

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

KEYSTONE FINANCIAL BANK.,	:	
N.A., successor by merger with	:	
NORTHERN CENTRAL BANK,	:	
Plaintiff	:	
	:	
v.	:	NO. 99-00,466
	:	
TNMP ACQUISITION CORPORATION,	:	
TROY NEWS COMPANY, INC., and	:	
ROBERT RUBIN,	:	
Defendants	:	

**OPINION and ORDER**

Ever since this court's opinion and order was issued on 25 May 1999, this court has been deluged with motions. Keystone Financial Bank has been struggling to force Robert Rubin to comply with the court's order that he attend a deposition in aid of execution when properly noticed; Robert Rubin has been attempting once again to escape deposition by once again claiming the court has no personal jurisdiction over him. Not surprisingly, Mr. Rubin argues that since the court had no power to compel him to attend the deposition, the court cannot impose sanctions upon him for disobeying the order.

One would have thought the issue of personal jurisdiction had been resolved once and for all by this court's previous opinion. Apparently it was not resolved to the satisfaction of Mr. Rubin. In addition to reviving his former argument that the court has no jurisdiction over him because he was not subpoenaed for deposition, Mr. Rubin now claims the court has no personal jurisdiction over him because the underlying judgment is void. Mr. Rubin also threw in lack of subject matter jurisdiction, for good measure, but wisely appears to have abandoned that argument.

The judgment the bank is attempting to collect on was entered by Confession of Judgment, by Warrant-of-Attorney. The Confession of Judgment clause was contained in a guaranty signed by Richard Rapone under a Power of Attorney signed by Robert Rubin. The essence of Mr. Rubin's argument is that the language in the Power of Attorney is inadequate to have authorized Mr. Rapone to execute a Warrant-of-Attorney to confess judgment.

Mr. Rubin may well have a colorable argument as to why the default judgment should be deemed void and like all defendants in his position, he is welcome to assert it. However, he must do so in the proper manner. The Pennsylvania Rules of Civil Procedure specifically explain how to challenge such a judgment. Rule 2959(a)(1), entitled "Striking Off or Opening Judgment," provides: "Relief from a judgment by confession shall be sought by petition."

Mr. Rubin contends that he cannot file a petition to strike off the judgment because the defect (lack of jurisdiction) does not appear on the face of the record. On the other hand, he contends he is fearful of filing a petition to open the judgment because in doing so he will waive the ability to claim lack of personal jurisdiction, which can be raised only by preliminary objection.

Mr. Rubin's fears are totally unfounded. He mistakenly casts the issue of lack of authority to execute a Warrant-of-Attorney as a jurisdiction issue. Although the theory behind confession of judgment is that the defendant has consented to jurisdiction over him, that does not mean such a judgment may be challenged by claiming lack of jurisdiction through preliminary objections to proceedings in aid of execution of the judgment. Rather, the Pennsylvania Supreme Court has explicitly

set forth precisely how to attack a judgment by confession in Rule 2959.

Mr. Rubin wishes to attack the judgment by disputing Mr. Rapone's authority to execute the Warrant of Attorney to confess judgment. If he files a petition to open judgment, no court in its right mind would prevent him from making that argument on the basis of his having waived personal jurisdiction. While it is true that by filing the petition Mr. Rubin consents to the jurisdiction of the court to decide the petition, it will entitle him to challenge the underlying judgment, which is his ultimate goal. If Mr. Rubin succeeds in proving the judgment should be deemed void, personal jurisdiction is irrelevant because the judgment will not be enforced. If he does not succeed, he will be in no worse position than he is presently in, for the court has already denied his lack of personal jurisdiction argument in the execution of judgment proceedings.

The court would like to believe that Mr. Rubin has filed his flurry of motions because he honestly believed his was in a quandary and that his only recourse was to file preliminary objections. We cannot suppress our nagging suspicion, however, that he is merely trying a novel approach to avoid or delay being deposed. Because Mr. Rubin's argument falls a hair above the line separating plausible from frivolous, we will give him the benefit of the doubt and not impose sanctions for failing to comply with our motion to compel him to attend a deposition. However, this court's patience has grown razor-thin, and he will not be shown such mercy again. The next time Mr. Rubin receives a properly scheduled notice of deposition, he had better appear. If he does not, he exposes himself to serious risk of sanctions.

## ORDER

AND NOW, this \_\_\_\_\_ day of August, 1999, for the reasons stated in the foregoing opinion, the recent motions filed by the parties are disposed of as follows:

1. The Preliminary Objections to Plaintiff's Motion to Compel, filed by Defendant Rubin on 29 June 1999, have been rendered moot and are therefore denied.
2. The Preliminary Objections to Preliminary Objections of Robert Rubin, filed by the plaintiff on 6 July 1999, have been rendered moot and are therefore denied.
3. The Motion for Sanctions filed by the plaintiff on 8 July 1999 is denied.
4. The Motion for Sanctions in the Nature of a Motion to Quash Two Notices of Deposition, filed by the plaintiff on 15 July 1999, is granted. Defendant Robert Rubin has no right to depose any witness in this matter unless and until he files a petition to open or strike the judgment.
5. The Preliminary Objections to Plaintiff's Motion for Sanctions in the Nature of a Motion to Quash Two Notices of Deposition, filed by Robert Rubin on 20 July 1999, are denied.

Robert Rubin is ordered to appear for the next properly scheduled and noticed deposition. Failure to appear shall subject Robert Rubin to the possibility of sanctions for willful disobedience to a court order.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq., Law Clerk  
Hon. Clinton W. Smith  
Elliott Weiss, Esq.  
William Carlucci, Esq.  
Gary Weber, Esq.