IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joanna Coletti	:	
	:	
v.	:	
	:	
PFN Associates, LLC and	:	
City of Philadelphia	:	
	:	No. 1846 C.D. 2009
Appeal of: PFN Associates, LLC	:	Argued: February 9, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: March 17, 2010

PFN Associates, LLC (PFN) appeals the April 9, 2009 order of the Court of Common Pleas of Philadelphia County (trial court) denying its petition to open default judgment granted to Joanna Coletti (Coletti). There are two issues before this Court: 1) whether the trial court erred as a matter of law or abused its discretion in denying PFN's petition to open default judgment, and 2) whether the trial court erred as a matter of law in denying the petition to open default judgment based solely on the petition and answer, without considering PFN's request, pursuant to Pa. R.C.P. No. 206.7(b), and without allowing PFN to take discovery, pursuant to Pa. R.C.P. No. 206.7(c). For the reasons that follow, we affirm the trial court's order.

Coletti commenced the underlying action against PFN and the City of Philadelphia on July 21, 2008. Coletti allegedly sustained injuries as a result of a defective sidewalk in front of PFN's premises on April 19, 2007. PFN notified its

insurance carrier of the claim, but was subsequently notified that its insurance coverage had lapsed during the time of the alleged incident. PFN advised Coletti of this lapse in October of 2007.

Coletti's complaint was served on PFN on July 31, 2008, but PFN failed to respond. A notice of intent to take default judgment, dated September 30, 2008, was sent to PFN and, at the request of PFN, a case management conference was scheduled for December of 2008. PFN failed to appear at that conference. On February 12, 2009, Coletti filed a praecipe for entry of default judgment against PFN. Upon receipt of the notice, PFN retained representation for the first time. PFN then filed a petition to open default judgment on March 11, 2009. On April 9, 2009, the trial court denied PFN's petition. A subsequent motion for reconsideration was also denied on April 17, 2009. PFN appealed to the Superior Court of Pennsylvania. Because the City of Philadelphia was a party to the original lawsuit, the case was transferred to this Court.[1]

PFN contends that the trial court committed errors of material fact which lead to erroneous legal conclusions, in that it incorrectly calculated its delay in filing the petition to open default judgment. It further claims that these mistakes colored the trial court's view of the petition, resulting in a snap decision denying relief. In addition, it argues that due to the company's lack of sophistication and confusion over the lapse in insurance coverage, its floundering was understandable. Finally, PFN argues that Coletti's four and one-half month delay in filing the praecipe for default judgment added to its confusion. We reject PFN's arguments.

"[A] petition to open judgment is an appeal to the [trial] court's equitable powers. It is committed to the sound discretion of the [trial] court and will

[1] The City of Philadelphia did not participate in any proceedings before this Court.

not be disturbed absent a manifest abuse of discretion." *Reaves v. Knauer*, 979 A.2d 404, 409 (Pa. Cmwlth. 2009) (citations omitted). Further, "[a]n abuse of discretion occurs when a trial court, in reaching its conclusions, overrides or misapplies the law, or exercises judgment which is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will." *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 175 (Pa. Super. 2009) (quotation marks omitted). "To be successful, a petition to open a judgment must meet the following test: the petition must be promptly filed; the failure to appear or file a timely answer must be excused; and, the party seeking relief must show a meritorious defense." *City of Phila. Water Revenue Bureau v. Towanda Props., Inc.,* 976 A.2d 1244, 1247 (Pa. Cmwlth. 2009). "[A]ll three factors must appear before a court is justified in opening a default judgment." *McCoy v. Pub. Acceptance Corp.,* 451 Pa. 495, 498, 305 A.2d 698, 700 (1973).

In the present case, the trial court found, and neither party disputes, that PFN met the third prong in showing that it had a meritorious defense to the underlying claim. However, since all three criteria must be met, showing a meritorious defense is not enough, in and of itself, to justify a finding that the trial court abused its discretion.

As previously stated, the first prong is that the petition to open a default judgment must be promptly filed. Pa. R.C.P. No. 237.3(b) requires that a trial court automatically grant a petition to open default judgment which is filed within ten days of entry of the judgment, if there is a meritorious defense. However,

> [t]he timeliness of a petition to open judgment is measured from the date that notice of the entry of the default judgment is received. The law does not establish a specific time period within which a petition to open a judgment must be filed to qualify as timely. Instead, the court must consider the length of time between discovery of the entry of the default judgment and the reason for delay.

Castings Condo. Ass'n, Inc. v. Klein, 663 A.2d 220, 223 (Pa. Super. 1995) (citation omitted). "In cases where the appellate courts have found a 'prompt' and timely filing of the petition to open a default judgment, the period of delay has normally been less than one month." *US Bank N.A. v. Mallory*, 982 A.2d 986, 995 (Pa. Super. 2009).

