenant's occupancy, and make a punch list of any problems. This will prevent a tenant defense that the premises were already in poor condition when he began occupancy.

b. Lease Provisions

i. Tenant may not alter premises. All alterations become property of landlord, unless landlord requests tenant to remove/restore alterations.

ii. Tenant shall return premises broom clean, or to same condition as when tenant took possession.

iii. Tenant must leave fixtures in premises upon termination.

iv. Tenant responsible for repairs. If none made, landlord may repair and bill tenant as additional rent.

c. Defenses

i. Condition of Premises – A tenant may use the poor condition of premises as a defense to a rent collection or eviction action. There is no implied warranty of habitability in commercial leases, Pawco, Inc. v. Bergman Knitting Mills, 424 A.2d 891 (Pa. Super. 1980), unless the premises are also used for residential purposes. Dysan Development v. Ross, C.P. Alleghany County 2011, PICS No. 11-3919. However, a commercial tenant is not without remedies if the premises are in poor condition, even though the lease provides for no specific remedy. Pawco, supra holds that these remedies are, after reasonable notice provided to landlord to cure the conditions; (1) surrender the premises; (2) repair and deduct, or (3) deduction of difference of the fair market value of the premises and the rent provided in the lease. The Pawco Court essentially rejected the independence of obligations approach and held that the tenant's covenants in the lease are mutually dependent or the landlord's covenants. Accord, Teaodri, supra; Sears Roebuck & Co. v. 69th St. Mall, L.P., 126 A.3d 959 (Pa. Super. 2015) also permits a tenant to withhold rent if there is a finding of a constructive eviction.

ii. Counterclaim - Quiet Enjoyment/Constructive Eviction – Every lease has an implied covenant of quiet enjoyment, and it is expressly set forth in many commercial leases. This right constitutes the ability to fully use and possess the premises without interference from landlord. Counterclaim by tenant may be brought only for substantial impairment by landlord of tenant's use of premises by landlord. Kelly v. Miller, 94 A.2d 1055 (Pa.1915); Sears Roebuck & Co., supra (deficient lighting and electrical systems in parking deck, deteriorated structural aspects of parking garage deck, water and sewer leaks and hookup, deterioration of store facade, etc.); Branish v. NHP Property Management, Inc. 694 A.2d 1106 (Pa. Super. 1997); Rittenhouse v. Barclay White, Inc., 625 A.2d 1208 (Pa. Super. 1993); 2401 Pennsylvania Ave. Corp., supra. A counterclaim may entitle the tenant to lost profits or an abatement of rent. A tenant may be awarded punitive damages if the landlord's actions are considered wanton or malicious. Minch v. Kauffman, 108 A. 597 (Pa. 1919); Kelly, supra; Kuriger v. Kramer, 498 A.2d 1331 (Pa. Super. 1985). A tenant may also be able to obtain injunctive relief to require landlord to repair the premises if the condition prevents actual use thereof. Elfman v. Berman, Philadelphia C.C.P., February Term, 2001, No. 2080.

A somewhat incomplete analysis of the distinction between a breach of the covenant of quiet enjoyment and a constructive eviction, is provided in Sears, Roebuck, supra. A breach of the covenant of quiet enjoyment lies when tenant's impairment of its enjoyment of the premises, or the utility of the premises for tenant's business, is substantially impaired. The court did not specifically state whether such a breach would entitle a tenant to a counterclaim or to withhold rent. However, the court did set forth specific holdings in regard to constructive eviction, which it found to be a subset of the breach of the covenant of quiet enjoyment. In Sears, there were significant issues with the premises, including deficient lighting and electrical systems in the parking garage, serious deterioration in the store facade, water and sewer leaks and sewage backup into the store, to name a few. Sears was patient, provided numerous notices to landlord and finally vacated the premises. The

court found a constructive eviction. The court found that a mere failure to maintain the premises, or even complying with building codes is insufficient to establish a constructive eviction. However, it is also not necessary to find that the use of the premises for the intended purpose is impossible. Rather, the premises must be rendered substantially unsuitable for the purpose for which they are leased or have conditions which seriously interfere with the beneficial enjoyment of the premises. Relying in part on Pollack v. Morrelli, 369 A.2d 458 (Pa. Super. 1976), the court found that a business' commercial "attractiveness" has a bearing upon the constructive eviction inquiry, and whether any such condition remain unremedied or a substantial period of time. In this case, Sears was entitled to terminate the lease.

iii. Practical Solutions

a. Have independence of obligations language in lease. But see Pawco, supra; Teadori, supra; McDaniel v. Mack Realty Co., 172 A. 97 (Pa. 1934);

b. Limitations on repairs to premises;

c. Tenant to accept premises "as is;"

d. Pictures, punch list.

5. Surrender v. Abandonment

a. Abandonment – Unilateral decision by tenant that discontinues tenant's use of property and evidences his decision not to return. Turnway Corp. v. Suffer, 336 A.2d 871 (Pa. 1975). See also Eckel v. Eiswerth, 92 A.2d 174 (Pa. 1952). Abandonment constitutes a breach of the lease. Gamesa Energy USA, LLC v. Ten Penn Center Associates, L.P., 181 A.3d. 1188 (Pa. Super. 2018) (based upon the terms of the lease). Permits landlord to re-enter premises and take possession without resort to judicial process. Turnway, supra; Ferrick v. Bianchi and SAB, LLC, 69 A.3d 642 (Pa. Super. 2013); Restatement (Second) of Property: Landlord & Tenant, Section 14.2, Comment g. A tenant who abandons premises is liable for future rent (so long as a judgment for possession is not obtained). Stonehenge, supra; Ferrick, supra; Abandonment found when tenant ceased to operate restaurant and removed fixtures. Ferrick, supra.

b. Surrender – A consensual act by both parties. Tenant must offer to give up leasehold and landlord must accept offer by tenant. Brill v. Haifetz, 44 A.2d. 311 (Pa. Super. 1945); In re Allegheny International, Inc., 136 B.R. 396 (Bankr W.D. Pa. 1991). A surrender is essentially an agreed upon termination of the lease and does not constitute a breach. Unequivocal action or words may constitute acceptance of surrender. In re Fifth Ave. Jewelers Inc., 203 B.R. 372 (Bankr. W.D. Pa. 1996). The courts look at the intention of the parties. Stonehenge, supra. If tenant's offer to surrender is accepted by landlord, tenant is relieved of obligation for future rent, as a surrender is not a breach. Auer v. Penn, 99 Pa. 370 (1882). Burden is on tenant to prove acceptance of surrender. Stonehenge, supra.

Reletting does not necessarily constitute an acceptance of surrender. Jenkins v. Root, 112 A.2d. 153 (Pa.1920); Trizechuan, supra, unless tenant can prove such by "clear and convincing evidence." In Hirsh v. Carbon Lehigh Intermediate Unit #21, 65 Pa. D&C 4th 390 (Lehigh County 2003), there was no acceptance of surrender when landlord sent letter to tenant demanding accelerated rent. If a tenant abandons the premises, and landlord obtains

a judgment for acceleration of rent and relets, tenant is entitled to a credit for rent received. Stonehenge, supra; Ferrick, supra.

c. Practical Solutions

i. Clause in lease – acceptance of surrender must be in writing.

ii. Clause in lease that acceptance of surrender by landlord does not waive landlord's rights.

iii. Send letter to tenant who vacates indicating that landlord believes tenant has abandoned, offer of surrender (if any) not accepted by landlord and landlord holds tenant fully responsible for obligations.

6. Notice – Carefully review the lease to determine:

a. If notice of default is required prior to entering judgment. Notice is not required if waived in lease. Eagle National Bank v. Pier 1 Hays Terminal, Inc., 2013 Phila.Ct.Com.Pl. LEXIS 1(Pa.C.P.2013): Beneficial Mutual Savings Bank v. Gbemudu, 2013 Phila.Ct.Com.Pl. LEXIS 280 (Pa.C.P.2013).

b. If the grace or cure period, if any, has expired. First Commonwealth Bank v. Federated Homes & Mortgage Co., 10 Pa. D&C 5th 37 (Centre County 2010).

c. By whom the notice must be sent. If required to be sent by "landlord," these definitions may not include landlords' attorney or real estate management company. See Parkside Banking Co v. Firehauf Trailer Co., 40 A.2d 268 (Pa. 1944) (although it is difficult to believe that the holding in this case will be followed).

d. By whom the notice must be received (i.e., the tenant, as opposed to his attorney) or to the attention of a specific person. 535 Penn Investments, LLC v. Delaware Steel Co., Montgo 2023 WL 3584660.

e. The manner by which notice must be sent (i.e., certified mail, overnight delivery, etc.). Penn Investments, supra.

Leases often provide that a default only occurs after notice and any applicable grace period.

7. Notice of Renewal – If a lease provides that a renewal of the term is effectuated by written notice from tenant to landlord, the notice must be provided. A mere holding over by tenant is insufficient. Federal Reserve Investment Trust v. Rao & Inc., 2023 WL 4621643; Adams v. Dunn, 64 Pa. Super. 303 (1915). Oral notice is insufficient unless the parties have established a pattern of oral notice. Matter of Opus One, Inc. 33 B.R. 190 (Bankr W.D. Pa. 1983); McClelland v. Rush, 24 A.2d 354 (Pa. 1982); Bantam Four Cinemas, Inc. v. Zamias, 544 A.2d 487 (Pa. Super. 1988).

8. Material Breach – Landlord must establish sufficient breach of lease to warrant forfeiture of tenant's rights. Barraclough v. Atlantic Refining Company, 326 A.2d. 477 (Pa. Super. 1974) (minor infraction insufficient for termination even if lease provides for termination upon breach as forfeitures are disfavored and strictly construed); Atlantic LB v. Vrbicek, 905 A.2d 552 (Pa. Super. 2006); Liazis v. Kosta, Inc., 618 A.2d 450 (Pa. Super. 1992). But see Barroclough, supra, which holds that courts should hesitate in enforcing forfeiture only when the lease has been carried out or its literal fulfillment has been prevented by oversight or uncontrollable circumstances. Atlantic LB, supra; Lynch v. Versailles Fuel Gas

Company, 30 A. 984 (Pa. 1895); The Old Creek Railroad Company v. The Atlantic and Great Western Railroad Company, 57 Pa. 65 (1868).

