

THE COMMONWEALTH COURT OF PENNSYLVANIA

Schuylkill Valley Sewer Authority :
 :
 v. : No. 776 C.D. 2009
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 Lee Son Yom and Michele M. Yom, :
 Appellants :
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 Schuylkill Valley Sewer Authority :
 :
 v. : No. 1131 C.D. 2009
 : SUBMITTED: September 25, 2009
 Lee Son Yom and Michele M. Yom, :
 Appellants :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 18, 2009

In these consolidated appeals, Lee Son Yom and Michele M. Yom, husband and wife, proceeding *pro se*, challenge the April 8, 2009 order of the Court of Common Pleas of Schuylkill County denying the Yoms' petition to strike and/or open the summary judgment entered in favor of Schuylkill Valley Sewer Authority (Authority) in the Authority's civil action against the Yoms and dismissing their counterclaim set forth in the petition (No. 776 C.D. 2009). The Yoms further challenge the court's May 13, 2009 order denying their motion to set aside a sheriff's sale (No. 1131 C.D. 2009). The Yoms argue that the trial court

lacked jurisdiction over the Authority's civil action and that the summary judgment should have been stricken because the Authority filed the action prematurely. They further argue that the sheriff's sale should be set aside because the sale price was grossly inadequate.

The Yoms owned an apartment building located at 12-18 Wiggan Street in the Borough of New Philadelphia (Borough), Schuylkill County. The property is within 150 feet of the public sewer system owned and operated by the Authority. Section 201 of the Borough Ordinance 52-1998 (Ordinance) requires an owner of improved property accessible to and located within 150 feet of the sewer system to connect the property to the sewer system within sixty days of notice from the Authority. The property owner must then file a written sewer connection application and "pay the permit, connection, customer facilities and tapping fees." Section 302 of the Ordinance. If the owner fails to make a required sewer connection, "the Authority may make the connection and collect the costs thereof in the manner provided by law." Section 202 of the Ordinance.

On April 18, 2007, the Authority commenced a civil action against the Yoms, alleging that they failed to file a written sewer connection application. The Authority sought an order directing them to file a written application or, in the alternative, permitting the Authority to make the connection solely at their costs, and ordering them to pay sewer charges unpaid through February 2007, totaling \$11,619.10. Through their counsel, the Yoms filed an answer admitting most of the Authority's allegations, but alleging that they received only the Authority's publication, "SVSA News," and did not receive any correspondence from the Authority advising them of their obligation to connect their property to the sewer system. They further alleged that the Authority filed the action prematurely when

the deadline for sewer connection was extended to May 1, 2007, and that they "fully intend[ed] to connect the premises to the sewer system." Answer to the Complaint, ¶ 17; Supplemental Reproduced Record (S.R.) at 49b. They denied that they owed any sewer charges.

The Authority subsequently submitted a request for admission, requesting that the Yoms admit their receipt of the SVSA News and the Guidelines for Connection of Properties to the Sewer System; a publication of Notice to Customers in the *Pottsville Republican and Herald*; and their receipt of sewer bills and a letter from the Authority's bookkeeper, notifying them of their failure to pay tapping fees. The Yoms did not respond to the request for admission. In March 2008, the Authority filed a motion for summary judgment, alleging that the Yoms admitted material facts in their answer to the complaint and that adequate notice of their obligation to make a sewer connection was established due to their failure to respond to the request for admission. The Yoms did not file an answer to the motion for summary judgment. On April 18, 2008, the trial court granted the motion in favor of the Authority and against the Yoms and awarded the Authority \$11,943.40 for the unpaid sewer charges for the period from March 2001 through February 4, 2008. The court also ordered the Yoms to make a written sewer connection application and permitted the Authority to make the connection solely at their costs upon their failure to do so. The Yoms did not appeal the trial court's order.

The Authority filed a praecipe for entry of judgment in May 2008 and a praecipe for writ of execution in January 2009. On February 12, 2009, Lee Son Yom was served at the State Correctional Institution at Albion with notice of a sheriff's sale scheduled for April 24, 2009. The Yoms then filed a *pro se* "petition

to strike and/or open judgment and counterclaim" on March 5, 2009, alleging that they filed the petition timely and had a meritorious defense to the judgment. They argued that the Authority did not have a valid claim supporting the April 18, 2007 action because the deadline for sewer connection was extended to May 1, 2007. They further alleged that they submitted a connection application in June 2007 and that the Authority refused to accept a check tendered for the undisputed portion of the tapping fees. They averred that while Lee Son Yom was incarcerated, their counsel failed to timely respond to the Authority's pleadings, motions and correspondence. They also set forth a counterclaim that the Authority singled them out in enforcing the Ordinance, in violation of Article 1, Section 26 of the Pennsylvania Constitution.¹ The Authority filed an answer and preliminary objections to the counterclaim. On April 8, 2009, the trial court denied the petition and dismissed the counterclaim. They appealed the trial court's order.²

