IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Borough of Laurel Mountain	:	
	:	
v.	:	No. 2175 CD 2007
	:	Submitted: June 20, 2008
Kimberly Kunkle,	:	
Appellant	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: July 28, 2008

Kimberly Kunkle (Appellant) appeals from an order of the Court of Common Pleas of Westmoreland County that denied her petition to open a default judgment entered against her on May 16, 2007 in a civil action initiated by the Borough of Laurel Mountain. The Borough seeks removal of Appellant's fence that allegedly was erected in violation of the zoning ordinance. The statement of the question involved is whether the trial court committed an error of law in denying Appellant's petition when she presented credible evidence that the petition had been promptly filed, a meritorious defense could be shown and the failure to file an answer to the Borough's complaint could be adequately explained.

Appellant owns property with a fence that enters into and crosses an unopened portion of Red Oak Road. Article VI, Section 603.2 of the Borough's zoning ordinance provides that "[f]ences, boundary walls and hedges shall be set back eighteen (18) inches from the edge of any public roadway." Pursuant to the ordinance, the Borough instructed Appellant and other affected property owners to

remove their fences from Red Oak Road, but Appellant did not comply. As a result, the Borough filed an action with the magisterial district court to compel Appellant to remove her fence and to pay a daily fine of $500. Judgment was entered in favor of the Borough. On May 8, 2006, it filed a complaint in the trial court seeking the same relief. On May 24, 2006, Appellant filed preliminary objections alleging lack of jurisdiction, which were overruled on September 13.

On May 1, 2007, the Borough properly served on Appellant a notice of praecipe to enter judgment by default pursuant to Pa. R.C.P. No. 237.1(a)(2).[1] On May 16, 2007, a default judgment was entered on the docket: "JUDGMENT BY DEFAULT EO DIE: JUDGMENT ENTERED/NOTICE SENT." Reproduced Record at 1a. Appellant nonetheless claims that she did not receive notice of the entry from the prothonotary. Five days later on May 21, 2007, Appellant filed an answer to the complaint, new matter and counterclaim, but she filed no petition to open the default judgment. By letter dated June 15, 2007, the Borough notified Appellant of its intent to file a motion for entry of final decree upon judgment of default on June 29, 2007; a hearing on the motion was scheduled for September 28, 2007. On July 6, 2007, Appellant served upon the Borough her petition to open default judgment, but she did not file it at the time.

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[1]Rule 237.1(a)(2) provides as follows:

> (2) No judgment of non pros for failure to file a complaint or by default for failure to plead shall be entered by the prothonotary unless the praecipe for entry includes a certification that a written notice of intention to file the praecipe was mailed or delivered
>
> ….
>
> (ii) in the case of a judgment by default, after the failure to plead to a complaint and at least ten days prior to the date of the filing of the praecipe to the party against whom judgment is to be entered and to the party's attorney of record, if any.

Appellant presented the petition to open judgment by default at the September 28 hearing, and the trial court denied the petition because Appellant offered no excuse for the failure to file an answer to the complaint. It reasoned:

> A petition to open a default judgment is a matter of judicial discretion and is an appeal to the equitable powers of the court which will be exercised only when the petition to open has been promptly filed, a meritorious defense has been shown, and failure to file a timely Answer has been reasonably explained or excused. These are stated in the conjunctive and thus all three criteria must be satisfied before the judgment may be opened. In the present case, at the hearing held in this matter, there was no evidence presented to excuse the filing of an Answer to the Complaint for 249 days or some 229 days late. ... It [sic] fact, and to her credit, counsel for the defendant candidly stated to the Court that she had no excuse. (See p. 31, lines 21 through 25 and p. 32, lines 1 through 15 of the hearing transcript attached hereto and made a part hereof) This is the basis for the Court's decision to refuse to open the judgment.

Trial Court's Opinion, p. 3.[2] The Supreme Court has held that "[a] lower court's ruling refusing to open a default judgment will not be reversed unless there has been an error of law or a clear, manifest abuse of discretion." *Schultz v. Erie Ins. Exch.*, 505 Pa. 90, 94, 477 A.2d 471, 472 (1984) (quoting *Balk v. Ford Motor Co.*, 446 Pa. 137, 140, 285 A.2d 128, 131 (1971) (stating that petition to open is matter for judicial discretion to be exercised only when petition has been promptly filed, meritorious defense can be shown and petitioner failure to appear can be excused)).

