NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

FARHAD SALARI-LAK, M.D.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
FELLOWSHIP OF FAITH, INC., GRACE TEMPLE CHURCH OF PGH, INC., AND MANCHESTER COMMUNITY BAPTIST MINISTRIES, INC.	:	No. 946 WDA 2013

Appeal from the Order, January 25, 2013,
in the Court of Common Pleas of Allegheny County
Civil Division at No. GD No. 04-0107064

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 14, 2015**

Farhad Salari-Lak, M.D. ("Salari-Lak"), appeals from the order of January 25, 2013, granting defendant/appellee, Manchester Community Baptist Ministries, Inc.'s ("Manchester"), petition to open default judgment. After careful review, we affirm.

The procedural history of this matter is lengthy, dating back over 10 years; however, the instant interlocutory appeal is from the order granting Manchester's petition to open default judgment, and involves a

narrow legal question.[1] Therefore, for purposes of this memorandum, it is unnecessary to set out the entire procedural history. The pertinent background has been aptly summarized by the trial court as follows:

> In pertinent part, on or about August 2, 2012, Counsel for Defendant, Manchester Community Baptist Ministries, Inc., ("Defendant, Manchester") filed a Petition to Open or Strike the Default Judgment entered against it for failure to Answer the Amended Complaint of June 25, 2010, regarding the ownership of three parcels of land located at 5[6]43 East Liberty Boulevard, Pittsburgh, PA 15206.
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> On or about January 25, 2013, [Salari-Lak] filed a Motion to Strike Affidavits of James Wimberly and Shirley White, the deacon and member of the church, submitted by Defendant, Manchester.
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> For a complete history of this lengthy case, this Court incorporates [Manchester]'s Brief in Support of Petition to Open or Strike Default Judgment, at p.p. 3-13.
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> Following the July 5, 2011 Default Judgment, [Salari-Lak] obtained an Order for Special Relief on January 27, 2012, confirming [Salari-Lak] as owner of the three parcels in question.
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> In April, 2012, [Salari-Lak] filed a separate Landlord/Tenant action in which he obtained a District Justice Judgment for Possession of the property dated May 1, 2012 against "Leasee [sic] Tenant, a/k/a [Manchester] . . ." and allegedly posted the property in June, 2012 to execute on the Judgment for Possession.

[1] On June 7, 2013, this court granted Salari-Lak's "Petition for review of order refusing to certify interlocutory order for appeal," and directed that the matter shall proceed as an appeal from the order entered January 25, 2013. (Docket #42.)

> According to [Manchester], early to mid June, 2012 was the first time they had notice of the Default Judgment and the church leaders promptly met with counsel to try to rectify the situation.
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> On June 13, 2012, [Manchester] presented an "Emergency Motion for Leave to Appeal from the Magisterial District Judge Judgment.["] [T]he [Judgment] contained a clerical error and [Manchester] was granted Leave to file a timely Appeal in the Court of Common Pleas.
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> On August 2, 2012, [Manchester] filed a Petition for Rule to have the Default Judgment Opened or Stricken and to have the Order for Special Relief opened, vacated or suspended pending a final Order in this litigation.
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> On October 7, 2012, [Manchester] filed Affidavits in Support of its Petition by James Wimberly, deacon and Shirley White, a church member to supports it's [sic] position that no notice was given of the Default Judgment until mid June, 2012. Plaintiff's counsel chose not to take the depositions of these defense witnesses. This Court heard all the outstanding Motions and Petitions on January 25, 2013, and hereby incorporates into this Opinion the January 25, 2013 Motions Court transcript in this matter ("M.C.T."). M.C.T. at pp. 2-48.
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> After argument on the Motions/Petitions, this Court acted upon two of the matters. The Court DENIED the Motion to Strike Affidavits and GRANTED the Petition to Open Judgment. The Court, through this Order, allowed the Affidavits to Supplement the record.
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> [Salari-Lak] timely filed an Application to Amend Interlocutory Order for Certification for Appeal pursuant to 42 Pa.C.S.A. § 702(b), which was deemed denied effective March 27, 2013. [Salari-Lak]'s Notice of Appeal was docketed on April 26, 2013.