For cases establishing material breach, see Lynch; supra; The Old Creek Railroad Company, supra; Brown v. Brown, 64 A.2d 506 (Pa. Super. 1949); Elizabethtown Lodge No. 596, Local Order of Moose v. Ellis, 137 A.2d 286 (Pa.1955); Barroclough, supra; In re Turner, 326 B.R. 563 (non-payment of rent); Burgess v. Cleary, 34 A.2d 265 (Pa. Super. 1943) (unauthorized assignment); O'Brien v. Bunt (5 Pa. D&C 552, 1924) (removing goods not in ordinary course of business); Woldman v. Baer, 81 Pa. Super. 390 (1923) (unlawful activity on premises); Ross, supra; McKnight-Seibert Shopping Center, Inc. v. National Tea Co., 397 A.2d 1214 (Pa. Super. 1979) (only if specifically prohibited in lease); Slater v. Pearle Vision Center, Inc., 546 A.2d 676 (Pa. Super. 1988) (non-use of premises).

9. Waiver and Estoppel – The mere acceptance of rent by landlord after termination of the lease, and while tenant is in possession of the premises, does not of itself constitute a waiver of termination even if the parties are negotiating for a new lease or extension. Clairton Corp. v. Geo-Con, Inc., 635 A.2d 1058 (Pa. Super. 1993); Federal Realty Investment Trust, supra; Brown v. Pittsburgh, supra.

Practical Solution – Place rent in escrow account. Motion can then be filed with Court for release of funds without admissibility or evidence of waiver or estoppel. Send letter to tenant indicating that acceptance of money, or mesne profits does not waive rights. Warren Tank Car Co. v. Dodson, 199 A. 139 (Pa. 1939); WAMCO XX v. DeSouza, Phila. C.C.P., July Term, 2000, No. 4385. Include "no waiver" clause in lease.

Then, if the landlord changes positions and insists on strict performance after a period of non-enforcement, there must be reasonable notice to the tenant of the change in policy. Daniels v. Fair Housing Commission, 513 A.2d 501 (Pa. Commw. Ct. 1986).

10. **Destruction of Premises** – In the absence of a contrary provision in the lease, tenant is not obligated to pay rent if premises are damaged to the extent that it is impossible to carry out the business of the tenant, Albert M. Greenfield v. Kolea, 380 A.2d 758 (Pa. 1977); Pawco, supra.

11. Pandemic Related Defenses – There are very few Pennsylvania cases on the subjects, and none of the cases related to the pandemic have been decided by the appellate courts.

a. Impossibility Performance – Section 261 of the Restatement (Second) of Contracts §261 (1981) provides that "...after a contract is made, a party's performance is made impractical without his fault of the occurrence of an event of the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary." Accord, Davis-Haas v. Exeter Township Zoning Hearing Board, 166 A.3d 527 (Pa Comwlth Ct. 2017). See also West v. Peoples First National Bank & Trust Co. 106 A.2d 427 (Pa. 1954); 1954; In re Busik, 759 A.2d 417 (Pa. Comwlth Ct. 2000).

b. Force Majeure – "In order to use a Force Majeure clause as an excuse to non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. Gulf Oil Corp.

v. Federal Energy Regulatory Commission, 706 F.2d 444 (3d Cir. 1983)…. "acts of a third-party making performance impossible to not excuse failure to perform if such acts were foreseeable. Yoffe v. Keller Industries Inc., 297 Pa. Superior Ct. 178, 443 A.2d 358 1982." Martin v. Commonwealth of Pennsylvania, 548 A.2d 675 (Pa. Comwlth Ct. 2008).

III. PROCEDURE

A. SELF HELP

1. Prohibited – Eviction without resort to legal process prohibited. Sherwood v. Farber, 2021 WC 4787101 (Pa. Super. 2020); Ewing v. Oliver Realty, 451 A.2d 751 (Pa. Super. 1982); Kuringer v. Kramer 498 A.2d 1331 (345 Pa. Super. 1985); Williams v. Guzzardi, 875 F. 2d 46 (3rd Cir. 1989); In re Adams, 65 B.R. 646 (Bkrcy. E.D. Pa. 1986); O'Brien v. Jacob Engle Foundation, 47 Pa. D&C 3d 557 (Cumberland 1987), even if authorized in lease. Wofford v. Vaureck, 22 D&C 3d 444 (1981); Could give rise to cause of action in trespass and breach of the covenant of quiet enjoyment against landlord. Kuringer, supra. Permissible in clear case of abandonment. Jenkins, supra; Turnway, supra.

2. Additional Self-Help Actions – Phila. Code 9-1600 prohibits additional self-help measures by landlord including the interference with utility services or removing windows or doors. There is no caselaw on these actions but landlord subjects himself to liability if taken.

3. Distraint – Pa.C.S.A. 250.101 et seq. However, the seizure of personal property on premises for rent due has been ruled unconstitutional. Smith v. Coyne, 722 A.2d 722 (Pa. 1999); Allegheny Clarklift, Inc. v. Woodbine Industries of Pennsylvania, Inc. 514 A.2d 606 (Pa. Super. 1986); In re Road Patch Services, Inc. 154 B.R. 869 (Bankr. E.D. Pa. 1993); Ragin v. Schwartz, 393 F. Supp. 152 (Bankr. W.D. Pa. 1975).

B. DISTRICT JUDGE AND MUNICIPAL COURT ACTIONS

1. Advantages

a. No attorney required (even for corporations with officers or personal representative with knowledge of facts. Pa.R.C.P.D.J. 207).

b. If attorney utilized, relatively inexpensive legal fees.

c. Relatively quick.

d. If appealed by tenant, a supersedeas is granted only if bond posted in the amount which is the lesser of three (3) months' rent or the amount of rent actually in arrears (based upon judgment), and continuing rental payments required every 30 days. Pa.R.C.P.D.J. 1008, Phila. M.C.R. Civ.P.No. 124. Landlord may apply to Court for release of sums from escrow account on a continuing basis to compensate landlord for tenant's actual use and possession of premises pending appeal. If bond or rental payments not made, supersedeas terminates upon filing of Praecipe, and all rent held in escrow returned to landlord.

2. Disadvantages

a. Jurisdictional limit of $12,000.00 (42 Pa.C.S. §1515(a)(3). Ryder v. Prospect Park Realty Co., 211 A.2d 53 (Pa. Super. 1965), except in Philadelphia where there is no limit for rental arrears if combined with claim for ejectment.

b. Judgments subject to de novo appeal to Court of Common Pleas.

c. Burden of proof on landlord.

d. Not as quick as Confession of Judgment (in some counties).

e. Unable to bring actions where no valid lease exists. i.e., cases of illegal assignments or foreclosures where prior owner occupies premises. See e.g., Pa.R.C.P.D.J. 518; Three Rivers Manor v. Little, 139 Pitt.C.J. 296 (1991).

f. Where default is solely result of failure to pay rent if tenant cures (along with payment of court costs) prior to execution – even if additional amounts of past due rent have accrued since the judgment — judgment is deemed satisfied and tenant regains possession of premises. Pa.R.C.P.D.J. 518; 68 P.S. 250.503(c); 42 Pa.C.S. §1515(a)(3); Johnson v. Bullock-Freeman, 61 A.3d 272 (Pa. Super. 2013); Ryder, supra.

g. Practical Solution – As a tenant may cure his rent default in a District Judge proceeding by paying all non-accelerated rent owed up until the time of execution, if your goal is eviction, assert other breaches of the lease in addition to non-payment of rent.

3. District Justice Procedures and Timetable

a. Venue – In District where property is located.

b. Service of Complaint – Made by court by mailing Complaint to tenant by first class mail, or if letter returned, by delivery to tenant or posting on leased premises by Constable. Constable service can be chosen in lieu of first-class mail. Pa.R.C.P.D.J. 506, Phila.M.C.R Civ.P. No. 111. Complaint must be served at least five (5) days prior to the hearing date. Pa.R.D.J.P. 506.B

c. Hearing Date – 7-15 days from when Complaint (or Counterclaim) is filed. Pa.R.C.P.D.J. 504(1). No default judgments.

d. Hearing.

e. Request for Order of Possession – After the 15th day following judgment

f. Service of Order of Possession – District Court must send copy by certified mail and constable must serve by delivery to Defendant or adult in charge of premises, or by posting upon premises. Service must be made within two (2) days of entry of Order. Pa.R.C.P.D.J. 515, 517.

g. Lockout – After the 15th day following service of the Order of Possession. Pa.R.C.P.D.J. 519. A representative of the landlord and a locksmith will meet the Constable at the premises.

4. Philadelphia Municipal Court Procedure – Electronic Filing

a. File Complaint, together with:

i. Affidavit of Non-Military Service;

ii. Business Privilege Licenses or license number (Phila. Code Section 102.8);

iii. Rental License and Certificate of Rental Suitability – If these are not provided to tenant, landlord may not collect rent for the period of non-compliance (Phila. Code Section 9-3901(e)(4), 3902 and 3093); O.H. Bel Air Partners, LP v. Hinton, 296 A.3d 1173 (Pa. Super. 2023); Frempong v. Richardson, 209 A.3d 1001 (Pa. Super. 2019);

iv. Lease;

v. Notice to Vacate/Quit (if required);

vi. Other evidence.

b. Service – By Writ Servers appointed by the court, and must file Affidavit of Service (with barcode on forms provided by Court) prior to hearing. Served by posting and first-class mail; Phila. M.R. Civ.P. 111.B.

c. Hearing within 30 days. Phila.M.C.R.Civ.P. 113.

d. Attend hearing and obtain judgment.

e. 15 days after judgment, file a Praecipe for Writ of Possession with Municipal Court. Phila.M.C.R.Civ.P.126.

f. 15 days after service of Writ by Landlord-Tenant Officer, file Praecipe for Alias Writ of Possession with Municipal Court Phila.M.C.R.Civ.P.126.

g. Landlord-Tenant Officer will contact you with a lockout date. Be at the premises on that date with a locksmith.

