

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

TTAP INVESTMENT COMPANY and
EAST END COMPANY REAL ESTATE

: FEBRUARY TERM, 2004

: No. 1209

v.

:

MARK BOJANOWSKI, *et al.*

: Control No. 051374

ORDER

AND NOW, this 7TH day of July 2005, upon consideration of defendant, Mark Bojanowski's Emergency Petition to Open Default Judgment, the response in opposition, all matters of record, after rule hearing and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that defendant's Petition is **Granted**.

It is further **ORDERED** that the defendant shall file an answer to plaintiffs' Complaint (breach of contract and unjust enrichment) within twenty (20) days of the date of this Order.

It is further **ORDERED** that the Motion to Strike Lis Pendens and the Motion for Sanctions are Denied.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

ALBERT W. SHEPPARD, JR., J. July 7, 2005

Defendant’s Petition to Open Default Judgment should be granted in that the Petition was filed timely, there exists a reason for delay, and there is alleged a meritorious defense.

The Complaint in this action was filed in February of 2004. Michael Luongo, attorney for defendant, Mark Bojanowski (“Bojanowski”) was asked by plaintiffs’ counsel if he would accept service on behalf of Bojanowski. Mr. Luongo was to consult with Bojanowski and advise plaintiffs’ counsel. Mr. Luongo never responded and the Complaint was reinstated on July 1, 2004. Bojanowski was personally served n July 6, 2004.

The Complaint sought legal and equitable relief for losses resulting from the April 2000, sale of real property at 1701-03 Spruce Street, Philadelphia. The Complaint included counts for fraud, breach of contract, unjust enrichment, constructive trust, quiet title, and for damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the Real Estate Licensing Act.

On July 30, 2004 plaintiff, TTAP Investment Company, Inc., (“TTAP”) mailed a notice of Intent to Enter Default Judgment under Pennsylvania Rule of Civil Procedure 237.1(2) for defendant’s failure to file an Answer. On August 6, 2004, plaintiff filed a Notice of Removal to the U.S. District Court based on diversity jurisdiction.

Plaintiff objected to the removal on the basis of untimely filing, lack of diversity as one plaintiff was listed as a Delaware resident (but who in actuality was a resident of Pennsylvania) and preclusion of removal under 28 U.S.C. §1441(b) because Bojanowski was a resident of Pennsylvania. Plaintiffs’ counsel agreed that if remand on the basis of lack of diversity was effected, plaintiff would file an amended complaint correcting an error in plaintiff’s address. On November 1, 2004, the case was remanded to the Court of Common Pleas on the basis of preclusion under 28 U.S.C. §1441(b). Because remand was done on this basis, plaintiff did not file an amended complaint.

The case returned to this court on January 6, 2005. Plaintiff sought a default judgment, twenty-eight days later, on February 2, 2005. Notice of default was mailed to Bojanowski.

Plaintiffs’ filed a Motion for Assessment of Damages hearing on March 11, 2005. On March 14, 2005 a Case Management Conference was conducted at which counsel for both sides appeared. Mr. Luongo was informed that a default judgment had been entered and a Motion for Assessment of Damages had been filed. The Motion for Assessment of Damages was scheduled for May 17, 2005. Mr. Luongo filed this Motion to Open Default Judgment on May 16, 2005.¹

¹ This Motion also includes a Motion to strike Lis Pendens and for sanctions against plaintiffs’ attorneys.

Discussion

To open a default judgment, the court must consider the following: 1) whether the petition to open was timely, 2) whether there is a good reason for delay leading to the default, and 3) whether a meritorious defense has been shown. Schultz v. Erie Ins. Exchange, 505 Pa. 90, 93; 477 A.2d 471, 472 (1984). Each prong of this test must be met. Id. A petition to open a default judgment should be decided based on principles of equity. Seeger v. First Union Nat'l. Bank, 836 A.2d 163, 165 (Pa. Super. 2003).

Timeliness is measured from the date notice of entry of default judgment was received. Hall v. MPH Transp., Inc., 58 Pa. D. & C.4th 482, 503, 2002 WL 31989010 Pa. Com. Pl. (May 1, 2002). Pennsylvania Rule of Civil Procedure 237.3 presumes that if a petition to open is filed within ten days after the entry of judgment, it is promptly filed and there is a legitimate excuse for the delay. Id. If, however, a petition to open is not filed within ten days, a petition to open may still be granted. Hall, 58 Pa. D. & C. at 503. In order to determine promptness, the court focuses on: 1) the length of delay between discovery of the default judgment entry and filing the petition to open; and 2) the reason for the delay. Id.