Trial court opinion, 11/3/14 at 2-4 (emphasis deleted) (docket #44.)[2]

Salari-Lak has raised the following issue for this court's review on appeal:

> Did the lower Court commit reversible error in law, in accepting and giving credence too [sic], over [Salari-Lak]'s objection, affidavits in lieu of depositions or other discovery techniques, in disposition of proceedings governed by Rule 206.7 Pa. R. Civ. Proc. on Petition to open a Default Judgment?

Salari-Lak's brief at 2.

> A petition to open a default judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court, and we will not overturn that decision absent a manifest abuse of discretion or error of law.

Green Acres Rehab. and Nursing Ctr. v. Sullivan, 113 A.3d 1261, 1270 (Pa.Super. 2015), quoting ***Graziani v. Randolph***, 856 A.2d 1212, 1223 (Pa.Super. 2004), ***appeal denied***, 875 A.2d 1075 (Pa. 2005).

> Ordinarily, if a petition to open a judgment is to be successful, it must meet the following test: (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. . . . In making this determination, a court can consider facts not before it at the time the judgment was entered.

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[2] Salari-Lak was not ordered to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. On October 15, 2014, this court ordered the trial court to file a Rule 1925(a) opinion within 21 days and forward the original record to this court forthwith.

Id., quoting ***Mother's Restaurant, Inc. v. Krystkiewicz***, 861 A.2d 327, 336 (Pa.Super. 2004) (***en banc***) (citation omitted).

As stated above, the sole issue raised on appeal is that the trial court erred in accepting the affidavits of James Wimberly ("Wimberly") and Shirley White ("White") in support of Manchester's petition to open judgment. Wimberly, the church deacon, averred, ***inter alia***, that he had no notice of any lawsuit until the spring of 2012, after a legal notice was posted on the building. Wimberly stated that the church receives all its mail at a post office box address and does not use its street address for mail or business. Allegedly, Salari-Lak had attempted service at Manchester's street address and/or an incorrect post office box address. Wimberly specifically denied being served by the sheriff at the church building on February 24, 2011, as indicated on the return of service. (Docket #24, Ex. D.) According to Wimberly, he was traveling out of town that day.

Similarly, White attested that the church receives all its mail at the post office box address, and she had no knowledge of any lawsuit filed against the congregation until the spring of 2012. Significantly, Salari-Lak does not argue that the three requirements for opening judgment by default were not satisfied. Rather, he contends that the acceptance of affidavits, in lieu of deposition testimony to refute the answers that were properly pled to material facts, was improper under Pa.R.C.P. 206.7. According to Salari-Lak, the burden was on Manchester, as petitioner, to prove all three

prongs of the test for opening default judgment by depositions, subject to the right of challenge through cross-examination. (Salari-Lak's brief at 15.) Salari-Lak complains that the petition should have been decided solely on the petition and answer; and, by supplementing the record with affidavits, Manchester failed to comply with the procedural requirements of Rule 206.7. (***Id.***) Salari-Lak argues that the trial court erred in relying upon factual allegations in affidavits in lieu of depositions or other permissible discovery. (***Id.*** at 16.)

Rule 206.7, "Procedure After Issuance of Rule to Show Cause," provides as follows:

> (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.
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> (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.
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> (d) The respondent may take depositions, or such other discovery as the court allows.

Pa.R.C.P. 206.7. The Explanatory Comment to the Rule states, in relevant part:

> If an answer is filed which raises disputed issues of material fact, subdivision (c) places on the petitioner the burden of proceeding to take depositions or other discovery as provided in the order. If the petitioner does not proceed as required, "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."
>
> Subdivision (d) makes clear that, while subdivision (c) places the burden of proceeding on the petitioner, the "respondent may take depositions, or such other discovery as the court allows."

Id., Comment. ***See also*** Pa.R.C.P. 208.4, Note ("The court has inherent power to permit forms of discovery other than depositions.").

Therefore, it is Salari-Lak's position that discovery is limited to depositions only, unless otherwise provided in the court's order. (Salari-Lak's brief at 14.)[3] Salari-Lak argues that while the discovery rules allow for other methods of discovery including interrogatories, request for admissions, etc., nowhere do they refer to the use of affidavits. (***Id.***)[4]

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[3] In this case, the court's rule to show cause order directed that the petition shall be decided under Rule 206.7 and depositions shall be completed within 60 days. (Order, 8/8/12 at 1; docket #26.)

