

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

PHILADELPHIA SCHOOL DISTRICT,	: MAY TERM, 2001
d/b/a PHILADELPHIA BOARD OF EDUCATION	
d/b/a PHILA. BOARD OF EDUCATION	: No. 2183
d/b/a SCHOOL DISTRICT OF PHILADELPHIA	
	:
v.	
	:
TRI-COUNTY ASSOCIATES BUILDERS, INC., and	
COMMONWEALTH INSURANCE COMPANY	: Control No. 071081

ORDER

AND NOW, this 16th day of August 2001, upon consideration of the objections of the School District of Philadelphia ("School District") to the timeliness of the July 13, 2001 Petition filed by Commonwealth Insurance Company ("Commonwealth") to Open or Strike the Confessed Judgment, it is hereby ORDERED that the request to Dismiss the Petition is Denied for the reasons set forth in the contemporaneously filed Opinion.

It is further ORDERED that a Rule is granted upon the plaintiff to Show Cause Why the relief requested in the Petitions filed by Tri-County Associates Builders, Inc. and by Commonwealth to Open or Strike the Confessed Judgments should not be granted.

Rule Returnable on the 6th day of September 2001, at 9:30 in Courtroom 513, City Hall, Philadelphia, Pa. 19107.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. August 16, 2001

I. INTRODUCTION

The issue presently before this court is whether Commonwealth Insurance Company's ("Commonwealth") Petition to Open or Strike a Confessed Judgment entered by the School District of Philadelphia ("School District") should be dismissed as untimely. Because factual issues were raised concerning the service of the Rule 2958.1 Notice which triggers the thirty-day response period for filing the petition, a hearing was held. Upon consideration of the testimony, arguments, relevant rules and precedent, and for the reasons set forth below, this court concludes that Commonwealth's Petition should not be dismissed as untimely.

Accordingly, a hearing on the Petition to Strike/Open Confessed Judgment will be scheduled.

II. PROCEDURAL BACKGROUND

On May 21, 2001, the School District filed a Complaint in confession of judgment in the amount of \$533,820. against a contractor, Tri-County Associates Builders, Inc. ("Tri-County") and its surety, Commonwealth Insurance Company ("Commonwealth"). There is no dispute that Commonwealth received notice of this Complaint. The School District claims that on May 22, 2001, it sent a Notice Under Rule 2958.1 of Judgment and Execution ("Rule 2958.1 Notice") with a cover letter to Commonwealth by certified mail return receipt requested. School District's 8/2/2001 Memorandum at 2. Commonwealth, however, denies that it received this notice by certified mail in May.¹ However, it acknowledges that it received a Praecipe to Reassess Damages Downward on May 23. N.T. at 42. According to the docket entries, this Praecipe was formally filed with the Prothonotary on May 22, 2001.

Commonwealth presented testimony that it never received the Rule 2958.1 Notice until it was faxed on July 13, 2001. N.T. at 38. It was on this date that the School District filed an Affidavit of Service of the Rule 2958.1 Notice with the Prothonotary, although it does not appear on the dockets.²

¹Commonwealth raised this issue of failure to serve the Notice of Execution in its initial July 13, 2001 Petition, ¶ 9. Commonwealth also filed an amended petition on July 20, 2001 which the School District claims is improper. N.T. at 8. It is not necessary to address at this point whether the amended petition is valid because the timeliness issue was clearly framed by the initial July 13 Petition.

²The official Prothonotary file for this case does contain the Affidavit of Service of Notice Under Rule 2958.1 with a July 13, 2001 time stamp. The document itself is dated July 13, 2001. Because of an apparent error by court personnel, this entry was not docketed. Nonetheless, the July 13 time stamp establishes that this Notice was, in fact, filed with the Prothonotary.

Commonwealth filed its Petition to Open/Strike the Confessed Judgment on July 13, 2001.³ It subsequently filed an Amended Petition on July 20, 2001. In its initial July 13 Petition Commonwealth asserts that its Petition was timely under Pa.R.C.P. 2959 because Commonwealth had not been served with a Notice of Execution or Writ of Execution. See July 13, 2001 Petition, ¶9.