In the present case, the default judgment was entered on February 12, 2009. PFN filed its petition on March 9, 2009,[2] which is a delay of approximately twenty-five days.[3] Reproduced Record (R.R.) at 4a-5a. Under *US Bank N.A.*, this filing after only a twenty-five day delay would be considered timely. However, as mentioned previously, meeting two of the criteria does not justify opening the default judgment without satisfaction of the remaining prong of the test.

The remaining prong of the test for opening a judgment is that there must be a reasonable excuse for the delay in filing. "[W]hether an excuse is legitimate is not easily answered and depends upon the specific circumstances of the case. The appellate courts have usually addressed the question of legitimate excuse in the context of an excuse for failure to respond to the original complaint in a timely fashion." *US Bank N.A.*, 982 A.2d at 995 (quotation marks and citation omitted). In general, the Superior Court of Pennsylvania has held that where the delay in filing the petition to open judgment was caused by an oversight, an unintentional omission, or a mistake of the rights and duties of the petitioning party, the judgment may be opened. *Myers*. It has also held, "that unacceptable mistakes involve attorney carelessness or dilatoriness, a failure to act by one who knows its implications, or a deliberate

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[2] The trial court indicates that the petition to open default judgment was filed on March 11, 2009; however, the trial court docket indicates that the petition was filed on March 9, 2009.

[3] PFN states in its brief that it received the notice of default judgment on Monday, February 16, 2009, thereby making the delay only twenty-three days from when it received notice. Appellant's Br. at 9.

decision not to defend." *Keystone Boiler Works, Inc. v. Combustion & Energy Corp.*, 439 A.2d 792, 794 (Pa. Super. 1982). However, the Superior Court has noted that it makes a distinction between corporations and laypersons in its determination to uphold a trial court's decision to open the judgment. *Myers*.

PFN is a limited liability corporation existing under the laws of Pennsylvania. R.R. at 10a. However, it bases its reasonableness argument on the fact that it was trying to work out a coverage dispute with its insurance company, and that its members lacked sophistication and an understanding of the gravity of the situation. Appellant's Br. at 11-12. In addition, PFN claims that since Coletti did not file the praecipe for entry of default judgment until approximately four months after she sent notice to take default judgment, equities weigh heavily in its favor for opening the judgment. *See Attix v. Lehman*, 925 A.2d 864, 866-67 (Pa. Super. 2007) (citations omitted) ("Default judgments are generally not favored. There may be equitable reasons for the trial court to reach the merits of the case and decide the issues rather than dismiss it for a procedural flaw").

The Superior Court has noted that, "[e]xcusable negligence must establish an oversight rather than a deliberate decision not to defend." *Seeger v. First Union Nat'l Bank*, 836 A.2d 163, 167 (Pa. Super. 2003). Specifically, in *Seeger*, an employee who handled the assignment of new complaints to outside counsel thought that she had faxed copies of the plaintiff's complaint to outside counsel and First Union's Loss Management Division, pursuant to First Union's procedures. However, she instead faxed two copies to the Loss Management Division. She did not realize her mistake until she received a notice of default judgment, at which time she immediately contacted outside counsel who filed a petition to open judgment.

In the present case, even though it does not appear that PFN had a formal system in place to address legal claims, and PFN's manager, Elio Nestico may not have had the legal sophistication to address the complaint himself, the failure to respond to any of the legal documents cannot be excused as a clerical error or unintentional omission. Nestico knew in October of 2007 that PFN's insurance company believed that there was a lapse in coverage at the time of the accident. R.R. at 26a. PFN received the complaint indicating that it was being sued and that it should retain legal counsel in June of 2008. R.R. at 9a. PFN, however, did not retain a lawyer until it received notice of the default judgment in February of 2009. R.R. at 27a. Instead, PFN ignored the complaint and tried to resolve the matter on its own. The underlying alleged clerical error that resulted in the lapse of coverage does not excuse PFN's failure to address the complaint. Even if Nestico did not have the legal sophistication to address the complaint himself, as manager of a limited liability corporation, he should be expected to have the business sense to contact a lawyer upon receipt of a legal document which advises him to do so.