Although there is some confusion as to the date of the entry of Default Judgment, it was either February 2, 2005 or February 3, 2005. Bojanowski's counsel did not file a Motion to Open Default Judgment until May 16, 2005 more than three months after filing and receipt.

Mr. Luongo alleges that he contacted Plaintiffs' attorneys several times in an attempt to induce them to voluntarily open the default judgment because the Notice of Intent to Enter Default was improper and defective. The reasons that Mr. Luongo argues are: 1) plaintiffs failed to serve the requisite Notice of Intent to Enter Default Judgment on defendant or counsel before the Praecipe to Enter was filed, as required by Pennsylvania Rules of Civil Procedure 237.1;

2) plaintiffs failed to serve a copy of the Notice of Intent on defendant's counsel; 3) Notice of Intent to Enter Default did not include a notice in Spanish as required by the Pennsylvania and Local Rules, 4) the Praecipe and related documents filed by plaintiffs contain conflicting and inconsistent dates of service of the Notice of Intent to Enter Default; and 5) the plaintiffs' correspondence with the Notice of Intent contains erroneous information and misinforms defendant by identifying the enclosed document incorrectly as a "ten day letter" instead of a Notice of Intent to Enter a Default Judgment. Most of these reasons are merely technical and not of any moment; however, not serving Mr. Luongo with the Notice of Intent is a legitimate concern. While Bojanowski's counsel had not officially filed an entry of appearance, plaintiffs' counsel was aware of who was representing Bowjanowski and should have served Mr. Luongo in accordance with the rules.²

Considering the totality of the circumstances, including Mr. Luongo's attempt to contact plaintiffs' attorneys to obtain a voluntarily opening of judgment, suggests that the first prong of the test is satisfied.

The legitimacy of an excuse depends upon the specific circumstances presented. Reid v. Boohar, 856 A.2d 156, 160 (Pa. Super. 2004). The carelessness of counsel does not qualify as a legitimate excuse. Allegheny Hydro No. 1, 722 A.2d at 194 (assuming that opposing counsel granted an extension based on professional courtesy, without an actual agreement, which is not a valid reason for delay in filing). Excusable negligence, however, "must establish an oversight rather than a deliberate decision not to defend." Duckson, 620 A.2d at 1210 (affirming that party moving to open default should not automatically be penalized for mishandling of papers by insurance company or attorney).

² Mr. Luongo shall enter his appearance.

Counsel for Bojanowski believed that plaintiffs planned to file an amended complaint. The basis for removal was diversity based on one plaintiff's Delaware address. In that the plaintiff's address was listed as Delaware on the Complaint, neither Bojanowski nor his attorney had knowledge that plaintiff's true address was in Pennsylvania. This was acknowledged in plaintiffs' response to the Removal Motion. In addition to acknowledging this, plaintiff claimed that they would amend the complaint if the case was remanded for lack of diversity. There appears to have been a misunderstanding between plaintiffs' and defendants' attorneys because, plaintiffs apparently meant that they would amend **only** if the case was actually remanded for diversity. However, defendant thought that they would amend the complaint if it was remanded. The case was remanded because the defendant is a citizen of the state where the case was brought pursuant to 28 U.S.C. §1441(b). Thus, plaintiff did not plan to amend the complaint. Defendant, however, apparently misunderstood and was waiting for an amended complaint before filing its answer. This excuse by defendant is more oversight than carelessness. Thus, the court considers it a legitimate excuse which justifies opening of the default judgment.

A meritorious defense will be found if there is a defense "pleaded that if proved at trial would justify relief." ABG Promotions v. Parkway Pub., Inc., 834 A.2d 613, 617-18 (Pa. Super. 2003) (internal quotes omitted). At the June 28, 2005, hearing it was determined that there was no cause of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law and Real Estate Licensing Act and that the tort actions were outside the statute of limitations. Mr. Bojanowski's defenses to the remaining claims³ are that they are baseless and filed in bad faith. If the defense of bad faith could be proved at trial, it would be a meritorious defense. Therefore, the third prong of the test has been satisfied.

³ The remaining Counts are breach of contract and unjust enrichment.

Conclusion

The default judgment in this action should be opened because defendant, Bojanowski, has met each of the three requirements. This court submits that opening the default judgment would be the equitable resolution.

The Motion to Strike Lis Pendens and the Motion for Sanctions are Denied.

The court will enter an Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.