NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PATRICIA G. DEWEES AND RONALD G. DEWEES Appellees v. BANK OF AMERICA, N.A. AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RAMP 2007RZ1 Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1073 EDA 2013

Appeal from the Order Entered March 27, 2013
In the Court of Common Pleas of Delaware County
Civil Division at No(s): 12-7498

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.: **FILED DECEMBER 23, 2013**

Appellant, Bank of America (BOA)[1], appeals from the March 27, 2013 order denying BOA's petition to open the October 31, 2012 default judgment entered against it and in favor of Appellees, Patricia G. Dewees and Ronald G. Dewees.[2] After careful review, we affirm.

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* Former Justice specially assigned to the Superior Court.

[1] Bank of America, National Association, is the successor by merger to Lasalle Bank National Association as Trustee for Ramp 2007RZ1.

[2] We note that, pursuant to Pennsylvania Rule of Appellate Procedure 311, an interlocutory appeal may be taken as of right from "[a]n order refusing to open, vacate[,] or strike off a judgment." Pa.R.A.P. 311(a)(1); ***see also***

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We summarize the relevant facts and procedural history of this case as follows. On April 18, 2012, BOA commenced a mortgage foreclosure action against Appellees' property located at 29 Country Run, Thornton, Delaware County, Pennsylvania 19373. On June 11, 2012, Appellees filed an answer, new matter, and 11 counterclaims against BOA.[3] On July 2, 2012, BOA filed preliminary objections to all of Appellees' counterclaims. Subsequently, Appellees withdrew their counterclaims by praecipe filed July 25, 2012.

Approximately one month later, on August 31, 2012, Appellees filed the underlying complaint against BOA.[4] In this action, Appellees raised the same 11 claims originally raised as counterclaims, albeit in a sequentially different order. Appellees "decided to assert [these 11] claims in the form of a plaintiff[s'] complaint in the law division, where money damages were

(Footnote Continued) ———————————

Myers v. Wells Fargo Bank, N.A., 986 A.2d 171, 175 n.2 (Pa. Super. 2009).

[3] Appellees' counterclaims included: (I) breach of contract; (II) wrongful foreclosure; (III) conspiracy; (IV) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (UTPCPA), 73 P.S. §§ 201-1-201-9.3; (V) slander of credit; (VI) promissory estoppel; (VII) violation of Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601-2617; (VIII) breach of the implied covenant of good faith and fair dealing; (IX) violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p; (X) violation of Loan Interest and Protection Law ("Act 6"), 41 P.S. §§ 101-605; and (XI) infliction of emotional distress. ***See*** Petition to Open Default Judgment, 12/12/12, Ex. 2.

[4] When Appellees commenced this action, BOA's foreclosure action against their Delaware County property was ongoing. ***See*** Petition to Open Default Judgment, 12/12/12, at ¶ 2; N.T., 3/25/13, at 21.

readily available, rather than as counterclaims in the equity division of th[e trial c]ourt, where money damages are not readily available." [Appellees'] Opposition to [BOA's] Petition to Open Default Judgment, 1/16/13, at ¶ 14.

On September 19, 2012, Appellees filed an affidavit of service, alleging it served the complaint upon BOA "by regular and certified mail on September 5, 2012[,] to 7105 Corporate Drive, PXT-B-346 Plano, TX 75024." Affidavit of Service, 9/19/12. Appellees attached a certified mail return receipt to their affidavit. ***Id.*** This receipt was returned to Appellees with the herein stamp within the signature block.