5. Appeals to Court of Common Pleas

a. Time Limits – Within 30 days of judgment. 68 Pa.C.S. §250.513(b); Pa.R.C.P.D.J.P. 1002.A.

b. Supersedeas – Only of tenant/appellant deposits with the Prothonotary a sum equal to the lesser of three (3) months' rent (as determines by the District Judge) or the amount of the rent actually in arrears (based upon the judgment) at the time of filing the Notice of Appeal. Thereafter, tenant/appellant must post with the Prothonotary a sum equal to the monthly rent which becomes due during the course of the proceedings every 30 days. The landlord, upon petition to the court, may request appropriate sums from the Prothonotary's escrow account to compensate him for tenant's actual possession of the premises. If tenant fails to post the continuing payments landlord may file a Praecipe with the Prothonotary terminating the supersedeas. Pa.R.C.P.D.J.P. 1008.B; 68 Pa.C.S. §250.513(h)(c). Nonetheless, even if the no supersedeas is granted due to the failure of tenant to post monies with the Prothonotary, the appeal of the District Justice or Municipal Court may continue. RCKA Investments v. Johnson, 281 A3d 328 (Pa. Super. 2022).

c. If a tenant fails to appeal the District Justice Judgment, tenant cannot collectively recover for damages arising out of the occupancy of the premises. Rothwell v. Groff, 72 A.2d 72 (Pa. 1950).

C. COMMON PLEAS COURT AND ACTIONS IN EJECTMENT

1. Advantages

a. No jurisdictional limit on money recovery

b. May bring action in ejectment even if contention is that no valid lease exists, i.e., cases of illegal assignments, trespassers, expiration of a lease, or subsequent to mortgage foreclosure actions. However, when the mortgagee is the successful bidder at a Sheriff's sale, he may only initiate an action in ejectment when the Sheriff's deed has been recorded. Wells Fargo Bank, N.A. v. Long, 934 A.2d 76 (Pa. Super. 2007); Girard Trust Co. v. Dempsey, 196 A. 193 (Pa. Super. 1938).

2. Disadvantages

a. If tenant defends, case becomes like any other common pleas case — lengthy and expensive

b. Burden of proof on landlord

c. In ejectment actions, expert testimony recommended for mesne profit determination, although courts will often use the rental amount under a prior existing lease. (for example, in cases where there is a "holdover tenant").

d. If there is no appeal from District Court, tenant is not required to post the monthly rent with the Prothonotary.

e. Practical Solution – If rent in arrears is significantly greater than $12,000.00, yet landlord desires a speedy eviction, or at least the ability to collect rent during the pendency of the action, file a Complaint in Common Pleas Court and when rent is not paid for the next month, landlord can file a separate action in District Justice Court for the one subsequent month which is in arrears and for possession. If landlord prevails in DJ Court and tenant does not appeal, tenant may be evicted. If tenant appeals, he is now required to post the lesser of three (3) months' rent or the amount actually in arrears under the lease, and then pay continuing rent to Prothonotary. Landlord may continue to pursue a judgment for the bulk of the arrears in the initial Common Pleas Court action and can file a Motion to Consolidate the two cases.

3. Procedure in Actions in Ejectment (as opposed to eviction)

Ejectment is a possessory action where no lease exists between the parties. Plaintiff must show title to the property, is out of possession and has an immediate right to possession. G.V. Homes, Inc. v. Frempong, 285 A.3d 940 (Pa. Super. 2022); Becker v. Wishard, 202 A.3d 718 (Pa. Super. 2019); Wells Fargo Bank, N.A. v. Long, 934 A.2d 76 (Pa. Super. 2007).

a. Pa.R.C.P. 1051 – Must proceed pursuant to Pa.R.C.P. 1051 et seq. Primary additional requirement to Pa.R.C.P. is that Plaintiff must describe the land and set forth an abstract of title in his Complaint. Pa.R.C.P. 1054. If the action is commenced by Writ of Summons, some counties require that the Writ contain a description of the property. See Leh. R.C.P. 1034, Rule N 1051.

b. Practical Hint – Attach a copy of the deed for the property to the Complaint as an exhibit. Along with the street address, a copy of the deed, in most cases, should satisfy the requirements of Pa.R.C.P. 1054. National Bear Hill Trust v. Rinker, C.P., Monroe County, June 21, 2016.

c. Damages - Mesne Profits – If cause of action is based upon possession not incident to a lease, i.e., an illegal assignment, you must demand "mesne profits," not

rent. "Mesne profits" are equivalent to the fair rental value of the property, and not necessarily the rent as set forth in a prior lease. See Doyle v. Goldman, 180 A.2d 51 (Pa. 1962); Amoco Oil Co. v. Burns, 408 A.2d 521 (Pa. Super. 1979); Crecium v. McCann; 67 A.2d 622 (Pa. Super. 1949); Phillips v. Bailey, 11 D&C. 3d 45 (1978). But see Mack v. Fennell, 171 A.2d 844 (195 Pa. Super. 1961), where the court allowed a judgment by confession to be entered for "rent" incurred subsequent to the termination of the lease.

Practical Hint – Expert testimony should be obtained to prove fair rental value. However, courts will often use the rent on a prior existing lease (for example, in cases where there is a "holdover tenant" or an illegal assignment).

d. Trespass Action – As damages for mesne profits may only be awarded up to date of verdict, an action in trespass musty be initiated for unlawful detention of premises after verdict. Crecium, supra; Smith v. Smith, 77 Pa. Super. 277 (1921).

4. Arbitration – Although I have my doubts as to whether a compulsory arbitration panel has jurisdiction to award possession, this relief does not appear to be prohibited pursuant to 42 Pa.C.S.A. §7361 which only provides that matters not be submitted to arbitration if the amount in controversy exceeds $50,000 or the case involves title to real property. Furthermore, the Westmoreland County Rules of Civil Procedure provide that landlord-tenant matters can be heard by an arbitration panel. Rule 1303(a). See also Goodwin v. Rodriguez, 554 A.2d 6 (Pa. 1989).

D. CONFESSION OF JUDGMENT

1. Advantages

a. Potentially reduces court time and attorneys' fees.

b. Shifts burden of proof to tenant in his Petition to Open or Strike.

c. Locks in lien for priority purposes even while a Petition to Open or Strike is pending.

d. If plaintiff loses on technical or procedural grounds, a lawsuit can still be filed against tenant.

2. Constitutionality

a. An entry of a judgment by confession is not, per se, unconstitutional, so long as tenant has knowingly, intelligently and voluntarily waived his rights to a pre-deprivation, or prompt, post deprivation notice and hearing. Swarb v. Lennox, 405 U.S. 191 (1972); D.H. Overmayer Co., Inc. v. Frick Co., 405 U.S. 74 (1972).

b. In Jordan v. Fox, Rothschild, O'Brien and Frankel, 20 F.3d 1250 (3rd Cir. 1994), the court held that a landlord, and its attorneys, were subject to a claim for damages pursuant to 42 U.S.C. Section 1983 if an execution of the tenant's assets pursuant to a warrant of attorney was performed when the tenant did not knowingly, intelligently and voluntarily waive his rights to a pre-deprivation, or a prompt post-deprivation, notice and hearing.

3. 1996 Revisions to Pennsylvania Rules of Civil Procedures Regarding Confessed Judgments; Pa. R.C.P. 2950 et seq.

a. Substantive Changes – The new rules were drafted specifically in response to Jordan, supra. They aimed to remedy the potential constitutional problems in the application (execution) of confessions of judgment and execution procedure, while preserving the essential confession of judgment remedy. The rules provide that landlords may proceed in either one of two ways when executing upon a confessed judgment for money or possession.

i. Landlord may either confess judgment and serve notice upon tenant that they will file a praecipe for writ of execution or possession in 30 days (Pa.R.C.P. 2956.1 (c)(2), 2958.1, 2964, 2973.2 and 2974.2), or

ii. Landlord may file a judgment and a writ of execution simultaneously. However, landlords must also provide a separate notice to tenant that he can file a petition to strike the judgment and obtain a hearing on the sole issue of whether tenant knowingly, intelligently, and voluntarily waived his right to a prior notice and hearing before judgment was taken. This petition must be filed by tenant within 30 days after service. Once tenant files this petition, the court must hold a hearing on this sole issue within three (3) business days. All execution proceedings are stayed from the date tenant files the notice until the hearing, but the judgment and lien created thereby will remain in effect. At the hearing, landlord has the burden of proof that tenant knowingly, intelligently, and voluntarily waived his rights to a prejudgment hearing. Pa.R.C.P. 2958.3, 2959(a)(3), 2966, 2967, 2973.3, 2974.3.

b. Which Option to Choose? – If the landlord chooses the first option, the element of surprise is taken away, as the tenant now has 30 days between notice of the execution, and the actual execution. Surprise is particularly valuable in a confession of judgment for money so that a tenant is deprived of the opportunity to hide his assets. The 30-day notice option also delays the eviction process However, even though the rules were drafted to remedy due process problems, the constitutionality of the new rules has not yet been tested. Many attorneys will choose the 30-day notice option in an effort to insulate their clients and themselves from liability under 42 U.S.C.A. Section 1983. My approach is somewhat more aggressive; with certain exceptions i.e., non-English speaking tenants. See Egyptian Sands Real Estate, Inc. v. Polony, 294 A.2d 799 (Pa. Super. 1972), where a judgment was opened when the Court found that Hungarian speaking tenants did not understand the cognovit clause. However, if I have a well drafted, post-Jordan warrant, I will usually not hesitate to use the second approach. Absent the Jordan language, I will usually choose the first option.