At a subsequent sheriff's sale held on April 24, 2009, the Authority, as the sole bidder, purchased the Yoms' property for \$893.06, the amount of its costs. On April 30, 2009, the Yoms filed a motion to set aside the sheriff's sale, contending that the fair market value of the property was more than \$75,000, and that the sale price was grossly inadequate. They requested that the sheriff's sale be

¹ Article 1, Section 26 of the Pennsylvania Constitution provides that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

² On April 18, 2007, the Authority commenced a separate civil action against the Yoms, seeking an order compelling them to connect another apartment building they owned (Water Street property) to the sewer system or permitting the Authority to make the connection solely at their costs. The trial court granted the Authority's motion for summary judgment in favor of the Authority, denied the Yoms' petition to strike and/or open the judgment and dismissed a counterclaim. The Yoms appealed the trial court's order, docketed at No. 781 C.D. 2009, which will be decided separately.

set aside pending their real estate appraiser's report on the property's fair market value. The trial court denied the motion by order dated May 13, 2009. They appealed the order, which was consolidated by this Court *sua sponte* with the appeal from the denial of the petition to strike and/or open a judgment and counterclaim.

The Yoms first argue that the summary judgment should be stricken because the trial court lacked subject matter jurisdiction over the Authority's action and that a jurisdictional issue may be raised at any time. In support, they cite cases holding that a property owner is entitled to the same protections afforded by the Pennsylvania Rules of Criminal Procedure when a municipal ordinance imposes an imprisonment term for violating its provision or for failing to pay a fine. *See, e.g., Commonwealth v. DeLoach*, 714 A.2d 483 (Pa. Cmwlth. 1998); *Three Rivers Realty & Dev. Corp. v. Borough of West View*, 608 A.2d 619 (Pa. Cmwlth. 1992). Relying on Section 102 of the Ordinance imposing a fine of up to \$1000 upon conviction of violating any provision of the Ordinance and imprisonment for up to thirty days for failing to pay a fine, they maintain that the Authority should have filed a complaint with an issuing authority pursuant to Pa. R. Crim. P. 130(A)(1) and 400, not with the trial court.

The cases cited by the Yoms, however, involved an appeal from a summary conviction before magisterial district judges of violating provisions of an ordinance. Those cases are inapplicable to the Authority's civil action, in which it sought injunctive relief and collection of unpaid sewer charges. Under Section 5607(d)(2) and (9) of the Municipality Authorities Act, *as amended*, 53 Pa. C.S. § 5607(d)(2) and (9), every municipal authority has "all powers necessary or convenient for the carrying out of [its] purposes," including powers "[t]o sue and

be sued, implead and be impleaded, complain and defend in all courts" and "[t]o fix, alter, charge and collect rates and other charges in the area served by its facilities." *See also Mun. Auth. of Hazle Twp. v. Lagana*, 848 A.2d 1089, 1093 n.7 (Pa. Cmwlth. 2004) ("an authority has the general power to sue"). The Yoms' argument that the trial court lacked jurisdiction over the Authority's action, therefore, is without merit.

The Yoms next argue that the trial court erred in refusing to strike or open the summary judgment because the Authority filed the action prematurely before the extended sewer connection deadline.³ In so arguing, they totally disregard that they failed to raise the argument previously in a timely filed response to the motion for summary judgment. A "[s]ummary judgment may be entered against a party who does not respond." Pa. R.C.P. No. 1035.3(d). *See also Commonwealth v. Jash Int'l, Inc.*, 847 A.2d 125, 130 (Pa. Cmwlth. 2004) ("in the absence of a timely response to a motion for summary judgment, a court may enter judgment in favor of the moving party"). In addition, they neither appealed the order granting the summary judgment nor sought permission to appeal the order *nunc pro tunc*.