> Bank of America Home Loans
> Plano Mail Center
> Plano[,] TX 75024

Id. As illustrated by the stamp, a BOA mail center is located at the Texas address. ***Id.*** Within its pleadings, BOA concedes this center is "a regular place of business or activity of BOA." ***See*** Praecipe to Strike, 1/10/13;[5] ***see also*** Trial Court Opinion, 6/20/13, at 10.[6] A United States Postal Service

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[5] Within this praecipe, BOA requested paragraph 33 of its Petition to Open Default Judgment be stricken. [BOA's] Praecipe to Strike Paragraph of its Petition to Open Default Judgment, 1/10/13. Paragraph 33 of BOA's petition avers the following: "7105 Corporate Drive, PTX-B-346, Plano, TX 75024 is not a regular place of business or activity of BOA." Petition to Open Default Judgment, 12/12/12, at ¶ 33.

[6] The trial court described the mail center's status within BOA as follows.

> [Appellees'] counsel presented unopposed documentary proof that BAC Home Loan Servicing LP

(Footnote Continued Next Page)

online tracking record confirms the complaint was received on September 10, 2012, at 2:44 p.m. Petition to Open Default Judgment, 12/12/12, Ex. 9.

On October 8, 2012, Appellees mailed a notice of intention to enter default judgment to the mail center. As of that date, BOA had not filed a responsive pleading. After receiving no response to the notice of intent, Appellees filed a praecipe to enter default judgment, on October 31, 2012. Appellees also sent this praecipe to the mail center. That same day, default judgment was entered in favor of Appellees and against BOA in this matter.

Over a month later, on December 12, 2012, BOA filed a petition to open the October 31, 2012 judgment, averring improper service of the original process. On March 27, 2013, the trial court denied BOA's petition. On April 11, 2013, BOA filed a timely notice of appeal.[7]

On appeal, BOA raises two issues for our review.

> 1. Is out-of-state service of original process valid if attempted by mail addressed to [BOA's] defunct former subsidiary[] and if the receipt required to be signed by [BOA] or its authorized agent is returned without the signature of either?

(Footnote Continued)

> has been merged with BOA on July 1, 2011[,] with the approval of the office of the federal Controller of the Currency and was, thus, no longer a subsidiary operation of BOA as claimed, but a place where [BOA] actually does business.

Trial Court Opinion, 6/20/13, at 10.

[7] BOA and the trial court have complied with Pa.R.A.P. 1925.

> 2. Should the [trial] court honor [the] default judgment, thereby rewarding gamesmanship at the expense of fair play and litigation on the merits?

BOA's Brief at 3.

The crux of BOA's argument rests upon Appellees' selected method of service. Specifically, BOA argues as follows.

> [Appellees] began this action after withdrawing the identical claims from another litigation involving [BOA]. Their counsel did not notify [BOA's] counsel that the match would continue in a different ring. Despite several obvious alternatives, [Appellees] attempted service outside the Commonwealth by mailing [original process] to a high-volume mail facility in Plano, Texas, naming as the addressee not [BOA] but a defunct former subsidiary of [BOA].
>
> This was not an attempt at service reasonably calculated to give actual notice. It was a calculated attempt to avoid actual notice, and in that it was repeatedly successful[] because [Appellees] "served" their notice of intent to take default in the very same manner. Nor was it in compliance with the rules. Original process served by mail must be addressed to the defendant and must be returned with a signature certifying receipt. Neither occurred here.

Id. at 7.

We are guided by the following law in addressing whether the trial court erred or abused its discretion in denying BOA's petition to open default judgment.

> It is well settled that a petition to open default judgment is an appeal to the equitable powers of the court, and absent an error of law or a clear, manifest abuse of discretion, it will not be disturbed on

> appeal. An abuse of discretion occurs when a trial court, in reaching its conclusion, overrides or misapplies the law, or exercises judgment which is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will.

Myers, ***supra*** at 175 (Pa. Super. 2009) (citation omitted). "[W]here the equities warrant opening a default judgment, this Court will not hesitate to find an abuse of discretion." ***Aquilino v. Phila. Catholic Archdiocese***, 884 A.2d 1269, 1280 (Pa. Super. 2005) (citation omitted).

In order to open a default judgment, the moving party must comport with the following requirements.

