

high chain-link fence. While in the process of climbing the fence, plaintiff caught his clothing on the fence causing him to fall to the ground. Plaintiff alleged that he sustained injuries ranging from bulging discs with a herniation to attendant radiculopathy.

Plaintiff instituted this action by filing a complaint on April 15, 1999. Although plaintiff attempted to execute service of notice at 5509 Linmore Street, the sheriff's return of service dated April 20, 1999 indicates that the Gentschs were not served with the notice and stated "Def. owns property but does not live there." The Complaint was re-instated on May 25, 1999 and on August 11, 1999. The Gentschs were ultimately served with the Complaint at their place of business located at 4631 Cedar Avenue, Philadelphia, Pennsylvania on August 17, 1999. On November 29, 1999, defense counsel filed Preliminary Objections to the Complaint which identified the Gentschs' residential address as 4614 Baltimore Avenue, Philadelphia Pennsylvania. On February 4, 2000, the Gentschs filed their Answer to the Complaint, which again included their residential address as 4614 Baltimore Avenue.

On March 1, 2000, the Court entered an Order requiring plaintiff to provide full and complete answers to defendants' interrogatories and request for production of documents. The Order indicates the address of the Gentschs' as 4614 Baltimore Avenue, Philadelphia, PA. Plaintiff never provided full and complete answers.

On April 17, 2000, defense counsel, Alfred M. Abel, filed a Motion to Withdraw his appearance and sent a copy to the Gentschs on or about April 16, 2000. On April 27, 2000, the court issued a Rule Returnable to show cause why leave to withdraw should not be granted. The date for the Rule Returnable hearing was set for May 12, 2000. By letter dated May 10, 2000, defense counsel forwarded the Rule Returnable to the Gentschs' at

their residence at 4614 Baltimore Avenue, Philadelphia, PA. The Gentschs did not receive this notice in time to attend the Rule Returnable hearing date. On May 19, 2000, the court entered an Order granting defense counsel's Petition to Withdraw in which it stated, "Relist in thirty days for status of appearance of counsel for defendants." Since the Gentschs did not have the financial means to retain substitute counsel at this time, they decided to defend the action pro-se and obtained sufficient funds to have counsel in the future. The Gentschs believed that they would be given notice of the progression of their case by the court or plaintiff's counsel. However, since Mr. Abel's withdrawal on May 19, 2000, the Gentschs never received any notification from either the court or opposing counsel regarding this case.¹

On June 19, 2000, the re-listing of Status of Appearance of Counsel for Defendants was scheduled, but the conference was subsequently cancelled because of the Gentschs' failure to appear. The Gentschs did not receive any notice of the June 19, 2000 conference. In addition to canceling the conference, the court advised plaintiff that he may proceed for default judgment.

On September 7, 2000, plaintiff filed a Praecipe to Enter Default Judgment against defendant Andrew Gentsch only. The documents attached to the Praecipe to Enter Default Judgment did not contain a notice according to Pa.R.C.P. 237.1(2) which requires certification that a written Notice of Intention to File the Praecipe was mailed or delivered prior to filing of the praecipe to the party against whom judgment is to be

¹ The only notice the Gentschs had of any future court actions was by prior defense counsel who forwarded a notice of a settlement conference scheduled for July 17, 2000. The notice was sent by Mr. Abel on May 30, 2000. The Gentschs subsequently attended the scheduled settlement conference, but were told that the case was not listed and that he would receive notice from the court of any further developments on the case.

entered and to the party's attorney of record. The prothonotary's office entered default judgment on September 7, 2000 against defendant Andrew Gentsch.

On March 13, 2002, the court subsequently issued its Findings and Order awarding damages to plaintiff in the amount of \$1,155,436.87 and entering judgment for the plaintiff and against defendants accordingly. The Civil Listing Section Trial Worksheet prepared on March 13, 2002 indicated the Gentschs address as 5509 Linmore Street, Philadelphia, PA. As a result, the Gentschs were not given notice of these Findings and Order entered against them because the court was sending its notices to 5509 Linmore Street, Philadelphia, PA and not 4614 Baltimore Avenue, Philadelphia, PA.

The Gentschs were unaware of the judgment of \$1,155, 436.87 rendered against them until approximately July 8, 2002 when a title report indicated such judgment. As a result, the Gentschs retained counsel and filed a Petition to Open or Strike the Judgment on August 6, 2002. The court issued a Findings and Order, which granted Defendants' Motion to Open or Strike the Judgment on October 3, 2002. The case was then reinstated and assigned to a trial pool. The plaintiff filed an appeal to the court's Findings and Order on October 31, 2002, but the Superior Court quashed the appeal on December 20, 2002 because the Findings and Order were interlocutory.

The case subsequently proceeded to trial on June 15, 2004, and another court granted the Gentschs' oral motion for summary judgment on the same day thereby disposing of all parties and claims in the case.²

Thereafter the plaintiff filed a timely appeal to the Order of October 3, 2002 and

² This court is under the assumption that Judge Watkins will issue an opinion addressing the issue of his granting defendants' oral Motion for Summary Judgment.

the Order granting summary judgment on June 15, 2004. Plaintiff has also issued his Statement of Matters in accordance with Pa.R.A.P. 1925(b).