³ Our review of an order denying a petition to strike or open a judgment is limited to determining whether the trial court abused its discretion or committed an error of law. *Clayton v. City of Philadelphia*, 910 A.2d 93 (Pa. Cmwlth. 2006). In deciding a petition to strike a judgment, a court considers only the facts in the record and grants the petition only if a fatal defect appears on the face of the record. *Cintas Corp. v. Lee's Cleaning Servs., Inc.*, 549 Pa. 84, 700 A.2d 915 (1997). A petition to open a judgment, on the other hand, is an appeal to the equitable power of the court and is committed to the sound discretion of the court; the court's decision will not be disturbed absent a manifest abuse of discretion. *Id.* A party filing a petition to open a judgment must establish: (1) timely filing of the petition; (2) a reasonable explanation or excuse for failure to appear or to file a timely answer; and (3) a meritorious defense. *City of Philadelphia Water Revenue Bureau v. Towanda Props., Inc.*, 976 A.2d 1244 (Pa. Cmwlth. 2009).

Moreover, the unappealed summary judgment cannot be stricken or opened under Pa. R.C.P. No. 237.3(a), which allows a party to obtain "relief from a judgment of non pros or of default." A judgment of non pros is entered by praecipe for failure to timely file a complaint, and a judgment by default is entered by praecipe for failure to timely file a responsive pleading to a complaint. Rules 237.1(a) and 1037(a) and (b). Rule 237.3(a) does not apply to the Yoms' petition because they filed an answer to the complaint and did not seek relief from a default judgment. Nor did they file a petition seeking relief from a judgment by confession under Rule 2959.

In *Lowrey v. East Pikeland Township*, 599 A.2d 271 (Pa. Cmwlth. 1991), the sewer authority filed an action against the property owner to compel him to connect his property to the sewer system and to pay sewer fees. The owner subsequently connected the property to the sewer system, and the trial court granted the authority's motion for summary judgment on the sewer fee claim. This Court affirmed, and the Supreme Court denied the petition for allowance of appeal. The owner thereafter filed a petition "to open summary judgment," as in this case. This Court affirmed the trial court's denial of the petition, stating:

The judgment initially entered by the trial court ... is conclusive as to all rights, questions or facts put in issue or which could have been raised in that action and is conclusive as to this or any subsequent action between [the owner] and the Authority whether on the same or a different claim.

Id. at 273. Under *Lowrey*, the Yoms may not seek to strike or open the trial court's unappealed, final and conclusive order entering summary judgment.

The trial court's dismissal of the Yoms' counterclaim set forth in the petition to strike or open the judgment is also proper. Pa. R.C.P. No. 1031(a) provides that "[t]he defendant may set forth in the answer [to a complaint] under

the heading 'Counterclaim' any cause of action cognizable in a civil action which the defendant has against the plaintiff at the time of filing the answer." Under Rule 1031(a), a counterclaim is not permitted as a separate pleading outside an answer. *Mistick Inc. v. City of Pittsburgh*, 646 A.2d 642 (Pa. Cmwlth. 1994). Thus, the Yoms may not attempt to plead a counterclaim in the petition to strike or open a judgment after failing to do so in the answer to the complaint.

The Yoms further argue that the trial court exhibited ill will and bias by denying the timely filed motion to set aside the sheriff's sale without first affording them an opportunity to establish that the sale price of \$893.06 was grossly inadequate. They assert that the fair market value of their property is \$77,000, as opined by their appraiser, Daniel Bingaman, in his report attached to their motion for reconsideration.

Pa. R.C.P. No. 3132 provides that, "[u]pon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances." A petition to set aside a sheriff's sale is governed by equitable principles and addressed to the sound discretion of the trial court. *Allegheny County v. Golf Resort, Inc.*, 974 A.2d 1242 (Pa. Cmwlth. 2009). The burden of proving circumstances warranting the court's exercise of equitable powers is on the party seeking to set aside the sale. *Id.*⁴

⁴ The Authority argues that the Yoms failed to comply with Rule 3132 by filing a "motion," rather than a "petition," to set aside the sale. According to the Authority, such noncompliance alone is sufficient to preclude the court from setting aside the sale. In support, it cites *In re Upset Sale, Tax Claim Bureau of Berks County*, 505 Pa. 327, 479 A.2d 940 (1984), holding that the appellants were not entitled to have the sheriff's deed impounded because they did not post
(Footnote continued on next page...)

Gross inadequacy of a sale price, in itself, provides a sufficient basis for setting aside a sheriff's sale. *Capozzi v. Antonoplos*, 414 Pa. 565, 201 A.2d 420 (1964). Whether a sale price is grossly inadequate is not determined by "any given amount or any percentage amount of the sale;" rather, each case is determined on

(continued...)

security; and *Kaib v. Smith*, 684 A.2d 630 (Pa. Super. 1996), affirming the denial of the petition to set aside a sale filed after the delivery of the sheriff's deed.