In addition, although PFN complains that it took Coletti four months between the time notice to take default judgment and the actual praecipe were filed, that depiction of the timeline is not entirely accurate. During those four months, case management meetings were scheduled. The first meeting was scheduled for November of 2008, but PFN asked for it to be rescheduled. Trial Court Op. at 2. The second meeting was scheduled for December of 2008, but PFN failed to appear. Trial Court Op. at 2. Thus, PFN cannot now claim that Coletti waited four months to take any action because, obviously, there were attempts made to manage the case, and the delays were caused by PFN's decision not to participate. Appellant's Br. at 12. Since all three of the prerequisites for the opening of a default judgment were not

met, the trial court did not err as a matter of law or abuse its discretion in denying the petition to open default judgment.

PFN also argues on appeal that the trial court should have, at a minimum, granted its application pursuant to Pa. R.C.P. No. 206.5 for issuance of a Rule to Show Cause, which would have provided for discovery and a hearing on a full record. It contends that these errors constitute a disregard of the court's rules and an abuse of discretion. We agree.

Pa. R.C.P. No. 206.4 states, in relevant part:

> (a) A petition shall proceed upon a rule to show cause, the issuance of which shall be discretionary with the court as provided by Rule 206.5 unless the court by local rule adopts the procedure of Rule 206.6 providing for issuance as of course.
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> . . . .
>
> (b) The procedure following issuance of the rule to show cause shall be in accordance with Rule 206.7.[4]

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[4] Pa. R.C.P. No. 206.7 states:

> (a) If an answer is not filed, all averments of fact in the petition may be deemed admitted for the purposes of this subdivision and the court shall enter an appropriate order.
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> (b) If an answer is filed raising no disputed issues of material fact, the court on request of the petitioner shall decide the petition on the petition and answer.
>
> (c) If an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not do so, the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of this subdivision.
>
> (d) The respondent may take depositions, or such other discovery as the court allows.

> *Note:* Subdivisions (b) through (e) of Rule 239.2 require every court to promulgate Local Rule 206.4(c) describing the court's procedures for the issuance of a rule to show cause. Local Rule 206.4(c) shall be published on the Pennsylvania Judiciary's Web Application Portal (http://ujsportal.pacourts.us).

The Common Pleas Court of Philadelphia County has adopted and promulgated Rule 206.4(c), which states:

> The Rule to Show cause process set forth in Pa.R.C.P. 206.6 is hereby adopted for all petitions filed pursuant to Pa.R.C.P. 206.1 *et seq.* Upon the filing of a petition, a rule to show cause shall be issued as of course by the Motion Court clerk on behalf of the Court. The form of rule to show cause order shall be substantially as set forth hereunder. To obtain a stay of proceedings, the filing party shall specifically set forth in the petition the reasons why the stay is required, and shall further indicate on the ***Petition/Motion Cover Sheet*** that a stay has been requested. The Court may schedule a conference on the request for stay, or grant or deny the stay *ex parte*.

The language of Phila.R.C.P. 206.4 indicates that if the petitioner properly files a petition subject to Pa. R.C.P. No. 206.1, *et seq*., the trial court *shall* enter an order issuing the rule to show cause. Here, the trial court did not initially enter an order issuing a rule to show cause upon the filing of PFN's petition to open default judgment, which is subject to Pa. R.C.P. No. 206.1, *et seq*. Thus, a week after filing the petition to open, PFN filed a "Praecipe to Attach" a proposed order for the rule to show cause, pursuant to Phila.R.C.P. 206.4. R.R. at 80a-81a. Contrary to its local rule and Pa. R.C.P. No. 206.6, however, the trial court never issued the appropriate rule to show cause.

Notwithstanding, the trial court's order is affirmed because, as stated above, we find no error in the trial court's substantive analysis. As a procedural matter, the order is affirmed because PFN waived the rule to show cause issue by failing to raise the issue in its statement of errors complained of on appeal. Pa. R.A.P. 1925(b)(4)(vii). The only issue PFN raised in its statement of errors was: "Whether Judge Howland W. Abramson properly denied the Petition to Open Default Judgment of Appellee [(*sic*)] Defendant, PFN Associates, LLC." Appellant's Br. at "Appendix A." PFN suggested the following answer for this Court:

> SUGGESTED ANSWER: Judge Howland W. Abramson improperly denied Appellee's petition and abused the courts discretion in not opening the default judgment because (1) the petition was filed promptly; (2) the petition showed a meritorious defense; and (3) the petition showed a reasonable explanation or excuse for the default. Moreover, the equities were not considered as Appellees are substantially more prejudiced than Plaintiff by the denial of the petition and the entering of "snap" default judgments should not upheld.

Id.

As explained above, we disagree with PFN's "Suggested Answer." All other issues are waived.

For the reasons stated above, we affirm the trial court's order.

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JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 17th day of March, 2010, the April 9, 2009 order of the Court of Common Pleas of Philadelphia County is affirmed.

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JOHNNY J. BUTLER, Judge