[4] ***See*** Pa.R.C.P. 4001(d) ("Subject to the provisions of this chapter, any party may obtain discovery by one or more of the following methods: depositions upon oral examination (Rule 4007.1) or written interrogatories (Rule 4004); written interrogatories to a party (Rule 4005); production of

The trial court agreed with Manchester's position that an affidavit is not a tool of discovery, but simply a way to put a statement of fact in the record. (Trial court opinion, 11/3/14 at 7.) While the trial court accepted Salari-Lak's premise, that nowhere in the Rules of Civil Procedure is an affidavit considered a means of discovery, it disagreed with Salari-Lak's conclusion, that affidavits cannot be used to supplement the record in support of a petition to open default judgment. (***Id.*** at 6.) The trial court also observed that under Rule 206.7, Salari-Lak had the right to take depositions, and chose not to avail himself of the opportunity. (***Id.*** at 6-7.) In fact, in the October 9, 2012 letter from defense counsel which included copies of the affidavits, counsel for plaintiff was invited to schedule depositions of White and Wimberly and declined to do so. (Notes of testimony, 1/25/13 at 22.) ***See also id.*** at 24-25 ("THE COURT: In that letter, the October 9th letter the last paragraph says because these have obviously been filed at the end of the period allowed for discovery, you are welcome to schedule depositions of these witnesses if you wish to do so any time soon. Please call to arrange -- and for whatever reason, Mr. Diamond, so the record is clear, you chose not to schedule those depositions."). Plaintiff's counsel responded that the burden is on Manchester and reiterated

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documents and things and entry for inspection and other purposes (Rule 4009); physical and mental examinations (Rule 4010); and requests for admission (Rule 4014).").

that without leave of court, affidavits cannot be used in support of a petition for rule to show cause. (***Id.*** at 25-26.)

Manchester points out that Salari-Lak cites no authority whatsoever for the proposition that the trial court's consideration of the affidavits of White and Wimberly was improper. (Manchester's brief at 27.) The parties agree that an affidavit is not a discovery device. Manchester argues that the rule to show cause issued by the trial court did not preclude Manchester from supplementing the petition with affidavits merely by reference to Rule 206.7. (***Id.*** at 28.) Manchester cites two decisions of this court which we agree are instructive.

In ***Liquid Carbonic Corp. v. Cooper & Reese, Inc.***, 416 A.2d 549 (Pa.Super. 1979), the defendant, Cooper & Reese, filed a petition to open or strike the default judgment, asserting that it was never served with the complaint and therefore had no notice of the proceedings. Notably for purposes of the instant case, the matter was submitted to the lower court on the basis of affidavits and depositions of the defendant's officers and bookkeeper, and the deputy sheriff who purportedly served the complaint. ***Id.*** at 550. The lower court denied the petition to open, on the basis that the defendant failed to show a meritorious defense. ***Id.***[5]

[5] This court found that the petition to strike off the default judgment was properly denied, where there were no defects appearing on the face of the record. ***Id.***

On appeal, this court reversed, noting first that where a defendant asserts lack of notice, it goes to personal jurisdiction and the court must determine whether such assertion is true before considering any other factors. ***Id.*** at 551. We then inquired into the accuracy of the defendant's contention that it was never served with the complaint, noting that the defendant corporation's president, in an affidavit, stated that he had extensively questioned the defendant's employees and determined that none of them was served with Liquid Carbonic's complaint on June 21, 1978, the date of service indicated on the sheriff's return. ***Id.*** Together with other evidence, including the deposition testimony of the deputy sheriff, this court determined that the defendant was not served with the complaint, and therefore, the lower court did not have jurisdiction to enter judgment. ***Id.*** at 551-552.[6]

Thus, in ***Liquid Carbonic***, the court appropriately considered an affidavit in support of a petition to open/strike default judgment. ***See also*** Pa.R.C.P. 2959(e) ("The court shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence."). Similarly, in ***Bensalem Twp. v. Terry***, 464 A.2d 371 (Pa.Super. 1983), the trial court entered an order granting the defendants' petition to open default judgment, based in part on supporting affidavits.

[6] Obviously, this court is not a fact-finding body; however, the deputy sheriff admitted in his deposition that the man with whom he left the complaint might not have been associated with the defendant. ***Id.*** at 552.