> [A] default judgment may be opened if the moving party has (1) promptly filed a petition to open the default judgment, (2) provided a reasonable excuse or explanation for failing to file a responsive pleading, and (3) pleaded a meritorious defense to the allegations contained in the complaint.

Myers, ***supra*** at 175-176. Failure to meet just one of these factors will preclude the opening of a default judgment. ***Id.*** at 178.

Presently, BOA argues, in part, that the trial court erred in denying its petition to open the default judgment because original process was not properly served upon it. BOA's Brief at 3. We are guided by the following principles when addressing an improper service claim within a petition to open default judgment.

> [W]here the party seeking to open a judgment asserts that service was improper, a court must address this issue first before considering any other factors. If valid service has not been made, then the

> judgment should be opened because the court has no jurisdiction over the defendant and is without power to enter a judgment against him or her. **In making this determination, a court can consider facts not before it at the time the judgment was entered**.

Cintas Corp. v. Lee's Cleaning Servs., Inc., 700 A.2d 915, 919 (Pa. 1997) (citations omitted; emphasis added). When proper service is at issue, the burden shifts between the parties.

> [T]he moving party has the burden of supporting its [] objections to the trial court's jurisdiction. Once the plaintiff has produced some evidence to support jurisdiction, the defendant must come forward with some evidence of his own to dispel or rebut the plaintiff's evidence. … It is only when the moving party properly raises the jurisdictional issue that the burden of proving jurisdiction is upon the party asserting it.

Nutrition Mgmt. Servs. Co. v. Hinchcliff, 926 A.2d 531, 535 (Pa. Super. 2007) (citations omitted) (pertaining to preliminary objections raised by the defendants, pursuant to Pa.R.C.P. 1028(a)(1)). With this precedent in mind, we turn to the applicable procedural rules.

Pennsylvania Rules of Civil Procedure 403, 404, 405 and 424 delineate the means by which one can serve original process upon foreign corporations. Rule 404 provides "[o]riginal process shall be served outside the Commonwealth within [90] days of … the filing of the complaint … by mail in the manner provided by Rule 403[.]" ***Id.*** Rule 403 follows.

> **Rule 403. Service by Mail**

> If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail **requiring a receipt signed by the defendant or his authorized agent**. Service is complete upon delivery of the mail.
>
> > (1) If the mail is returned with notation by the postal authorities that the defendant refused to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to the sender within fifteen days after mailing.
> >
> > (2) If the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to these rules.
>
> *Note:* The United States Postal Service provides for restricted delivery mail, which can only be delivered to the addressee or his authorized agent. Rule 403 has been drafted to accommodate the Postal Service procedures with respect to restricted delivery.

Id. (emphasis added). Additionally, Rule 405 reads, "[p]roof of service by mail under Rule 403 shall include a return receipt signed by the defendant…." ***Id.*** Also relevant to our discussion is Rule 424.

> **Rule 424. Corporations and Similar Entities**
>
> Service of original process upon a corporation or similar entity shall be made by handing a copy to any of the following persons provided the person served is not a plaintiff in the action:
>
> > (1) an executive officer, partner or trustee of the corporation or similar entity, or

> (2) the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity, or
>
> (3) an agent authorized by the corporation or similar entity in writing to receive service of process for it.

Id.

In the case *sub judice*, BOA alleges original service was deficient in two respects. Initially, BOA claims "[Rule] 424 requires service upon the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity[]" and the mail center is not such a place. Petition to Open Default Judgment, 12/12/12, at ¶ 31 (emphasis and quotation marks omitted); ***see also*** BOA's Brief at 3, 7. Secondly, BOA maintains "[Rule] 405(c) requires the proof of service by mail under Rule 403(c) to include a receipt **signed** by the defendant[]" and the mail center's stamp does not suffice. Petition to Open Default Judgment, 12/12/12, ¶ 34 (emphasis in original; internal quotation marks omitted); ***see also*** BOA's Brief at 3, 8.