In response, the School District, as a threshold issue, argues that Commonwealth's Petition was untimely. During a conference with this court, the parties agreed that a hearing should be held on this timeliness issue alone.⁴ A Rule Returnable was therefore issued scheduling a hearing for August 2, 2001.⁵

III. DISCUSSION

A. The Timeliness of Commonwealth's Petition Hinges on the Date of Service of the Rule 2958.1 Notice of Judgment and Execution.

The dispute between Commonwealth and the School District over the timeliness of Commonwealth's July 13th Petition focuses on the narrow factual issue: when did Commonwealth receive notice of the School District's Notice Under Rule 2958.1 of Judgment and Execution

³In fact, there are presently pending two Petitions to Open or Strike the Confessed Judgment; one filed by Commonwealth and the other by the contractor, Tri-County.

⁴See Letter dated July 23, 2001 from Peter Norman to Roy Cohen; N.T. at 8.

⁵Pa.R.C.P. 206.5 provides that depositions may be held in response to a petition or rule to show cause as set forth in the proposed order of 206.5(d). The Note to this Rule also provides, as an alternative in lieu of depositions, for an evidentiary hearing. The two parties to this hearing each presented two witnesses, thereby creating an adequate record for resolving the threshold issue of notice.

thereon ("Rule 2958.1 Notice")? This Rule 2958.1 Notice comes into play in the present case due to the interrelationship of Pa.R.C.P. 2959 and Pa.R.C.P. 2956.1(c)(2).

Pa.R.C.P. 2959 sets the standard for striking off and opening confessed judgments. This rule provides, inter alia, that written notice may be served on the party against whom a judgment is confessed.⁶ This notice then triggers a thirty-day response period for filing a petition to open or strike the judgment:

If written notice is served upon the petitioner pursuant to Rule 2956.1(c)(2) or Rule 2973.1(c), the petition shall be filed within thirty days after such service. Unless the defendant can demonstrate that there were compelling reasons for the delay, a petition not timely filed shall be denied.

Pa.R.C.P. 2959 (a)(3).

Before Pa.R.C.P. 2959 was amended in 1996,⁷ the timeliness of a petition to open and strike a confessed judgment was determined by weighing three factors: "the extent of the delay, the explanation for the delay, and the nature of the harm resulting from the delay." First Seneca Bank & Trust Company v. Laurel Mountain Development, 324 Pa. Super. 352, 471 A.2d 875, 877 (1984), aff'd, 506 Pa. 439, 485 A.2d 1086 (1984). The Seneca Court cautioned that "a mere consideration of the calendar provides an insufficient basis from which to determine whether the petitioner has complied with the requirement that the effort to open be commenced promptly." 471 A.2d at *877. Courts typically focused on the time between when a judgment was confessed

⁶There is no time limit for filing the execution notice and the judgment creditor can file the notice at its discretion. Thomas Associates Investigative & Consulting Servs., Inc. v. GPT Ltd., 711 A.2d 506, 508 (Pa. Super. 1998).

⁷See Thomas Associates Investigative & Consulting Servs. v. GPI Ltd., 711 A.2d 506, 508 (Pa. Super. 1998).

and when the petition was filed to determine its timeliness, adopting fairly flexible guideposts.⁸

In recent decisions, however, our Superior Court has focused on the precise language of Pa.R.C.P. 2959(a)(3) and its reference to written notice under Rules 2956.1(c)(2) or 2973.1(c). The Superior Court recently concluded that under the revised confession of judgment rules, the timeliness of a petition to open is now linked to the execution notice and not to when a party is notified that a judgment has been entered against him. Thomas Associates Investigative and Consulting Services, Inc. v. GPI LTD., Inc. 711 A.2d 506, *507-08 (Pa. Super. 1998). See also Magee v. J.G. Wentworth, Inc., 2000 Pa. Super. 300, 761 A.2d 159 (2000)(Timeliness clock is triggered by notice of execution not notice of judgment).

Under Pa. R.C.P. 2956.1(c)(2) a judgment creditor has three options for delivering the requisite notice. The School District decided to serve Notice pursuant to Pa.R.C.P. 2958.1. School District's 8/2/2001 Memorandum at 3. Significantly, Rule 2958.1 adopts the rules of service for original process.

Rule 2958.1 for Notice Served Prior to Execution thus provides in relevant part:

(a) A written notice substantially in the form prescribed by Rule 2964 shall be served on the defendant at least thirty days prior to the filing of the praecipe for a writ of execution.