4. Negotiating the Warrant of Attorney

a. Evaluate your client's bargaining position.

b. Compromises.

i. Keep the confession of judgment for possession, take out the confession for money.

ii. Limit the amount of accelerated rent.

iii. Reduce the attorneys' fees and costs.

(a) reduce percentage.

(b) limit to fees and costs incurred.

(c) Add a minimum attorney fee.

iv. Remove warrant of attorney, or obtain other concessions, if tenant has performed for a certain period of time.

v. Etc.

5. Drafting the Warrant of Attorney

a. Elements

i. Court where judgment may be entered – As broad as possible. "...any Prothonotary, Clerk of Court as attorney of any Court of Record..." Make sure that this authority does not contradict a venue clause elsewhere in the lease. This clause is enforceable. The Court in Midwest Financial Acceptance Corp. v. Lopez, 78 A.3d 614 (Pa. Super. 2013) held that the general venue terms of Pa.R.C.P. 1006 do not apply to judgments by confession. Actions in confession of judgment are specifically defined by Pa.R.C.P. 2950, and Pa.R.C.P. 1006 only applies to "actions" as defined by Pa.R.C.P. 1001. Furthermore, Pa.R.C.P. 1003 permits the rules of venue to be waived by agreement of the parties. Ferrick v. Bianchin, 69 A.3d 642 (Pa. Super. 2019).

ii. Notice – "...without prior notice...," or as little notice as possible. Check for conflicts with other notice provisions in the lease.

iii. Successive Judgments – "Such authority shall not be exhausted by one exercise thereof..." A warrant may be used for successive judgments only if it authorizes multiple uses, and only for debt not confessed in prior judgment. Pa.R.C.P. 2953; Bank of Nanty Glo v. Schnabel, 139 A.2d 862 (Pa.1927); B. Lipsitz Company v. Walker, 522 A.2d 562 (Pa. Super. 1986). However, clause may not be used twice on the same debt, even if original Complaint struck on procedural grounds. Scott Factors v. Hartley, 228 A.2d 887 (Pa. 1990); Continental Bank v. Tuteur, 450 A.2d 32 (Pa. Super. 1982). But see PNC Bank, supra. In TCPF Limited Partnership v. Skatell, 976 A.2d 571 (Pa. Super. 2009), a landlord entered a judgment by confession involving its right to overdue rent for the entire balance of the unexpired term in the amount of $65,196.91. Upon realizing that it had erred in its calculation of the amount as it had not included the amount due for another portion of the unexpired term, landlord filed a Motion to Amend Complaint to increase the amount of the judgment to $203,420.45. The Superior Court affirmed the trial court's denial of the request. Even though a single warrant may be used to confess judgment on severable portions of the debt, the plaintiff in this case attempted to use it to collect on the same debt (the unexpired balance of the term), albeit in differing amounts. The court found that Pa.R.C.P. 1033, which allows for the amendment of pleadings, does not permit an amendment where it is against a positive rule of law.

A warrant may be used for a successive judgment if the first judgment was mistakenly stricken by the trial court. Kwasnik v. Hahn, 615 A.2d 84 (Pa. Super. 1992), or if a stipulated order provides that the striking or opening of a judgment shall not preclude landlord from entering in second judgment on the same warrant. Atlantic National Trust, LLC, supra.

A series of recent cases, including Dominic's, Inc. v. Tony's Famous Tomato Pie & Bar & Restaurant, Inc., 214 A.3d 259 (Pa. Super. 2019) and Dime Bank v. Andrews, 115 A.3d 358 (Pa. Super. 2015) culminated in the holding of SDO Funding II D 32, LLC v. Donahue, 234 A.3d 738 (Pa. Super. 2020) where the Superior Court reasoned that a creditor or landlord may confess judgment multiple times on the same warrant of attorney if authorized in the warrant. The language in this particular clause reads in part as follows: "No single example of the foregoing warrant to confess judgment or a service of judgment, shall be deemed to exhaust the power . . . ." However, the case does not make clear whether the warrant was used on the same debt.

iv. Attorneys' Fees and Costs – Usually a percentage of the debt (5%-20%, usually 10%-15%). There can be a minimum such as $1000 or $2500.00. Fees can be limited to those which are incurred. Attorney's fees, the warrant, even if a percentage, are valid. A fee of $450,000.00, or 15% of the judgment was upheld as the provision was contained in the warrant. Rait Partnership, L.P. v. E. Pointe Properties I, 957 A.2d 1275 (Pa. Super. 2008); See also Centric Bank v. Sciore, 2021 WL 4025262 (Pa. Super.) (10% fee upheld, particularly when creditor's counsel performed substantial work); Dillon Bank v. Northwood Cheese Co., 637 A.2d 309 (Pa. Super. 1994); Colony Federal Savings and Loan Association v. Beaver Valley Engineering Supplies Co., 361 A.2d 343 (Pa. Super. 1970). However, if the cognovit clause limits the fees to those which are "reasonable," the Court may modify the judgment to reduce the amount of attorneys' fees. See PNC Bank v. Bolus, 655 A.2d 997 (Pa. Super. 1995) ($70,000.00 fee reduced to $60,000.00) See also Colony Federal, supra; Faulke v. Hatfield Fair Grounds Bazaar, Inc., 173 A.2d 703 (Pa. Super. 1961). These reductions are within the discretion of the Court. PNC, supra; Bolus, supra.

From a practical standpoint, although tempting, it is probably not a good idea to confess judgment for clearly excessive attorneys' fees even if authorized in the warrant of attorney, as this simply provides grounds for the debtor/tenant to file a Petition to Strike or Open. I will typically authorize attorneys' fees "up to 15% of the principal balance due, at the sole discretion of Landlord, but not less than $2,500". Also, Courts often order that a hearing be held at the end of the case — after the Petition to Strike or Open has been denied — to determine the specific amount of attorneys' fees. Another reason to proceed cautiously is that the charge of excessive attorneys' fees may be in violation of the Pennsylvania Rules of Professional Conduct 3.3, 4.1 and 8.4.

See also Dillon Bank v. Northwood Cheese Co., 637 A.2d 309 (Pa. Super. 1994). However, in an "Ethics Forum" column in the Pennsylvania Law Weekly, Samuel Stretton, Esquire stated that presenting a percentage fee to a Court in excess of the fee actually incurred by the Landlord is in violation of Pa.R.C.P. 3.3, 4.1 and 8.4. If the cognovit clause limits the fees to those which are "reasonable" the Court may modify the judgment to reduce the amount of attorneys' fees. See PNC Bank v. Bolus, 655 A.2d 997 (Pa. Super. 1995) ($70,000 fee reduced to $60,000). These reductions are within the discretion of the Court. PNC, supra; Bolus, supra.

v. Release of errors – "Tenant releases and agrees to release Landlord and any aforementioned attorney, from all errors and defects whatsoever of a procedural nature in entering such judgment or causing such writ to be issued or in any proceeding thereon or concerning the same."

vi. Waiver of Rights – Include a separate paragraph that tenant has consulted with an attorney or has had the opportunity to do so; he is aware that judgment may be entered against him; that his personal property and bank accounts may be attached and levied upon without prior notice or hearing, and that he knowingly, intelligently, and voluntarily waives his federal and state constitutional rights to such prior notice or hearing.

b. Visibility – Knowing, Voluntary and Intelligent Waiver

1. Bold type
2. Capitalized letters
3. Different color ink
4. Signature line
5. Restate reduced cognovit clause terms at end of lease; in bold and caps above final signature line
6. Waivers on separate page

6. Confessing and Executing upon the Judgment.

a. Complaint v. Praecipe – Pursuant to the 2008 revisions to Pa.R.C.P. 2951, a Complaint in confession of judgment, rather than a Praecipe, must be used. This rule simply confirms the prior practice that a Praecipe cannot be used as the amount owed is usually not apparent from face of the lease. Van Arkel & Moss Properties, Inc. v. Kendor Ltd., 419 A.2d 593 (Pa. Super. 1980).

b. Confession of Judgment Package – As confessions of judgments are creatures of statute and in derogation of common law, they are strictly construed, so be sure to conform to all pleading requirements set forth in statutes, case law and local rules. Include:

i. Complaint – Requirements — Pa.R.C.P. 2952

a. Original or copy of lease containing warrant of attorney.

b. Averment that judgment is not being entered by confession against a natural person in connection with a consumer credit transaction. Pa.R.C.P. 2950; 2951(a)(2)(ii); Beneficial Savings Bank v. Gbemudu, 2013 Phila.Ct.Com.Pl. LEXIS 280.

c. A statement of any assignment of the lease.

d. A statement that either a judgment has not been entered on the warrant, or if it has, an identification of the proceedings.

e. An averment of the default or of the occurrence of the condition precedent which allows judgment to be entered. This requirement specifically includes the averment of the notice, and attachment to the Complaint of a copy of any notice of default required by the lease. A.B.&F., supra; Dime Bank, supra.

f. An itemized computation of the amount due. But see Davis v. Wozall Hotel, Inc., 577 A.2d 636 (Pa. Super. 1990); Stahl Oil Co. v. Helsel, 860 A.2d 508 (Pa. Super. 2004); Gur v. Nadov, 178 A.2d 851 (Pa. Super. 2017), which held that it is sufficient if the itemization is provided in discovery.

g. Averment of any notice of default. Dime Bank, supra; A.B. & F. Contracting Corporation v. Matthew Coal Company, 166 A.2d 317 (Pa. Super. 1960).