Rule 206.4(a) provides that a petition must "proceed upon a rule to show cause, the issuance of which shall be discretionary with the court." A petitioner seeking issuance of a rule to show cause must attach a proposed order, directing a respondent to, *inter alia*, file an answer to the petition within twenty days of service upon the respondent. Rules 206.5(b) and 206.6(c); Schuylkill County Rules of Civil Procedure Rule 206.4(c). If an answer is filed raising disputed issues of material fact, "the petitioner may take deposition on those issues, or such other discovery as the court allows, within the time set forth in the order of the court." Rule 206.7(c). A motion is "any application to the court for an order made in any civil action or proceeding except ... "[p]etitions." Rule 208.1(a) and (b)(vii). The court must initially consider a motion without written responses or briefs, unless the local rules require a response within twenty days. Rules 208.3. The court may enter an order disposing of the motion or setting forth procedures, including "the issuance of a rule to show cause." Rule 208.4(a)(2)(iv) and (b).

Rule 126 provides that the Rules of Civil Procedure "shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable." This mandate establishes an affirmative duty that courts must follow in applying all procedural rules. *McCarthy v. City of Bethlehem*, 962 A.2d 1276 (Pa. Cmwlth. 2008), *appeal denied*, ___ Pa. ___, ___ A.2d ___ (No. 43 MAL 2009, filed August 18, 2009). Unlike the case relied on by the Authority, the Yoms substantially complied with Rule 3132 by seeking to set aside the sale before the delivery of the sheriff's deed to the Authority. The record fails to demonstrate that the Authority suffered any prejudice from the filing of a motion, instead of a petition with a rule to show cause attached thereto. Indeed, the Authority filed an answer to the motion denying the Yoms' allegation that the sale price was grossly inadequate. Hence, we reject the Authority's argument that the motion to set aside the sale should be denied based solely on the form of the application used by the Yoms in seeking relief. We note that in the companion case involving the Water Street property (781 C.D. 2009), the Yoms also filed a "motion" to set aside the sheriff's sale raising the issue of the gross inadequacy of the sale price. Unlike in this case, the trial court issued a rule to show cause upon the Authority and directed the parties to complete depositions on the disputed issues within sixty days.

its own facts. *Scott v. Adal Corp.*, 509 A.2d 1279, 1283 (Pa. Super. 1986). The trial court's ruling on a petition to set aside a sheriff's sale will not be reversed absent an abuse of discretion. *First Union Nat'l Bank v. Estate of Shevlin*, 897 A.2d 1241 (Pa. Super. 2006).

The trial court denied the motion to set aside the sale without ordering deposition or holding an evidentiary hearing on the disputed issue of whether the sale price was grossly inadequate. Nor did the court address the issue in its order or opinion. The Authority maintains that the sale price of \$893.06 is not grossly inadequate when it is considered in conjunction with the judgment amount of \$11943.40, citing *Vend-A-Matic, Inc. v. Frankford Trust Co.*, 442 A.2d 1158 (Pa. Super. 1982) (the Court considered the amount of the judgment in evaluating whether the sale price was grossly inadequate). The Authority asserts that the Schuylkill County tax assessment records show that Kyo Yom purchased the property for \$13,250 in 2001 and sold to the Yoms for \$1 in 2005, and that the fair market value of the property for tax assessment purposes is \$44,290. The tax records, however, were not admitted into evidence. As the Court held in *Greater Pittsburgh Business Development Corporation v. Braunstein*, 568 A.2d 1261, 1264 (Pa. Super. 1989), "[a]bsent evidence of the actual or estimated value of the property sold ... a determination of gross inadequacy [of the sale price] cannot be made." We conclude that the trial court abused its discretion in denying the motion without affording the Yoms an opportunity to present evidence to establish the gross inadequacy of the sale price.

Accordingly, we affirm the trial court's order denying the petition to strike and/or open the judgment and dismissing the counterclaim and vacate the order denying the motion to set aside the sheriff's sale. This matter is remanded for

further proceedings on the issue of whether the sheriff's sale should be set aside due to the gross inadequacy of the sale price.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Appellants	:	

ORDER

AND NOW, this 18th day of December, 2009, the order of the Court of Common Pleas of Schuylkill County denying the petition to strike and/or open a judgment and dismissing the counterclaim in the above- captioned matters is hereby **AFFIRMED**. The order denying the motion to set aside the sheriff's sale is **VACATED**. This matter is **REMANDED** for further proceedings on the issue of whether the sheriff's sale should be set aside due to the gross inadequacy of the sale price.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge