J-S19042-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BANK OF AMERICA, N.A., as successor by merger to BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
DALE J. HANCOCK,	:	
Appellant	:	No. 1848 MDA 2013

Appeal from the Order entered on September 20, 2013
in the Court of Common Pleas of Susquehanna County,
Civil Division, No. 2012-1993

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED MAY 12, 2014**

Dale J. Hancock ("Hancock") appeals from the Order denying the Petition to Open the default judgment entered against her and in favor of Bank of America, N.A. ("the Bank"), successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP. We affirm.

The Bank filed a Complaint in Mortgage Foreclosure on November 1, 2012. According to the Return of Service, a certified copy of the Complaint was personally handed to Hancock on November 2, 2012, at her residence located at 852 Orphan School Road, a/k/a 9769 SR 106, Harford Township, Pennsylvania.

On January 31, 2013, the Bank filed a Praecipe for *In Rem* Judgment for Failure to Answer and Assessment of Damages ("the Praecipe"). The Praecipe identified Hancock's last known address as 9769 SR 106, Kingsley, Pennsylvania, 18826. The Praecipe also included a Notice of Intent to Enter Default Judgment ("Notice of Intent"). That same day, the Bank entered a default judgment against Hancock. The Bank provided Hancock Notice of the default judgment.

The Bank filed two Motions to Reassess Damages. Both Motions included notices of presentation, and identified Hancock's address as 852 Orphan School Road, Kingsley, Pennsylvania *and* 9769 SR 106, Kingsley, Pennsylvania. The trial court issued rules to show cause why each Motion should not be granted. The trial court granted the first Motion, and amended the judgment, on May 7, 2013. On August 27, 2013, the trial court granted the Bank's second Motion and amended the judgment.

On September 20, 2013, Hancock filed an Emergency Motion to stay the sale of the property, and a Petition to Open the default judgment entered against her. On that same date, the trial court denied Hancock's Motion and Petition. Thereafter, Hancock filed the instant timely appeal, followed by a court-ordered Pennsylvania Rule of Appellate Procedure 1925(b) Concise Statement of Matters Complained of on Appeal.

Hancock presents the following claim for our review: "Whether the [trial] court erred in denying [Hancock's [Petition] to Open without a proper hearing or consideration by the [trial court]?" Brief for Appellant at 2.

Hancock claims that the trial court improperly denied her Petition to Open the default judgment entered against her. ***Id.*** at 4. In support, Hancock asserts that she obtained her mortgage through NFM, Inc., d/b/a NFM Consultants, Inc. ("NFM"), which was not licensed in Pennsylvania at that time. ***Id.*** at 4-5. According to Hancock, an assignment of the mortgage to the Bank was recorded on April 3, 2012. ***Id.*** at 4-5. Hancock argues that because NFM was unlicensed, her mortgage was invalid at the time of its origination. ***Id.*** at 5. Further, Hancock argues that "[s]ince the mortgage and note were created under false pretenses, they are void and the alleged assignment is *prima facie* invalid[,] as a company cannot transfer rights it does not own or possess." ***Id.***

Hancock additionally argues that she was not present on the date that the Complaint was served and, therefore, service could not have taken place. ***Id.*** Hancock also contends that the trial court denied her "uncontested" Emergency Motion for a stay and her Petition to Open the default judgment, without a proper hearing. ***Id.***

Regarding the merits of her Petition to Open the default judgment, Hancock argues that she was not properly served with the Bank's Complaint, and that she is still trying to modify her loan. ***Id.*** at 6. According to

Hancock, she lost her job in late 2010, at which time she sought to refinance her loan. ***Id.*** However, the Bank changed case managers four times during this process, and the Bank continues to state that her case is "under review," her paperwork was lost or outdated, and that she had to re-send her paperwork for other reasons. ***Id.***

"A petition to open [a] default judgment is discretionary; to reverse, we must find either a manifest abuse of discretion or an error of law by the trial court." ***Oswald v. WB Pub. Square Assocs., LLC***, 80 A.3d 790, 794 (Pa. Super. 2013).