Not necessarily required, but a good idea to set forth that all required notices have been provided and to attach a copy of the notices.

h. Demand for judgment.

i. Signature and verification of landlord.

j. Separate counts for money and possession.

k. No Notice to Defend or Plead necessary.

ii. Affidavit – usually required by the warrant of attorney. Verified Complaint can be considered affidavit. Pa.R.C.P. 76.

iii. Affidavit that judgment is not being entered by confession against a natural person in connection with a consumer credit transaction. Pa.R.C.P. 2951(a)(2)(ii) (can be included in Complaint).

iv. Affidavit of non-retail installment sales transaction (can be included in Complaint).

v. Affidavit of non-military service (for individual defendants).

vi. Certificate of residence of Plaintiff and Defendant.

vii. Confession of Judgment.

a. Money – Pa.R.C.P. 2962.

b. Possession – Pa.R.C.P. 2974.

viii. Petition to Strike Judgment/Request for Prompt Hearing (only if execution proceeds pursuant to Pa.R.C.P. 2958.3 (money) or 2973.3 (possession). Form of Petition at Pa.R.C.P. 2967.

ix. Notice of Entry of Judgment. Pa.R.C.P. 236.

x. Notice of Writ of Execution or Possession.

a. Money – Pa.R.C.P. 2964 or 2965.

b. Possession – Pa.R.C.P. 2974.2 or 2974.3.

xi. Praecipe for Writ of Execution or Writ of Possession with Certification.

a. Money – Pa.R.C.P. 2963.

b. Possession – Pa.R.C.P. 2974.1.

xii. Writ of Execution or Possession.

xiii. Waiver of Watchman.

xiv. Stamped, addressed envelope to tenant.

Best practice is to use forms on the individual county websites.

c. Service of Judgment and Notices

i. Judgment – Pursuant to Pa.R.C.P. 236, by ordinary mail, together with all documents filed with the Prothonotary. A stamped envelope addressed to the defendant must also be provided to the Prothonotary, as the Prothonotary sends notice as well.

ii. 2958.1 or 2973.2 Notice

a. Must be served at least 30 days prior to filing of Praecipe for Writ of Execution.

b. Must be served:

- By Sheriff, or an adult who is not a party to the action pursuant to Pa.R.C.P. 403(a)
- By certified mail pursuant to Pa.R.C.P. 403
- By special order of Court pursuant to Pa.R.C.P. 403 if necessary.
- If Defendant has entered his appearance, pursuant to Pa.R.C.P. 440. Although Rule 440 permits legal papers which are not original process to be served upon the attorney of record, I would serve Defendant directly pursuant to Pa.R.C.P. 440(a)(2)(1)

c. A return of service must be filed pursuant to Pa.R.C.P. 405.

iii. 2958.3 or 2973.3 Notice – Served with the Writ of Execution.

iv. Practical Hint – In the Order for Service (or cover letter, if served pursuant to Pa.R.C.P. 403), list all documents to be served by the Sheriff, including the 2958.3 Notice, to prevent an assertion by tenant that he was not served with the Notice.

v. Notice Upon Subsequent Executions – Not necessary to re-serve the 2958.1 or 2958.3 Notices upon subsequent executions on the judgment. Pa.R.C.P. 2958.4(b).

vi. Filing – Judgments by Confession can be efiled in Philadelphia, Chester, Delaware and Lehigh Counties. In Bucks County, they must be filed in person or by mail Montgomery County will only accept these if filed in person or by mail, and they must be reviewed and accepted by the Prothonotary's solicitor, which could take up to several weeks.

7. Petitions to Open or Strike

These are the only means by which a judgment by confession may be challenged. See, e.g., PNC Bank v. Bluestream, supra (preliminary objections improper).

a. Petition to Strike – "A petition to strike a judgment is a common law proceeding that operates as a demurrer to the records and … may be granted only for a fatal defect or irregularity appearing on the face of the record." Dime Bank, pg. 364. Accord, Stolzfus v. Green Line Labs, LLC, 303 A.3d 447 (Pa. Super. 2023). If the confessed judgment includes any item not authorized by the warranty or a "fatal defect on the face of the record" it will be stricken. Centric Bank v. Sciore, supra; Dime Bank, supra.; Ferrick, supra;

ESB Bank v. McDade, 2 A.3d 1236 (Pa. Super. 2010): Germantown Savings Bank v. Talacki, 657 A.2d 1285 (Pa. Super. 1995) (maker died); PNC Bank, N.A. v. Bolus, supra (included real estate taxes not authorized by warrant) ; Langman v. Metropolitan Acceptance Corp., 465 A.2d 5 (Pa. Super. 1983) (included estimate of repairs not performed). May be stricken only if defects on the face of the document. Petition to Strike acts as a demurrer to the record. DeCoatsworth v. Jones, 639 A.2d 792 (Pa.1994); Gur, supra; Lebovitz v. Moser, 164 A.3d 1271 (Pa. Super 2016); Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 683 A.2d 269 (Pa. 1966); Rait Partnership, L.P.O. v. E Painter Properties I Ltd. 957 A.2d 1275 (Pa. Super. 2008); "If the record is self-sustaining, the judgment will not be stricken. However, if the truth of the factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike." Lechowitz, p. 1274, quoting Resolution Trust Co. v. Coplay Qu-Wayne Associates, 683 A.2d 269, 273 (Pa. 1966); Accord, Gur, supra; Driscoll v. Arena, 2018 Pa. Super. LEXIS 96. However, if the defect to the record is one that can be remedied by an amendment, the judgment will not be stricken. Dime Bank, supra; George H. Althof, supra. If the judgment is excessive, a court will open and modify the judgment. Dollar Bank v. Northwood Cheese Co., supra. However, a judgment may be stricken if the amount is unauthorized by the warrant or grossly excessive. Germantown Savings Bank, supra; Davis, supra; Leasing Service Corp. v. Benson, 464 A.2d 402 (Pa. Super. 1983).

An exception to this rule is that interest is allowed if contained in lease, but not specifically authorized in warrant. Heller v. Lombard, 223 A.2d 716 (Pa. 1966); McDowell National Bank of Sharon v. Vasconi, 178 A.2d 589 (Pa. 1962); Willow Grove Bank v. ATS Products Corp., 823 A.2d 1037 (Pa. Super. 2003).

b. Petition to Open – A Petition to Open is addressed to the equitable powers of the trial court, Centric, supra; Gur, supra; Crum v. F.L. Shaffer; 693 A.2d 984 (Pa. Super. 1997), and the result will not be disturbed absent a manifest abuse of discretion. Dominick's Inc. v. Tony's Famous Tomato Pie Bar & Restaurant Inc., 214 A.3d 259 (Pa. Super. 2019); PNC Bank National Association v. Bluestream, supra; PNC Bank v. Kerr, 802 A.2d 634 (Pa. Super. 2002). Matters outside the record may be considered. May be opened only if:

i. Petitioner acts promptly (within 30 days if tenant proceeds pursuant to Pa.R.C.P. 2956.1(c)); and

ii. Petitioner has presented sufficient evidence supporting the defense to require submission of the issues to a jury. First Seneca Bank v. Laurell Mt. Development Corporation, 485 A.2d 1086 (Pa. 1984); Resolution Trust Corporation v. Coply Qu-Wayne Assoc, 683 A.2.d 269 (Pa. 1996); Centric, supra; Dominick's, supra; Pops, supra. Petitioner must offer a meritorious defense based upon "...clear, direct, precise and believable evidence, sufficient to raise a jury question." Stahl, supra; Germantown Savings Bank, supra; Crum, supra. The court will employ the same standard as in a directed verdict, view all evidence in the light most favorable to the petitioner and accepting as true all evidence and proper inferences therefrom supporting the defense while rejecting adverse allegations of the party obtaining the judgment. Stahl, supra; Crum, supra; Weitzman v. Ulan, 450 A.2d 173 (Pa. Super. 1982). However, petitioner need not produce evidence proving that if judgment is opened, petitioner will prevail. Dominick's, supra; Miller v. Sacred Heart Hospital, 753 A.2d 829 (Pa. Super. 2000).

c. Procedure

i. Timelines

a. Petition to Open – Must be filed within 30 days of service of the notices required by Pa.R.C.P. 2956.1(c)(2) or 2973.1(c) unless compelling reasons are stated for the delay. Pa.R.C.P. 2959 (a)(3). Greater North American Funding Corp. v. Tara Enterprises, 814 A.2d 258 (Pa. Super. 2002); Thomas Associates Investigative and Consulting Services, Inc. v. GPI Ltd., Inc., 711 A.2d 506 (Pa. Super. 1998).

b. Petition to Strike – Must be filed within 30 days of service of the notices required by Pa.R.C.P. 2956.1(c)(2) or 2973.1(a)(3). Driscoll v. Arena, 213 A.3d 253 (Pa. Super. 2019). However, despite the language of Pa.R.C.P. 2959(a)(3), the Pennsylvania Supreme Court has ruled that there is no time limit for the filing of a Petition to Strike if the judgment is void. Typically, Petitions to Strike are granted in cases involving judgment because the judgment was entered without the authority of the warrant of attorney. A void judgment is one upon which a court has no authority to enter. Thus, in cases where the judgment is void, there is no time limit. M&P Management, L.P. v. Williams, 937 A.2d 398 (Pa. 2007) (amended promissory notes did not contain cognovit clause). However, if a judgment is merely voidable, the 30-day time period still applies. Accord, Rovick v. Neduscin, 231 A.3d 994 (Pa. Super. 2020). Driscoll, supra (statute of limitations would render the judgment voidable, but not void, and the 30-day time period applied).