As to BOA's first sub-issue, we have previously concluded that Rule 424 "simply delineate[s] those individuals who may be served by **hand delivery** on behalf of a corporation **should that manner of delivery be chosen by the plaintiff**." ***Reichert v. TRW, Inc.***, 561 A.2d 745, 750-751 (Pa. Super. 1989), *reversed on other grounds*, 611 A.2d 1191 (Pa. 1992)

(some emphasis in original; footnote omitted). In the instant matter, Appellees attempted to serve BOA by regular and certified mail, not hand delivery. ***See*** Affidavit of Service, 9/19/12, at 1. Accordingly, Rule 424 does not apply to the present matter, and BOA's reliance on such rule is misplaced. ***See Reichert***, ***supra***. Therefore, this first sub-issue fails.

Turning to BOA's second sub-issue, we conclude the stamp conforms to our procedural rules regarding service upon foreign corporations. According to Rule 403, a plaintiff may serve original process by any form of mail that requires a receipt signed by the defendant or his authorized agent. ***Id.*** Additionally, we note Rule 403 also contains alternatives that a plaintiff may undergo if service is returned as refused or unclaimed. ***Id.*** In this instance, a return receipt and a postal service tracking slip confirm that the mail center received the original complaint on September 10, 2012. Affidavit of Service, 9/19/12; Petition to Open Default Judgment, 12/12/12, Ex. 9. Due to the complaint being delivered and the receipt being stamped, the postal service did not return any mailings to Appellees for alternative service attempts. Appellees further memorialized this service by filing an affidavit of service. Affidavit of Service, 9/19/12. Upon review, the trial court concluded these actions to be proper service.

> [Appellees'] counsel has offered repeated uncontested statements that he has served [BOA] at the Plano, Texas location many times when filing Complaints in unrelated cases that were timely answered by BOA, and that attorneys who have represented BOA both in litigation arising from

> [Appellees' counsel's] experience and in other actions filed by him as an attorney practicing in the field of mortgage foreclosure have refused to accept service on [BOA] at their firm offices.

Trial Court Opinion, 6/20/13, at 9; ***see also*** [Appellees'] Opposition to [BOA's] Petition to Open Default Judgment, 1/16/13, at ¶ 16 (averring "[Appellees'] counsel had conversations with [BOA]'s previous attorney of record regarding acceptance of service of process of the within Complaint, then contemplated, but not formed, and counsel declined to accept service.")

Considering the foregoing, we agree that ample evidence exists to support the trial court's finding that Appellees properly served BOA with original process at the mail center. As the mail center is a regular place of business or activity of BOA, service upon BOA there was proper. ***See*** Praecipe to Strike, 1/10/13; Pa.R.C.P. 404(2); ***ANS Assocs., Inc. v. Gotham Ins. Co.***, 42 A.3d 1074, 1076 (Pa. Super. 2012) (holding that a corporation found in New York could be served with original process in New York). Additionally, Appellees' method of service was proper.[8] Therefore,

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[8] BOA additionally relies upon ***Furin v. Reese Teleservices, Inc.***, 2:07cv1542, 2008 U.S. Dist. LEXIS 95426 (W.D.Pa. Nov. 24, 2008), and ***Scanlin v. TD Waterhouse Inc.***, 4:05-CV-02458, 2006 U.S. Dist. LEXIS 40613 (M.D.Pa. June 19, 2006), to support its argument that service was improper. We do not find these cases persuasive and note "this Court is not bound by the decisions of federal courts, other than the United States Supreme Court…." ***Eckman v. Erie Ins. Exch.***, 21 A.3d 1203, 1207 (Pa. Super. 2011) (citations omitted).

BOA's claim that Appellees did not effectuate original service in conformance with the rules of procedure is devoid of merit and must fail.