Pursuant to plaintiff's Statement of Matters, the sole issue this court will address is whether the trial court committed an error of law or abuse of discretion in granting defendants' Petition to Open or Strike the Judgment of October 3, 2002.

III. LEGAL ANALYSIS

It has long been the law of Pennsylvania that a petition to open a judgment is a matter of judicial discretion which is to be exercised in trespass actions only if (1) the petition to open has been promptly filed, and (2) the failure to appear or file a timely answer can be reasonably explained or excused. *Zellman v. Fickenscher*, 452 Pa. 596, 598, 307 A.2d 837, 838 (1971). A request to open a default judgment is by way of grace and not right, and its grant or refusal is peculiarly a matter for the trial court's discretion. *Jung v. St. Paul's Parish*, 522 Pa. 167, 171-172, 560 A.2d 1356, 1358 (1989). A lower court's ruling opening or refusing to open will not be reversed unless there has been an error of law or a clear, manifest abuse of discretion. *Kraynick v. Hertz*, 443 Pa. 105, 277 A. 2d 144 (1971). A court reviewing denial of a petition to open judgment by default must ascertain whether there are any equitable considerations present in the factual posture of the case, which require the court to grant to a defendant, against whom the judgment has been entered, an opportunity to have his day in court and to have the case decided upon the merits. *Id.* at 175, 1360.

Notice to opposing counsel of the intent to enter a default judgment is a frequent element in cases where default judgment has been upheld. *Jenkins v. Blanchfield*, 297 Pa. Super. 95, 101, 443 A.2d 316, 319 (1982). Conversely, the lack of such notice is

frequently singled out as an important factor justifying the opening of a default judgment.

Id. Errors of counsel or clerical errors, which indicate an oversight rather than a deliberate decision not to defend, have been held to constitute sufficient legal justification to open a default judgment. ***Johnson v. Yellow Cab Co.***, 226 Pa. Super. 270, 272, 307 A.2d 423, 424 (1973).

In the case *sub judice*, plaintiff's several attempts at executing service on the Complaint at 5509 Linmore Street, were unsuccessful. The sheriff's return of service dated April 20, 1999 indicates that the Gentschs were not served notice and stated "Def. owns property but does not live there." The Gentschs were ultimately served with the Complaint at their place of business located at 4631 Cedar Avenue, Philadelphia, on August 17, 1999. In addition, the Gentschs, through their attorney Mr. Abel, filed several documents with the court throughout the pleading stage, indicating their residential address was 4614 Baltimore Avenue, Philadelphia. The plaintiff received a copy of all documents filed with the court by defendants. However, the official docket of the trial court showed the Gentschs address as 5509 Linmore Street, Philadelphia. This is critical because all notices from the court would have been sent to this address with a carbon copy sent to Mr. Abel. This error, along with the withdrawal of their attorney, Mr. Abel on May 19, 2000, prevented the Gentschs from receiving any notice of further filings, proceedings, or communications continuing in this matter until the July 8, 2002 title report indicated an outstanding judgment.

The failure of either the court or plaintiff to recognize the Gentsch's address as either 4614 Baltimore Avenue or 4631 Cedar Avenue was the result of clerical error on behalf of both. This error therefore justifies this court's opening of default judgment

entered against the defendants.

As a response to discovering the outstanding judgment, the Gentschs promptly retained counsel and filed a Petition to Open or Strike the Judgment on August 6, 2002, less than one (1) month after discovery of the judgment against them. In *Balk v. Ford Motor Company*,³ the Pennsylvania Supreme Court held that defendant acted promptly in moving to open a default judgment when defendant filed their motion to open the judgment within two (2) weeks of learning that damages had been assessed against it. In its holding the court stated, “Although its action came nine months after the entry of the default judgment, the trial court sitting as a court in equity was more strongly influenced, and we think properly, by the date when defendant actually learned of the situation rather than the date it could have learned of it through the constructive notice given by recording a judgment.” *Id.*

Here, the court entered default judgment on September 7, 2000 against defendant Andrew Gentsch and issued its Findings and Order on March 13, 2002 awarding damages to plaintiff in the amount of \$1,155,436.87. The Gentschs were completely unaware that these actions had taken place until July 8, 2002, when a title report indicated an outstanding judgment against them. Having not received actual notice of the judgment until approximately four (4) months after assessment of damages, the Gentschs acted promptly in procuring counsel and petitioning to open the default judgment.

Notwithstanding plaintiff’s argument to the contrary, the court finds that the Gentschs were never given proper notice and therefore, were never afforded an opportunity to prepare or offer a defense in this case.

³ 446 Pa. 137, 140-141, 285 A.2d 128, 131 (1973).

IV. CONCLUSION

In consideration of the analysis set forth above, this Court believes that the defendants' Motion to Open and/or Strike Judgment was properly granted and should be affirmed by the Court above.

BY THE COURT:

Date

ALLAN L. TERESHKO, J.

cc: Marc S. Greenfield for Appellants
Edward V. Shulgen for Appellees