Nonetheless, it is always advisable to file your Petition within 30 days. Don't count on the judgment being void. Furthermore, the 30-day time period is still applicable to Petitions to Open, which are typically filed in a single Petition along with Petitions to Strike.

ii. Single Petition – All grounds for relief must be asserted in a single petition Pa.R.C.P. 2959(a)(1), except where a due process rights waiver issue is raised and a separate Petition is filed on this sole issue. Pa R.C.P. 2958.3, 2959(a)(2). All defenses are waived if not included in the Petition. See also, Huntingdon Valley National Bank v. K-Cor, Inc., 107 A.3d 783 (Pa. Super. 2014); Stahl, supra; Davis v.Woxall Hotel, Inc., 377 A.2d 636 (Pa. Super. 1990); Pa.R.C.P. 2959(c). The prayer for relief in each count should often be to strike, or in the alternative, to open the judgment. What may not be good enough to strike may be good enough to open.

iii. Briefs/Memorandum of Law Upon Filing of Petition – Normally briefs or a memorandum of law will only be required when the matter is ready for disposition by the court. However, in counties which require electronic filing (e.g., Montgomery, Philadelphia), the electronic system requires that all Petitions be accompanied by briefs or a memorandum of law, pursuant to the local rules – even though prior to the advent of electronic filing, these briefs were not required with Petitions to Open or Strike. In counties which utilize manual filing, briefs are not required to be filed with the Petition. In the electronic filing counties, judges will normally permit supplemental briefs after discovery has been taken.

iv. 2958.3 and 2973.3 Petitions to Strike – Filing a Petition pursuant to these Rules, as opposed to Pa.R.C.P. 2959 is the only means to challenge whether a tenant's due process rights were violated because he did not knowingly, intelligently, and voluntarily waive his right to notice and a hearing prior to the entry of judgment.

Resolution Trust Corporation, supra.; Beneficial Mutual Savings Bank, supra; Beneficial Savings Bank v. Gbemudu, supra.

Requirements:

a. On form prescribed by Pa.R.C.P. 2967

b. Must be filed within 30 days after service of notices required by Pa.R.C.P. 2956.1(a)(2) or 2973.1(c).

c. Limited to issue of whether defendant knowingly, intelligently, and voluntarily waived his right to notice and hearing prior to entry of judgment.

d. Hearing on Petition must be within three (3) business days after Sheriff presents Petition to Court.

e. Plaintiff must prove, by a preponderance of the evidence, that defendant knowingly, intelligently, and voluntarily waived his right to notice and hearing prior to entry of judgment.

f. Execution proceedings shall be stayed pending disposition of Petition.

v. Stay of Execution – A judgment and lien are preserved while all proceedings to open or strike are pending, and execution on the judgment may proceed. Pa.R.C.P. 2959(f) and Explanatory Comment; FRG, Inc. v. Manley, 919 F.2d 850 (3rd Cir. 1990); In re Zampatti, 300 B.R. 415 (Bankr. W.D. Pa. 2003); Macioce v. Glinatsis, 522 A.2d 94 (Pa. Super. 1987); Rochester Machine Corp. v. Mulach Steel Corp., (Pa. Super. 1981). An order for "a stay of all proceedings" prevents the judgment from being transferred to another county. Reed Oil Co. v. Forbes, Lawrence County C.C.P. 2011, PICS No. 11-1146. If a bond is posted sufficient to cover payment of the judgment, the attachment may be removed. Pa.R.C.P. 3143(b)(1). Execution may also be stayed by the court in its discretion. Pa.R.C.P. 2959(e); 3121(b)(2); Continental Bank v. Frank, 495 A.2d 565 (Pa. Super. 1985); Beth-Westgate, supra, if a Petition to Stay Execution is filed. Some counties (e.g., Bucks, B.C.R.C.P. 206.4(c)(3), Philadelphia, Phila. Civ.R. 206.4(c)) provide for this Petition to be heard at a conference, rather than a hearing. A stay may also be granted ex parte (Philadelphia) in the appropriate case. Needless to say, ex parte petitions are frowned upon, and will only be granted in the most extreme circumstances. Given the significant consequences to a commercial tenant if judgments for money, or particularly a judgment for possession, is executed upon , it is strongly advised that tenant File a Petition to Stay Execution together with his Petition to Strike/Open if the and Writ of Execution was filed simultaneously with the judgment, or file the Petition immediately following any subsequent filing of a Praecipe for Writ of Execution or Possession. These Petitions should rightfully (but are not always) be granted if there are colorable grounds upon which to strike or open the judgment.

vi. Disposition – A Petition to Open or Strike is disposed of pursuant to Pa.R.C.P. 2959 and 206.7. If the Petition sets forth prima facie grounds for relief the Court will issue a Rule to Show Cause. Pa.R.C.P. 2959(b). Ohio Pure Foods, Inc. v. Barbe, 697 A.2d 252 (Pa. 1997): Ferrick, supra; Sierra North Associates Limited PA v. KRG Kings, LLC, 296 A.3d 633 (Pa. Super. 2023). Only a "minimal offering" is necessary to satisfy the requirement of the issuance of a Rule to Show Cause. Ohio Pure Foods, supra. A more recent Superior Court opinion, Dominic's, Inc. v. Tony's Famous Tomato Pie Bar &

Restaurant, Inc., 214 A.3d 259 (Pa. Super. 2019) reaches a contrary (and in my opinion, a mistaken) finding. The Dominic's Court found that a Rule to Show Cause Order must be issued as a matter of course, relying upon Pa.R.C.P. 206.6. However, Pa.R.C.P. 206.6 governs Rules to Show Cause entered upon Petitions, and the Note to Pa.R.C.P. 206.1(a)(2) states that the Petitions for Relief from a judgment entered by confession are governed by Rule 2959. Nonetheless, most courts issue Rules as a matter of course even when the grounds set forth in the Petition are patently frivolous.

After the issuance of a Rule to Show Cause on the Petition, depositions and other discovery may be taken pursuant to the order of Court pursuant to the Rule, although the Court is not obligated to authorize discovery. Ohio Pure Foods, supra; Ferrick, supra. A briefing schedule is often set forth in the Order as well. In Northampton County, Rule N 2959 mandates that depositions must be taken within 30 days from the date that the Rule to Show Cause is issued, or all counts in the Petition to Open which raise questions of fact will be stricken. If there is a legitimate discovery dispute, a Motion to Compel or a Motion for Protective Order may be filed. These Motions can significantly delay the disposition of a Petition to Strike/Open.

Bucks County – When landlord files a Reply to the Petition, tenant may file a Praecipe pursuant to B.C.R.C.P. 208.3(b) and order the matter to be submitted for disposition, together with a proposed form of Order, a Memorandum of Law, and a Certificate of Service. Landlord has ten (10) days from the filing of this Praecipe in which to file a Memorandum of Law. Oral argument may be requested in the Praecipe. If tenant does not file the Praecipe, landlord may send a notice to tenant providing tenant ten (10) days in which to file the Praecipe. If tenant fails to file a Praecipe within ten (10) days of this notice, landlord may file a Motion to dismiss the Petition.

vii. Discovery – The Court will typically allow 30-45 days for discovery which can include interrogatories, requests for production of documents and depositions. If there is a discovery dispute, Motions to Compel Discovery, Determine Objections or for a Protective Order can be filed. These Motions can significantly delay the disposition of a Petition to Strike/Open.

viii. Hearing – The Court will normally require briefs (or supplemental briefs in counties with electronic filing), and may schedule a hearing, or oral argument on the Petition. Sometimes, a case will simply require that a memorandum of law and supporting evidence (i.e., deposition transcripts, etc.) be presented and the Court will make a decision based upon these documents. A hearing is not required if the Court finds that the tenant has not made out a prima facie case that the judgment should be open or stricken. Pa.R.C.P. 2959(e); Beneficial Mutual Savings Bank v. Premier Residential Holdings, LLC, 2012 Phila.Ct.Com.Pl. LEXIS 304. However, see Gur, supra, where the appellate court remanded the case to the trial court for a hearing.

ix. Procedure Upon Opening of Judgment – If a Petition to Open is granted, landlord's case is still preserved, and no responsive pleading to the Complaint is necessary as the issues to be tried shall be defined by the Complaint, Petition and Answer opening the judgment Pa.R.C.P. 2960. A trial will ensue. The right to a jury trial is waived unless a demand for jury trial is filed within 20 days of the Order opening judgment. Pa.R.C.P. 2960. An order of court opening the judgment does not impair the lien of judgment. Resolution Trust Corp., supra; Ferrick, supra; Hazer, supra.

8. SUBSTANTIVE LAW

A. Strict Construction

1. Substantive Matters -- The warrant of attorney is strictly construed. A.B.&F. Contracting Corp. v. Matthews Coal Co., 166 A.2d 317 (Pa. 1960); Cutler v. Latshaw, 97 A.2d 234 (Pa. 1953); Dime Bank v. Andrews, 115 A.3d 358 (Pa. Super. 2015); PNC Bank v. Bluestream, 14 A.3d 831 (Pa. Super. 2010); PNC Bank v. Bolus, supra, "…in light of…due process attacks on cognovit clauses." Solebury National Bank of New Hope v. Cairns, 380 A.2d 1273, 1275 (Pa. Super. 1977). Construed against the party benefited by the warrant, not necessarily the party who drafted it. Grady v. Schiffer, 121 A.2d 71 (Pa.1956); Ferrick, supra; Egyptian Sands, supra. May be entered only by "rigid adherence to the provisions of the warrant of attorney and can only include items contained in the warrant." First Union National Bank v. Refrigerated Services, 827 A.2d 1224 (Pa. Super. 2003); Dollar Bank, et al. v. Northwood Cheese Co., 637 A.2d 309 (Pa. Super. 1994); Accord, Scott Factors. supra.

The Pennsylvania Supreme Court in Cutler Corp. v Latshaw, 97 A.2d 234 (Pa.1953) provides some powerful language on this subject:

> A warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law. The signer deprives himself of every defense and every delay of execution, he waives exemption of personal property from levy and sale under the exemption laws, and he places his cause in the hands of a hostile defender. The signing of the warrant of attorney is equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword.

Id. at 236. Accord, Ferrick, supra; Drum v. Leta, 512 A.2d 36 (Pa. Super. 1986).