"To open a default judgment, the movant must promptly file a petition to that effect, must plead a meritorious defense to the claims raised in the complaint, and provide a reasonable excuse for not filing a responsive pleading." ***Wells Fargo Bank, N.A. v. Vanmeter***, 67 A.3d 14, 18 (Pa. Super. 2013).

> The timeliness of a petition to open a 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.
>
> ***
>
> 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. ***See Duckson v. Wee Wheelers, Inc.***, 423 Pa.Super. 251, 620 A.2d 1206 (Pa. Super. 1993)

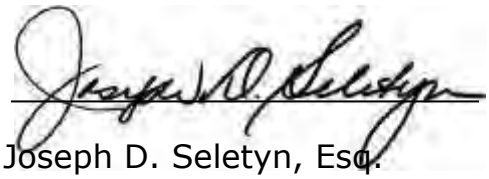
> (one day is timely); ***Alba v. Urology Associates of Kingston,*** 409 Pa.Super. 406, 598 A.2d 57 (Pa. Super. 1991) (fourteen days is timely); ***Fink v. General Accident Ins. Co.,*** 406 Pa. Super. 294, 594 A.2d 345 (Pa.Super. 1991) (period of five days is timely).
>
> ***US Bank N.A.***, 982 A.2d at 995 (quotation omitted) (finding eighty-two day delay was not timely). ***See Myers v. Wells Fargo Bank, N.A.***, 2009 PA Super 241, 986 A.2d 171 (Pa. Super. 2009) (indicating delay of fourteen days in filing petition to open was timely); ***Pappas v. Stefan***, 451 Pa. 354, 304 A.2d 143 (Pa. Super. 1973) (fifty-five day delay was not prompt).

Kelly v. Siuma, 34 A.3d 86, 92 (Pa. Super. 2011). However, "where equitable circumstances exist, a default judgment may be opened regardless of the time that may have elapsed between entry of the judgment and filing of the petition to open." ***Queen City Elec. Supply Co. v. Soltis Elec. Co.***, 421 A.2d 174, 177 (Pa. 1980).

In its Opinion, the trial court addressed Hancock's arguments, and concluded that they lack merit. Trial Court Opinion, 1/8/14, at 2-8. We agree with the sound reasoning of the trial court, as set forth in its Opinion, and affirm on this basis.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/12/2014

BANK OF AMERICA, et al.,	:	IN THE COURT OF COMMON PLEAS
	:	OF SUSQUEHANNA COUNTY,
Plaintiffs/Appellees,	:	COMMONWEALTH OF PENNSYLVANIA
	:	
V.	:	
	:	
DALE J. HANCOCK,	:	
	:	
Defendant/Appellant.	:	NO.: 2012 – 1993 C.P.

OPINION PURSUANT TO Pa. R.A.P. 1925

I. INTRODUCTION

Currently before this Court is a Concise Statement of Matters Complained of on Appeal (hereinafter "Statement of Matters") filed by Dale J. Hancock (hereinafter "Appellant") on December 30, 2013.

On January 31, 2013, a default judgment was entered in favor of Bank of America, et al., (hereinafter "Appellees") and against Appellant. Appellant claims that this Court committed multiple errors of law when it denied her Petition to Open Judgment (hereinafter "Petition") in an Order dated September 20, 2013.[1] Statement of Matters, ¶ 1-5. Specifically, Appellant alleges the following five (5) errors of law: (1) Denying her Petition "with no hearing, no argument and no opposition", id., at ¶ 1, (2) not opening the default judgment "given the bad faith shown by [Appellees] regarding the trial modification attempts", id., at ¶ 2, (3) not allowing an answer to be filed, id., at ¶ 3, (4) not allowing discovery to take place "given the questionable nature of the Note that [Appellees] based standing on", id., at ¶ 4, and (5) finding for [Appellees] despite [Appellant's] sound arguments in fact and law that [Appellees] lacked standing to foreclose", id., at ¶ 5.

[1] Her Statement of Matters references an Order of Court dated September 26, 2013. Statement of Matters, p 1. However, we are unaware of any Order dated as such. Furthermore, since her Statement of Matters concerns her Petition, and since said Petition was denied on September 20, 2013, we are satisfied that the date included in her Statement of Matters was mistyped and should read September 20, 2013.

23-8

After thorough consideration of the record and Appellant's Statement of Matters, this Court stands by our decision in the above-captioned case and asks that the Superior Court affirm our Order dated September 20, 2013 denying Appellant's Petition.

II. DISCUSSION

When reviewing a petition to open a judgment, courts may consider matters dehors the record. Kophazy v. Kophazy, 421 A.2d 246, 247 (Pa. Super. 1980) (citation omitted). However, in general, a petition to open a judgment "will not be granted unless three factors coalesce: '(1) the petition to open must be promptly filed; (2) the failure to appear or file a timely answer must be excused; and (3) the party seeking to open the judgment must show a meritorious defense.'" Id. (citations omitted).

Before addressing the merits of Appellant's arguments, it is worth delving into a brief procedural history of the above-captioned matter.

Appellees filed their Complaint in Mortgage Foreclosure (hereinafter "Complaint") with the Susquehanna County Court of Common Pleas on November 1, 2012. On November 9, 2012, this Court was provided with a Return of Service, in which Sheriff Lance M. Benedict certified that Appellant was personally handed a certified copy of the Complaint on November 2, 2012 at her place of residence located at 852 Orphan School Road, a/k/a 9769 SR 106, Kingsley, Harford Township, Susquehanna County, Pennsylvania. Return of Service. Almost three (3) months later, on January 31, 2013, a Praecipe for In Rem Judgment for Failure to Answer and Assessment of Damages (hereinafter "Praecipe") was filed by Appellees, in which Appellant's last known address was stated as 9769 SR 106, Kingsley, Pennsylvania, 18826. Praecipe. The Praecipe also included a Notice of Intent to Enter Default Judgment (hereinafter "Notice of Intent"),

which certified that Appellant was given notice in accordance with Rule 237.1 of the Pennsylvania Rules of Civil Procedure. Id. On the same day, default judgment was entered in favor of Appellees and against Appellant, and a Notice of Entry was provided to Appellant of said judgment. Id.; Notice of Entry.

From February 1, 2013 through September 19, 2013, two (2) Motions to Reassess Damages (hereinafter "Motion[s]") were filed by Appellees and Orders were entered by this Court concerning the amount of damages.[2] Both Motions filed contained a Notice of Presentation, in which Appellant was notified that Appellees' Motion was to be presented at Motions Court on the date provided, respectively. Notice of Presentation, 04/16/13; Notice of Presentation, 08/06/13. Furthermore, both Notices of Presentation listed Appellant's address as 852 Orphan School Road, Kingsley, Pennsylvania and 9769 SR 106, Kingsley, Pennsylvania. Id. In addition to the Notices of Presentation, Appellees provided Certifications of Service concerning Rules issued by this Court as to both Motions. The addresses listed for Appellant in the Certifications of Service are the same as those listed in both Notices of Presentation. Certification of Service, 04/23/13; Certification of Service, 08/09/13. Finally, subsequent to this Court granting Appellees' first Motion, an Affidavit of Service was filed by Appellees, in which it stated the following: "As required by Pa. R.C.P. 3129.2(a) Notice of Sale has been given to Lienholders and any known interested party in the manner required by Pa. R.C.P. 3129.2(c) on each of the persons or parties named, at that address, set forth on the Affidavit and as amended if applicable." Affidavit of Service.

[2] On April 16, 2013, Appellees filed a Motion to Reassess Damages. On the same day, this Court issued a Rule to show cause why an Order should not be entered granting Appellees' Motion. On May 7, 2013, this Court entered an Order amending the judgment pursuant to Appellees' Motion, and further ordered the Sheriff to amend the writ *nunc pro tunc*. On August 6, 2013, Appellees filed another Motion to Reassess Damages. On the same day, this Court issued another Rule to show cause why an Order should not be entered granting Appellees' second Motion. Finally, on August 27, 2013, this Court entered an Order amending the judgment pursuant to Appellees' second Motion, and further ordered the Sheriff to once again amend the writ *nunc pro tunc*.

The Amended Affidavit listed the same addresses for Appellant as both Certifications of Service and both Notices of Presentation.

Although a brief review of the procedural history in the above-captioned matter, along with service addresses, may seem superfluous, it is important for two (2) reasons.

First, Appellant claims that her failure to appear or file a timely answer is excusable because she was never properly served with the Complaint. Petition, ¶ 17. According to Appellant, she was not present at the residence at the time of service. Brief for Appellant, p 5.

Under the Pennsylvania Rules of Civil Procedure, original process may be served by handing a copy to the defendant. Pa. R.C.P. 402(a)(1). When service of original process has been made, "the sheriff or other person making service shall make a return of service forthwith", or, "[i]f service has not been made and the writ has not been reissued or the complaint reinstated, a return of no service shall be made upon the expiration of the period allowed for service." Pa. R.C.P. 405(a) (emphasis added). With regard to service made by a sheriff, Pennsylvania courts have long adhered to the rule that, "in the absence of fraud, the return of service of a sheriff, which is full and complete on its face, is conclusive and immune from attack by extrinsic evidence." Hollinger v. Hollinger, 206 A.2d 1, 3 (Pa. 1965) (citation omitted). While this is the long standing rule, the conclusive nature of a sheriff's return is restricted "*only to facts stated in the return of which the sheriff presumptively has personal knowledge*, such as *when* and *where* the writ was served". Id. (emphasis included).

Here, Sheriff Benedict provided a Return of Service, not a Return of No Service, which indicates that service was accomplished. In addition, the Return of Service states

that the individual to which the Complaint was personally handed was identified as Dale J. Hancock, a/k/a Dale Hancock. Return of Service. It is clear that Appellant's contention that she was not present at the residence at the time of service is contradicted by the Return of Service, which, as stated, is conclusive as to facts stated in said Return of which Sheriff Benedict presumptively had personal knowledge.

Because (1) there is no allegation of fraud, (2) the Return of Service is full and complete on its face, and (3) Sheriff Benedict had personal knowledge of handing the Complaint to an individual identified as Dale J. Hancock, a/k/a Dale Hancock, we are inclined to hold that the Return of Service is conclusive and constitutes sufficient service upon Appellant. As such, Appellant has provided insufficient reasons as to why her failure to appear or file a timely answer must be excused.

Since we have determined that Appellant has failed to provide a reasonable excuse for her failure to appear or file a timely answer, her Petition cannot be granted as all three-(3) of the aforementioned factors must be present. However, assuming *arguendo* that Appellant was not properly served, her Petition would still fail since it was not promptly filed, which brings us to our second reason for engaging in a brief review of the procedural history in the above-captioned matter.

Rule 237.1 of the Pennsylvania Rules of Civil Procedure provides, in part, the following:

> (2) No judgment . . . 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) . . . 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.

Pa. R.C.P. 237.1(2)(ii). The timeliness of a petition to open a judgment "is measured from the date that notice of the entry of the default judgment is received." Kelly v. Siuma, 34 A.3d 86, 92 (Pa. Super. 2011). Furthermore, "[t]he law does not establish a specific time period within which a petition to open a judgment must be filed to qualify as timely." Id. Instead, courts "must consider the length of time between discovery of the entry of the default judgment and the reason for delay." Id.

In the instant matter and as previously stated, the Notice of Intent was mailed to Appellant at her last known address, which is the same address used on each and every document filed and served, on January 11, 2013.[3] Having received no response from Appellant, Appellees filed its Praecipe on January 30, 2013, nineteen (19) days after it provided notice of its intent to do so.[4] Default judgment was subsequently entered on January 31, 2013, at which point a Notice of Entry was provided to Appellant.[5]

Appellant's rationale for believing that her Petition was promptly filed seems to stem primarily from the hardships and difficulties she alleges to have faced in trying to come to what is assumed to be an out-of-court resolution with Appellees. See Petition, ¶ 14-21. Appellant then states that her Petition is prompt considering those circumstances and the short period of time with which her counsel was able to collect information and draft the petition. Id., at ¶ 24. However, contrary to Appellant's belief, timeliness is not measured from the date a defendant finally decides to pursue relief through the courts.

[3] There is no indication, nor has Appellant alleged, that there was any attorney of record at the time notice was provided. Thus, Appellant was the only individual served.
[4] This is beyond the ten (10) day requirement set forth in Rule 237.1 and therefore complies with said Rule.
[5] Appellant does not argue that she never received the Notice of Entry. However, she does state that, from the date Appellees filed for and received a default judgment, she "was still working with and continues to work with Appellees to try to cure the default." Brief for Appellant, p 5. This statement indicates that Appellant was aware of the default judgment and proceeded to "work with" Appellees in an attempt to cure it.

Instead, it is measured, as stated, from the date that notice of the entry of the default judgment is received. See Kelly, 34 A.3d 86 (Pa. Super. 2011).

From the date the Notice of Entry was provided to Appellant to the date she filed her Petition, two hundred thirty two (232) days had passed. During this time, not only had a default judgment already been entered and served, but two (2) Motions, each with an accompanying Rule, Notice of Presentation, and Certification of Service, and an Affidavit of Service regarding the Sheriff's Sale were all filed with this Court and served upon Appellant at an address she admits is her primary place of residence, i.e., 852 Orphan School Road, Kingsley, Pennsylvania. See Petition, ¶ 2. During this time, Appellant claims that she was "working with" Appellees in an attempt to come to a resolution regarding her loan and the default. Id., at ¶ 15-18. However, any subjective belief she may have had that an out-of-court resolution was possible was contradicted by Appellees' continued pursuit for damages through the courts. Unfortunately for Appellant, allowing two hundred thirty two (232) days to pass, during which time eleven (11) documents were served upon her, before deciding to take action within the legal system demonstrates dilatoriness and renders her Petition untimely. See Allegheny Hydo No. 1 v. Am. Line Builders, Inc., 722 A.2d 189 (Pa. Super. 1998) (forty one day delay is untimely); B.C.Y., Inc., Equip. Leasing Assocs. v. Bukovich, 390 A.2d 279 (Pa. Super. 1978) (twenty one day delay is untimely); Hatgimisios v. Dave's N.E. Mint, Inc., 380 A.2d 485 (Pa. Super. 1977) (thirty seven day delay is untimely). It is noteworthy that in cases where courts have found there to be prompt filing, the period of delay was generally less than one (1) month. See Duckson v. Wee Wheelers, Inc., 620 A.2d 1206 (Pa. Super. 1993) (one day is timely); Alba v. Urology Assocs. of Kingston, 598 A.2d 57 (Pa. Super. 1991) (fourteen day delay is

timely); Fink v. Gen. Acc. Ins. Co., 594 A.2d 345 (Pa. Super. 1991) (five day delay is timely).

It is our opinion that Appellant failed to provide sufficient reasons to support her claims that (1) her Petition was promptly filed and (2) her failure to appear or file a timely answer must be excused. Having determined that two (2) of the three (3) factors that must be present in order to successfully petition a court to open a judgment do not exist, we need not address the third factor, i.e., the party seeking to open the judgment must show a meritorious defense. Therefore, Appellant's Petition was properly denied.

III. CONCLUSION

Based on the foregoing, our Order dated September 20, 2013 should be affirmed.