On appeal, the plaintiff/respondent, Bensalem Township, argued, ***inter alia***, that the trial court failed to correctly apply Pa.R.C.P. 209,[7] the predecessor to Rule 206.7:

> The major point of contention between the parties is the extent of the record on which the trial judge may appropriately decide the questions presented by a petition to open a default judgment. In this case, the trial judge expressly considered "all uncontraverted [sic] averments in the petition ***and supporting materials*** . . . ." (Emphasis added.) Appellant argues that the judge erred in considering anything more than "the petition, answer, new matter and reply . . . ." We do not agree. Rule 209 of the Rules of Civil Procedure contains no such proscription.[Footnote 4] Furthermore, in ***Shainline v. Alberti Builders, Inc.***, 266 Pa.Super. at 134, n. 1, 403 A.2d at 579, n. 1, this court stated that:
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> > This court has made it clear on prior occasions that, in addition to the petition to open, it is proper also to consider depositions, additional testimony, as well as supplemental memorandae [sic] in assessing a meritorious defense. (Citations omitted.)
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> The ***Shainline*** court itself went on to consider the supplemental material as well in assessing whether the petitioner had adequately explained his failure to file an answer. ***Id.*** at 135-136, 403 A.2d at 579-580. We conclude that the trial judge committed no error by extending his review beyond those documents enumerated by appellant.
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> [Footnote 4] Rule 209 of the Pennsylvania Rules of Civil Procedure states:

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[7] Rescinded Sept. 8, 1995, effective Jan. 1, 1996.

> If, after the filing and service of the answer, the moving party does not within fifteen days:
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> (a) Proceed by rule or by agreement of counsel to take depositions on disputed issues of fact; or
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> (b) Order the cause for argument on petition and answer (in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule); the respondent may take a rule as of course on the moving party to show cause why he should not proceed as above. If after hearing the rule shall be made absolute by the court, and the petitioner shall not proceed, as above provided, within fifteen days thereafter, the respondent may order the cause for argument on petition and answer, in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule.

Id. at 373-374. Furthermore, this court in ***Terry*** rejected the Township's argument that the trial judge improperly considered as fact those averments in the defendants' petition that were denied in the Township's answer. ***Id.*** at 374. The defendants/petitioners had submitted sworn affidavits in support of those averments, while the Township submitted no similar affidavits or any other evidentiary material and instead relied on denials based on "insufficient knowledge." ***Id.*** The ***Terry*** court explicitly endorsed the use of affidavits, rather than depositions, to expeditiously resolve a petition for rule to show cause:

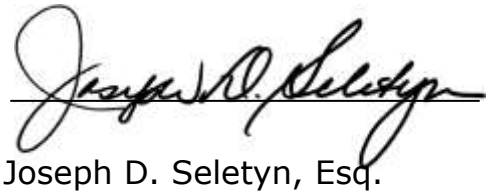
> First, if we accepted appellant's argument, we would eliminate an important feature of Rule 209. As it now stands, Rule 209 allows the parties to expeditiously resolve questions without the need for long hearings devoted to the introduction of evidence. Rather, the parties may obtain an adjudication on an agreed statement of facts contained in the filed documents. If facts are disputed, then, of course, the parties may resort to depositions as provided by the rule. If we were to find that appellant's "denials," in this case, required appellees to resort to depositions, such a ruling would merely serve to delay resolution of the question while depositions were conducted for the sole purpose of stating anew the facts alleged in the affidavits. ***See Moss v. Consolidated Rail Corporation***, 277 Pa.Super. [192] at 197, 419 A.2d [727] at 729-730 [(1980)]. Furthermore, while appellant does state some facts in its answer and new matter, none of these facts dispute the existence of the facts alleged in the appellees' affidavits. At best, appellant discusses what it labels "inconsistencies" among the facts stated by appellees. However, it is for the court to decide if the petition and supplementary materials are internally consistent or not. Appellant's claim that the averments are inconsistent with one another does not make it so. For these reasons we find no error in the manner in which the trial judge applied Rule 209.

Id.

The trial court did not err in accepting Manchester's affidavits in support of its petition to open default judgment. Affidavits are not a discovery device, and Manchester was not required to depose its own witnesses. Salari-Lak had the right under Rule 206.7 to depose White and Wimberly and elected not to do so. There is no error here.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/14/2015