2. Technical Defects – The court in Stein v. Penncrest Construction Corp., 421 A.2d 1074 (Pa. Super. 1980) held that "...notwithstanding the rule that warrants of attorney to confess judgment must be strictly construed, we believe these principles are more properly applicable to basic and substantive questions such as exceeding the scope of the warrant) as opposed to a technical irregularity." (Usurious rate of interest cured by Praecipe to assess damages). Accord, Mulcahy v. Loftus, 267 A.2d 872 (Pa. 1970); Blackbourne Viking Investment Group, LLC, 162 A.3d 461 (Pa. Super. 2017); PNC Bank v. Bluestream, supra; Atlantic National Trust, LLC v. Stivala Investments, Inc., 922 A.2d 919 (Pa. Super. 2007) (failure to include language required by Pa.R.C.P. 2952(a)(5) as to whether a prior judgment has been entered upon the warrant insufficient to strike judgment). Essentially, a Petition to Strike may not be granted on a technicality which can be cured by amendment "...where the ends of justice require the allowance of such amendment and where the substantive rights of defendant . . . will not be prejudiced thereby." West Penn Sand & Gravel Co. v. Shippingport Sand Co., 80 A.2d 84 (Pa. 1951) (notice of default referred to in affidavit but not attached thereto). Accord, W. H. Keech Co. v. O'Herron, 41 Pa. Super. 108 (1909) (amount of judgment slightly more than warrant allowed; George H. Althof v. Spartan Inns of America, Inc., 441 A.2d 1236 (Pa. Super. 1982) (verification not attached); Parliament Industries, Inc. v. William H. Vaughn & Co., 430 A.2d 981 (Pa. Super. 1980) (complaint verified by attorney instead of plaintiff); Tabas v. Robert Development Co., 297 A.2d 481 (Pa. Super. 1972) (affidavit of non-military service not filed at time of judgment, yet subsequently filed). Even if the judgment is entered " . . . for items clearly

within the judgment note but excessive in amount, the court will modify a judgment and cause a proper judgment be entered." Dime Bank, Federal Savings Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994). Accord, Blackburn v. King Investment Group, LLC, 2017 Pa. Super. LEXIS 222; W. H. Keech Co. v. O'Herran, 41 Pa. Super. 108 (1909).

This is particularly the case when the warrant contains "release of all errors" language. West Penn, supra; Atlantic National Trust, LLC, supra. But see First Union National Bank, supra, where the court found that even with "release of all errors" language in the warrant, this was insufficient to overcome a failure to provide notice to the debtor of the procedure required to file a petition to strike (this notice is no longer required. See Pa.R.C.P. 2959(g)).

B. Knowing, Intelligent and Voluntary Waiver of Rights – Given the fact that confessions of judgment are in derogation of the constitutional right to a trial, the courts are careful to ensure that they be entered only upon those who knowingly, intelligently, and voluntarily waive their rights. Accordingly, the warrants of attorney must be clearly visible in the executed document. Cutler, supra; (warrant stricken when among items on reverse side of a five-page contract).The document containing the warrant must be signed. Frantz Tractor Co., Inc. v. Wyoming Valley Nursery, 120 A.2d 303 (Pa.1956); Reinvestment Fund, Inc. v. Brewey Park Associates, L.P., 2011 Phila.Ct.Com.Pl LEXIS 283. The same rationale requires confession of judgment clauses to be set forth in all assignments. Frantz Tractor Co., supra. "Where a lease contains a warrant of attorney, the signature of the lessee must bear such direct relation to the provision authorizing the warrant as to leave no doubt that the lessee signed, conscious of the fact that he was there by conferring…. such plenary power on the donee." Id. at 305; Accord, JBG/Rosenfield Retail Properties v. Anspach, 803 A.2d 783 (Pa. Super. 2002). The warrant must be signed by all sublessees, Stewart v. Lawson, 37 A. 519 (Pa. 1897); guarantors, Solebury National Bank of New Hope v. Cairns, 380 A.2d 1273 (Pa. Super. 1977); Am Quip Corp. v. Pearson, 101 F.R.D. 332 (E.D. Pa. 1984); and extensions, Scott v. 1523 Walnut Corp., 447 A.2d 951 (Pa. Super. 1982); SDO Funding, supra. A cognovit clause which is contained in an unsigned addendum to a lease, even though the addendum is "incorporated by reference" into the lease, is unenforceable. Hazer v. Zapala, 26 A.3d 1166 (Pa. Super. 2011). A general incorporation of all terms and conditions of the lease is insufficient. Scott, supra. However. the clause does not have to be repeated in its entirety. Language which specifically refers to the original warrant in a subsequent document is sufficient. See, e.g., SDO Funding, supra, where a second Guaranty stating that a debtor "ratifies and confirms the deficient confession of judgment and waiver of jury trial provisions" prevented him from striking the judgment. However, see Ferrick v. Bianchi, supra, where the Court refused to strike a judgment when the addendum to the lease was merely for a temporary reduction in monthly rent, and the amendment specifically stated that the confession of judgment provisions "are hereby republished and …Tenant … agree[s] to be bound thereby…." Confession of judgment clauses are not binding upon a successor company. Centennial Bank v. Germantown-Stevens Academy, 419 A.2d 698 (Pa. Super. 1980). However, a confession of judgment clause is enforceable in a holdover situation. City of Pittsburg v. Charles Zubick & Sons, Inc., 171 A.2d 776 (Pa. 1961).

A trial Court found that a warrant of attorney contained in a commercial condominium declaration never signed by the purchaser but incorporated into the deed, was binding. Abbott Square Condominium Association v. Stabba Residential Associates, L.P., 2013 Phila.Ct.Com. Pl. LEXIS 294. And a confession of judgment clause does not have to be incorporated in an alonge which narrowly modifies the terms of a loan. First Bank v. Market E. 14th St., LLC, 2013 Phila.Ct.Com.Pl. LEXIS 304. A judgment may be entered against a general partner of a limited partnership even if he is not a signatory to the cognovit clause, as the general partner is liable for the obligations of a limited partnership. D'Amerlio v. Capponi, 2013 Phila.Ct.Com.Pl.LEXIS 266.

Practical Hint – Repeat and include the full cognovit clause in any document other than the lease, including guaranties, assignments, and extensions.

Nonetheless, despite the burden of proof being on the landlord, it is difficult for the tenant to establish, in a commercial setting and with a well drafted cognovit clause and waiver, that the tenant did not knowingly waive his rights. See e.g., Germantown Savings Bank, supra; Standard Venetian Blind Co. v. American Emp. Ins. Co., 469 A.2d 563 (Pa. 1983); Olson Estate, 291 A.2d 95 (Pa. 1972); North Penn Consumer Discount Co. v. Schultz, 378 A.2d. 1275 (Pa. Super. 1977).

C. Residential Leases – A Confession of Judgment in Ejectment may not be entered against a person pursuant to residential lease. Pa.R.C.P. 2970. Be careful if your tenant is using the premises for both his commercial enterprise and residence.

D. Attorney's Fees – See Section III.A.4, pg. 16. The fee may be challenged as unauthorized by the loan document or lease. For example, the cognovit clause may provide for any attorneys' commission of 15% of the judgment, but another section of the lease may provide that debtor/tenant shall pay creditor/landlord all attorneys' fees incurred by creditor/landlord, which may be substantially lower than the percentage. The fees may also be challenged as an unenforceable penalty, as opposed to enforceable liquidated damages. See Pantuso Motors, Inc. v. Corestates Bank, N.A., 798 A.2d 1277 (Pa. 2002); A.G. Cotler Construction Co., Inc. v. State System of Higher Education, 89 A.2d 71 (Pa. 1956); Colony Supplies Co., 361 A.2d 343 (Pa. Super. 1970); Post-Main Co. v. Fayette National Bank & Trust Co., 152 A.2d 714 (Pa. Super. 1959).

E. Assignment of Warrant – Landlord may assign a warrant of attorney. Warrant doesn't have to specifically allow assignment, but must not specifically forbid. Pa.R.C.P. 2951(a); Kine v. Forman, 172 A.2d 164 (Pa. 1961); Truist Bank v. Pennsylvania Muscle, Bone and Joint, 292 A.3d 1116 (Pa. Super. 2023); B. Lipsitz Company v. Walker, 522 A.2d 562 (Pa. Super. 1987). Complaint must clearly set forth assignee's interest in lease. Manor Building Corp. v. Manor Complex Assoc., 645 A.2d 543 (Pa. Super. 1994); Botnik, supra; Testa v. Lally, 55 A.2d 552 (Pa. Super. 1947).

F. Successive Judgments – A warrant may be used for successive judgments only if it authorizes multiple uses, and only for debt not confessed in prior judgment. Pa.R.C.P. 2953; Bank of Nanty Glo v. Schnabel, 139 A. 2d 862 (Pa. 1927); Ferrick, supra; B. Lipsitz, supra. A cognovit clause is not extinguished if landlord confesses judgment in a different portion of the debt than in his prior confession. Ferrick, supra: However,the clause may not be used twice on the same debt, even if original Complaint struck on procedural grounds and even if authorized in warrant. Scott Factors v. Harley,

228 A.2d, 886 (Pa. 1987); Continental Bank v. Tuteur, 450 A.2d 32 (Pa. Super. 1982). But see Kohl v. PNC Bank 912 A.2d. 237 (Pa. 2006). This is a matter of substantive law, and cannot be modified by the language of the warrant of the attorney. TCPF Limited Partnership v. Skatell, 976 A. 2d 571 (Pa. Super. 2009); B. Lipsitz, supra. In TCPF, supra, a landlord entered a judgment by confession involving its right to accelerated rent for the entire balance of the unexpired term in the amount of $65,196.91. Upon realizing that it had erred in its calculation of the amount as it had not included the amount due for another portion of the unexpired term, it filed a Motion to Amend Complaint to increase the amount of the judgment to $203,420.45. The Superior Court affirmed the trial court's denial of the request. Even though a single warrant may be used to confess judgment on severable portions of the debt, the plaintiff in this case attempted to use it to collect on the same debt (the unexpired balance of the term), albeit in differing amounts. The court found that Pa.R.C.P. 1033, which allows for the amendment of pleadings, does not permit an amendment where it is against a positive rule of law.