⁸While a petition filed nearly 4 months after judgment was confessed was considered timely in Hellam Township v. DiCicco, 287 Pa. Super. 227, 429 A.2d 1183 (1981) a 3 month delay was considered untimely in Haggerty v. Fetner, 332 Pa. Super. 333, 481 A.2d 641 (1984). See generally Duque v. D'Angelis, 390 Pa. Super. 136, 568 A.2d 231 (1990)(delay of 1 year and one month between confession of judgment and petition to open was untimely); First Seneca Bank & Trust Co. v. Laurel Mountain Development Corp., 324 Pa. Super. 352, 471 A.2d 875 (1984)(28 month delay in filing petition to open was untimely).

- (b) the notice shall be served
- (1) upon a defendant in the judgment who has not entered an appearance
 - (ii) by the plaintiff mailing a copy in the manner prescribed by Rule 403
- (c) The person serving the notice shall file a return of service as provided by Rule 405. Pa.R.C.P. 2958.1

The provisions for serving the Execution Notice under Rule 2958.1 thus directly incorporate two rules of service of original process: Rule 403, for service by mail, and Rule 405, for filing a return of service.

It is Rule 405 that pertains to the present controversy. It provides in relevant part that the person making service of process shall file a return of service "forthwith."⁹ It also provides that if a person other than a sheriff effectuates service, his return of service should be by affidavit. Pa.R.C.P. 405(d). More critically, Rule 405(e) states:

The return of service or of no service shall be filed with the prothonotary.

Pa.R.C.P. 405 (e).

Read as a whole, therefore, Pa.R.C.P. 2958.1(c) and Pa.R.C.P. 405 require that an affidavit that the Notice of Execution has been served should be filed with the prothonotary forthwith. This concern for notice and verification is explained in the Explanatory Comment -

⁹Pa.R.C.P. 405(a). "Forthwith" is defined in Black's Law Dictionary (6th Ed.) as "immediately; without delay; within a reasonable time under the circumstances."

One commentator has set the outer limit of "forthwith" under Rule 405(a) as thirty days: The affirmative duty which 405(a) places upon a sheriff or other person to make a return of service of original process forthwith upon making service obligates a sheriff or other person to make the return even before the expiration of the 30-day life span of the process.

Goodrich-Amram 2d §405(a):1 (1991 & Supp. 1999).

1996 to the Confession of Judgment Rules which states that "[n]ew rules have been promulgated to provide for notice to be served upon the defendant in most cases prior to or during execution on a judgment entered by confession."¹⁰

B. Testimony and Arguments at the Hearing Concerning Service of the Rule 2958.1 Notice.

Commonwealth presented four broad arguments at the August 2, 2001 hearing to support its claim that it had not received the Rule 2958.1 Notice prior to July 13, 2001 when it was faxed to it and when Commonwealth filed its Petition to Open/Strike the Confessed Judgment:

- . The School District claimed that it mailed two documents to Commonwealth on the same day: a Praecipe to Reassess Damages Downward and the Rule 2958.1 Notice. N.T. at 5 (argument); N.T. 58 (confirmation of this point by witness for School District).
- . There was no evidence that could link the certified mail return receipt that the School District relies on for proof of service specifically to either the Praecipe or the Rule 2958.1 Notice. Hence, it is impossible to tell whether the Praecipe or the Notice was sent by registered mail to obtain service on Commonwealth. N.T. at 14-15.
- . The Commonwealth employees responsible for processing mail relating to legal documents, Sidney Zilber and Leann Wells, had no recollection of receiving the Rule 2958.1 Notice. N.T. at 38; 42 (Zilber testimony); N.T. at 47-48 (Wells testimony).
- . The School District did not file its Affidavit of Service of the Rule 2958.1 Notice until July 13, 2001, even though Pa.R.C.P. 405 required it to be filed "forthwith." N.T. at 7 & 60.

¹⁰See Pa.R.C.P. 2958.1, Explanatory Comment - 1996 following Rule 2950.

Commonwealth presented two witnesses to testify at the hearing: Sidney Zilber, an employee at Commonwealth for twelve years who owned an interest in the company and was also an attorney,¹¹ and Leann Wells, the secretary¹² who had signed the certified mail return receipt that the School District relied upon to establish service of the Rule 2958.1 Notice. Ms. Wells testified about her customary procedure for processing mail which was to refer all legal documents to Mr. Zilber. She had no recollection of receiving any of the legal documents by certified mail from the School District identified as the complaint or the Rule 2958.1 Notice. N.T. at 46-48.