BOA's final claim avers the trial court committed an error of law in refusing to open the October 31, 2012 default judgment. When addressing the trial court's decision to uphold the judgment, BOA states the following.

> There is no question where the [trial] court's conscience should have led it. The right result was to grant the petition to open judgment. The [trial] court came to a different conclusion, choosing legal technicalities over the right result, applying factors that might hold sway in the typical case, where service was proper and no gamesmanship was evident. But this was no typical case. This case is all about gamesmanship, and the factors the [trial] court relied upon provide little support for allowing [Appellees'] stratagem to succeed.

BOA's Brief at 11.

Applying the test set forth by this Court in ***Myers***, we conclude the trial court did not commit an error of law or abuse its discretion when it denied BOA's petition to open default judgment. In denying BOA's petition, the trial court found BOA neither promptly filed its petition to open nor provided a reasonable excuse for failing to file a responsive pleading. Trial Court Opinion, 6/20/13, at 13-18; ***see also Myers***, ***supra*** at 175-176. In support of these conclusions, the trial court reasoned as follows.

> The record and circumstances lead inexorably to the conclusions that this Petition was not promptly filed, and that [BOA] has proffered no reasonable excuse or explanation for not timely responding to the Complaint. Counsel for [BOA] argued at the [h]earing on this Petition that it took [44] days from

> the time of its receipt in Texas on September 10, 2012, for the Complaint to arrive at BOA's mail department in California on October 24, 2012. Once there, the Complaint sat for another nine days until being forwarded to [BOA's] legal department on November 2, 2012, or two days after the Default Judgment was entered. From there, it was inexplicably forwarded on November 6, 2012[,] to GMAC, the Loan Servicer, which is not a party to this action and did not hire counsel for [BOA], [for] approximately ten more days until mid-November, who then waited nearly another month to file the Petition to Open this Default Judgment on December 12, 2012. Therefore, it was difficult to take seriously the remark from defense counsel that petitioning to open a default judgment on a Complaint that had been served on BOA on September 10, 2012[,] and languished in its mail department for an extended period of time, took merely "a matter of weeks."
>
> Initially, it must be observed that the docketing of [BOA's] Petition also did not take place for six full weeks following alleged receipt of notice, by BOA's legal department in California, of [Appellees'] intention to take a default judgment within ten days. Moreover, counsel for the defense has never attempted to explain why that notice took until October 25, 2012, or nearly two weeks after it was delivered to BAC Home Loans Servicing LP in Plano, Texas on October 12, 2012, to reach BOA's legal department in California. Counsel for [BOA] has also averred no credible explanation as to why the Complaint received at the BAC location on September 10, 2012, did not turn up in BOA's mail department in California until October 24, 2012, or nearly a month and a half later.
>
> These timing delays are exorbitant considering the one or two days' time an express courier transporting the Complaint and the ten day notice of intent to take default judgment would have taken to deliver these documents to [BOA's] legal department. Nor did the defense seek to condemn

> these lapses so as to exhibit a professional mindfulness of the significant damages that are potentially awardable against [BOA] in this action. …

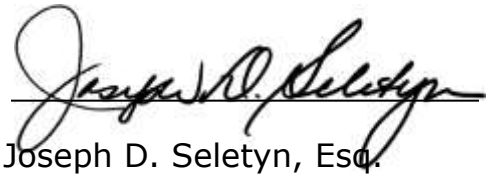
Trial Court Opinion, 6/20/13, at 13-14 (citation to transcript omitted).

Upon review, we conclude the record supports the trial court's findings that BOA failed to promptly file its petition and adequately explain its failure to file a responsive pleading. Based upon these insufficiencies, the trial court was justified in refusing to open the judgment, and we will not disturb its decision herein. ***See Myers***, ***supra*** at 175, 178.

Based on the foregoing, we conclude BOA's issues are devoid of merit. Therefore, we affirm the March 27, 2013 order.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2013