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[2]The trial court points to the following portion of the September 28 hearing transcript:

> Miss Williams [counsel for Appellant]: Judge, I am offering no excuse. The reason for failing to file [an answer] I frankly don't know why it was not. … I have no explanation to offer as to why my office did not file….

Reproduced Record at 4a.

Appellant argues that she met the three requirements under *Balk* to open the default judgment: the petition to open was promptly filed; a meritorious defense can be established; and the failure to appear can be excused. First, the petition was timely filed because Appellant mailed a copy of it to the Borough on July 6, 2007, only four business days after she was served with the motion for entry of final decree upon judgment of default on June 29. The petition was not filed on July 6 because counsel for both parties agreed that it could be considered at the September 28 hearing. Second, Appellant has several meritorious defenses: the matter should have been brought before the zoning hearing board; the disputed portion of Red Oak Road is unopened and has never been accepted by the Borough; the Borough lacks consent from 51% of the owners of property abutting the road to open it; this proceeding is retaliatory; and the Borough has effected a *de facto* partial condemnation of Appellant's property. Lastly, the failure to file a timely answer is attributed to "an unspoken understanding among members of the local bar that one attorney will not 'default' another without some advance notification such as a telephone call." Appellant's Brief, p. 7.

Citing to *Dumoff v. Spencer*, 754 A.2d 1280 (Pa. Super. 2000), the Borough responds that all three of the *Balk* test requirements must be satisfied before a court may grant relief. Appellant's counsel, however, stated that she could offer no adequate excuse for the delay in filing a timely answer. Citing as well *Triolo v. Philadelphia Coca Cola Bottling Co.*, 440 Pa. 164, 270 A.2d 620 (1970), the Borough argues that Appellant's counsel's belief that the Borough would not exercise its rights is unfounded and does not excuse the delay. In *Triolo* the Supreme Court held that "[appellant] cannot be foreclosed from exercising [the right to obtain a default judgment] simply because he was courteous and extended

the time limits" and that the appellee in that case "cannot be heard to say that he did not think appellant was serious in his desire to enforce his rights." *Id.*, 440 Pa. at 167, 270 A.2d at 622. Appellant does not allege that the Borough failed to follow the proper procedure in obtaining a default judgment, and the Borough agreed to no extension for filing an answer that could excuse the delay. Appellant filed an answer five days after entry of the default judgment and three weeks after the ten-day notice.

The Court has stated that "default judgments are not favored" and that "[t]he purpose of the rules in authorizing the entry of default judgments is to prevent a dilatory defendant from impeding the plaintiff in establishing his claim." *Peters Township Sanitary Authority v. Am. Home and Land Dev. Co.*, 696 A.2d 899, 902 (Pa. Cmwlth. 1997) (quoting *Tronzo v. Equitable Gas Co.*, 410 A.2d 313, 315 (Pa. Super. 1979)). The trial court properly denied relief here, however, because Appellant failed to provide a reasonable excuse for her delay in answering, and she admitted that there was no excuse. *Schultz*; *Balk*. Appellant's expectation that the Borough would not pursue a default judgment does not excuse the delay. *Triolo*. Furthermore, Appellant's petition was not promptly filed. Although she claims a lack of notice of entry of the default judgment until receipt of the June 15, 2007 letter, the record shows that notice was sent to Appellant in May 2007. Even assuming that she lacked notice until receipt of the June 15 letter, she served the petition to open on July 6, or three weeks later. Default judgments are not favored, but no relief is due in this matter given Appellant's unexcused delay and dilatory response. *Peters Township Sanitary Authority*. Finding no error of law or abuse of discretion by the trial court, the Court affirms its order.

DORIS A. SMITH-RIBNER, Judge

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O R D E R

AND NOW, this 28th of July, 2008, the Court affirms the order of the Court of Common Pleas of Westmoreland County.

DORIS A. SMITH-RIBNER, Judge