There are exceptions to this rule. A warrant may be used for a successive judgment if the first judgment was mistakenly stricken by the trial court. Kwasnik v. Hahn, 615 A.2d 84 (Pa. Super. 1992), or if a stipulated order provides that the striking or opening of a judgment shall not preclude landlord from entering in second judgment on the same warrant, Atlantic National Trust, LLC, supra.

G. Venue – Most cognovit clauses allow for a landlord to confess judgment "in any court of record" or "in any court in the Commonwealth of Pennsylvania, or elsewhere." The Superior Court in Midwest Financial Acceptance Corporation v. Lopez, 78 A.3d 614 (Pa. Super. 2013) held that Pa.R.C.P. 1006 does not govern the venue of judgments entered by confession as the judgments are not "civil actions" to which Pa.R.C.P. 1006 is applicable, and the parties waived the ordinary venue requirements in the warrant of attorney.

H. Failure to Attach All Documents Upon Which Judgment is Based to Complaint – Pa.R.C.P. 1019(i) provides that when any claim or defense is based upon a writing, the pleader must attach a copy of the writing or the material part thereof to the Complaint. Accord, Feigley v. Department of Conversions, 872 A.2d 189 (Pa. Comwlth. Ct. 2005); Delgrasso v. Gruesio, 389 A.2d 119 (Pa. Super. 1978); General State Authority v. Lawrence and Green, 356 A.2d 851 (Pa. Comwlth. Ct. 1976). If Plaintiff, for example, attaches the guaranty which contains the warrant of attorney, but fails to attach the loan agreement or lease upon which the guaranty is based, a debtor may avail himself of this ground to strike or open. From a practical standpoint, the missing documents may be supplied in discovery, or filed as an amendment to the Complaint. Nonetheless the additional documentation may provide additional grounds for the tenant to strike or open the judgment, e.g., venue, notice requirements, etc. See also Provident Consumer Discount Co. v. Rice, 12 Pa D&C 3d. 388 (1979), which held that although a creditor attached the note which contained the warrant of attorney to its Complaint, as the note referred to obligations of the debtor in a security agreement, the security agreement also had to be attached to the Complaint. As such, if the underlying documents are not affixed to the Complaint, debtor/tenant may have grounds to have the judgment stricken as there may be no authority in the Complaint or exhibits to enter a judgment.

I. Material Modification of Risk to Guarantor – If a lease, or the terms of a loan have been modified without the consent of the guarantor[1] a judgment against the guarantor may be stricken or opened. If there has been a material modification in a creditor/debtor relationship without a gratuitous surety's consent, the gratuitous surety is completely discharged. A compensated surety (either specifically compensated for the suretyship or if he has a beneficial relationship with the debtor, i.e., shareholder, director, spouse, etc.) is discharged if without the surety's consent, there has been a material modification in the creditor/debtor relationship and the modification has substantially increased the risk of the surety. Reliance Insurance Co. v. Penn Paving, Inc., 734 A.2d 833 (Pa. 1999); McIntyre Square Associates v. Evans, 827 A.2d 446 (Pa. Super. 2003); Continental Bank v. Axler, 510 A.2d 721 (Pa. Super. 1986); Restatement of Security 128. Even standard language in a guaranty which purportedly continues to hold the guarantor liable despite modifications in the lease or loan terms will not bind the guarantor unless the provision states that the guarantor is still liable if there is a material modification which increases his risk. McIntyre, supra.

J. ECOA Defense to Spousal Guaranty - The Equal Credit Opportunity Act ("ECOA") provides that it is unlawful "for any creditor to discriminate against any [credit] applicant, with respect to any aspect of a credit transaction … on the basis of … marital status." 15 U.S.C.A. §169(a)(1). Federal regulations implementing the ECOA provide that a creditor cannot require the signature of an applicant's spouse if the applicant qualifies under the creditor's standards of creditworthiness 12 C.F.R. §202.7(d)(1). Truist Bank v. Pennsylvania Muscle, Bone and Joint, supra; Silverman v. Eastich Multiple Investor Fund, 51 F.3d 28 (3d Cir. 1995). Only the spousal guarantor can raise the defense. Truist, supra. And the lender does not violate the ECOA where spouses are joint applicants or where the credit applicant is not individually creditworthy without the spouse's signature. Truist, supra; Southwestern Regional Pennsylvania Council v. Gentile, 776 A.2d 276 (Pa. Super. 2001).

9. ISSUES ON APPEAL

a. Appeal from Order Refusing to Strike/Open Judgment – Ordinarily, an appeal must be taken from a final order. Pa.R.C.P. 341. However, appeals may be taken from certain interlocutory orders, including orders refusing to strike or open a judgment Pa. R.A.P. 311(a)(1). If an order which modifies the amount of the judgment is entered subsequent to an interlocutory order dismissing a petition to strike, the 30-day appeal period runs from the first interlocutory order. Dollar Bank v. Northwood Cheese, supra.

The denial of a petition to open a confessed judgment can only be overturned if the trial court abused its discretion or committed a manifest error. Truist Bank v. Pennsylvania Muscle, Bone and Joint, supra; Neducsin v. Caplan, 121 A.3d 498 (Pa. Super. 2015); Atlantic National Trust, LLC v. Stivala Investments, Inc. 922 A.2d 925 (Pa. Super. 2007).

b. Appeals from Denial of Stay of Execution – These orders are not

[1] There is a distinction between a "guaranty" or a "surety." In a suretyship agreement, the creditor may pursue the surety for payment of the debt before, after or simultaneously looking to the debtor. In a guaranty, the creditor must look first to the tenant/debtor before pursuing the guarantor. McIntyre Square Associates v. Evans, 827 A.2d 446; Reuter v. Citizens & Northern Bank, 599 A.2d 673 (Pa. Super. 1991). However, "guaranties" are presumed to be suretyships unless specifically stated otherwise. 8 Pa. C.S.A. 1.

appealable. They are not final orders and do not fall under any of the exceptions for interlocutory orders which can be appealed as of right under Pa. R.A.P. 311.

c. Specific Appeal Issues Regarding Petitions to Open – A judgment must be entered to perfect an appeal to the Superior Court. If a Petition to Open is granted by the trial court and a trial ensues, an appeal cannot be taken from the order disposing of the post-verdict motions. The trial court must first enter a judgment or the appeal is interlocutory and not appealable. Atlantic LB. supra; Fanning v. Davne, 795 A.2d 388. (Pa. Super. 2002); Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863 (Pa. Super. 2000). If landlord receives an unfavorable verdict in the trial court, and neither the tenant nor the trial court enters a judgment on that verdict, landlord is placed in the unusual, but necessary position of having to file a Praecipe to enter judgment against itself in order to appeal. However, in Stahl Oil Company, Inc. v. Helsel, 860 A.2d 508 (Pa. Super. 2004), the Superior Court, for reasons of judicial economy, allowed an appeal to proceed upon an order issued by the trial court on post-trial motions.

d. Appeal from Order Striking or Opening Judgment – An order striking a judgment is considered a final order as it ends the litigation between the parties and therefore appealable. Pa. R.A.P. 341; Stoltzfus v. Green Line Labs, LLC, A.3d WL 6206454 (Pa. Super. 2023); United Parcel Services v. Hohider, 954 A.2d 13 (Pa. Super. 2008).

IV. TERMINATION OF LEASE BY MORTGAGE FORECLOSURE

A. Common Law Rule – If the mortgage was recorded prior to the execution of the lease, and the tenant had either actual or constructive notice of the mortgage at the time the lease became effective, the purchaser at a foreclosure sale may terminate the lease upon foreclosure. However, if the mortgage was executed after the lease became effective or the tenant had no actual or constructive notice of the mortgage, the purchaser at a foreclosure sale must take the premises subject to the tenant's rights under the lease. Peoples Pittsburgh Trust Co. v. Henshaw, 15 A. 2d 711 (Pa. Super. 1940).

B. Subordination Clause – In most commercial leases. Renders a tenant's rights inferior to those of a mortgagee. Allows a purchaser at a foreclosure sale to terminate the lease. Be careful about accepting rent after a foreclosure sale – this may lead to a waiver or estoppel defense.

V. DISPOSITION OF TENANT'S PERSONAL PROPERTY

It is often the case that that a tenant upon his abandonment or surrender of the leased premises, leaves his personal property behind. The landlord is confronted with the dilemma of storing the property on the premises and not being able to relet the premises, storing the property off the premises and paying for storage, or disposing of the property and facing potential liability. Generally, a tenant does not lose title to personal property by failing to remove it. Bednar v. Marine, 646 A.2d 573 (Pa. Super. 1994). The disposal of a tenant's property under these circumstances constitutes conversion, and subjects the landlord to liability for compensatory and punitive damages. Pikunse v. Kopchinski, 631 A.2d 1049 (Pa. Super. 1993).

68 Pa.C.S.P. §250.501.1 now governs the disposition of personal property left in the premises by an out of-possession tenant. This statute is unduly complicated. However, the basic requirements are as follows: The tenant has ten (10) days after he is out of possession to remove the property. Landlord must then provide ten (10) days written notice to retrieve

the property. If he doesn't, Landlord must hold the personal property for 30 days after the original notice. If tenant fails to retrieve the property within the 30 days, Landlord may dispose of or sell the property, keeping the sale proceeds to satisfy the outstanding judgments and returning the excess to tenant. If the Court Order contains the statutory ten (10) and 30-day notice requirements, the Landlord need not provide any further notice. The tenant is liable for storage costs if tenant fails to retrieve the property within the ten (10) days after Landlord's notice. If landlord violates this statute, he/she is subject to treble damages and attorneys' fees. Sherwood, supra.

Practical Solution – These requirements can be waived in the lease. As such, the lease should include language to the effect that tenant must remove all personal property from the premises within ten (10) days of when the premises are vacated, or landlord has the right to dispose of the property, and tenant is liable for storage costs. Or have the Court include the statutory language in its Order.