Mr. Zilber likewise described his customary procedure for dealing with legal documents that came in the mail. After Ms. Wells opens the letters, she distributes legal documents to him. Mr. Zilber recalled receiving the Complaint in Confession of Judgment from the School District on May 22, 2001 and the Praecipe to Reassess Damages Downward on May 23, 2001. N.T. at 34-36 & 42. He had no recollection of receiving the Rule 2958.1 Notice until it was faxed to him on July 13, 2001. N.T. at 37-38. As an attorney, he was aware of the legal significance of the Rule 2958.1 Notice as triggering the period for filing a Petition to Open/Strike a Confessed Judgment. N.T. at 39. He stated that his normal practice upon receiving such a notice was to contact the company's attorney. N.T. at 43.

¹¹N.T. at 32-33.

¹²N.T. at 46. Ms. Wells testified that she has been employed at Commonwealth for 5 years.

The School District also presented testimony from two witnesses. The first witness was the attorney, Peter Norman, who prepared the Rule 2958.1 Notice and its cover letter. He testified that he sent the cover letter and Rule 2958.1 Notice, but conceded that he had not personally placed the documents in their respective envelopes. N.T. at 54, 56, 58. He emphasized that special care had been taken in preparing the Notice and that in the month of May, he sent only two certified letters. N.T. at 54-55. On cross-examination, he admitted that he had two separate mailings to Commonwealth on the same day (i.e., May 22) for both the Praecipe and the Notice but that he did not file an Affidavit of Service for the Rule 2958.1 Notice until July 13, 2001. N.T. at 58 & 60.

The School District's next witness, Deborah Krause, who is Mr. Norman's secretary, testified that she actually prepared the certified mail return receipt and sent the Praecipe, the Rule 2958.1 Notice and its cover letter. N.T. at 65, 68-69, 77-78. She stated that she was certain she had not confused the mailings because certified mail had to be sent down to the messenger by 4:00 p.m., while the Praecipe, which was time stamped 4:27 p.m., would have gone to the mail bin for the 5:00 p.m. pickup. N.T. at 70, 72-73. On cross-examination, she testified that she was not merely describing office mail procedure but that she specifically recalled "putting the letter and the enclosure in the envelope." N.T. at 77. She conceded, however, that she had no other independent recollection of that particular day, such as what occurred or what she was wearing. N.T. at 76.

In reviewing the testimony as a whole, the testimony of all witnesses was credible concerning the general procedures for processing or sending the mail. This court is skeptical,

however, that Ms. Krause had a specific recollection of placing a particular document in a particular envelope nearly 2 months prior to her testimony. Moreover, the mere fact that different types of letters had to be sent down at different times does not provide assurance that the right letter was placed in the right envelope.

By presenting uncontroverted evidence that the School District intended to send two documents to Commonwealth on the same day and that the certified mail return receipt cannot be traced to either document, Commonwealth created doubt as to the effectiveness of the certified return receipt as documenting service of the Rule 2958.1 Notice. In light, then, of the generally credible evidence about facts which remain unknown, the School District's failure to adhere to the dictates of Pa.R.C.P. 405 which required the filing of an Affidavit of Service of the Rule 2958.1 Notice with the Prothonotary "forthwith" is critical.

C. The Rules for Serving the Rule 2958.1 Notice Incorporate the Rules for Serving Original Process and Must Be Strictly Construed in Light of the Procedural Safeguards for Executing on Confessions of Judgment.

As previously discussed, Rule 2958.1 provides, inter alia, that the person serving the Rule 2958.1 Notice shall file a return of service as provided by Pa.R.C.P. 405. Rule 405 applies to original process, suggesting that Rule 2958.1 incorporates the strict standards applicable to original process.

The Pennsylvania Supreme Court has long held that rules relating to the service of process should be strictly construed because, in cases involving service of original process, the court lacks jurisdiction if service is improper. There is, moreover, "no presumption as to the

validity of the service and return itself is required to set forth service in conformance with the rules." Sharp v. Valley Forge Medical Center and Heart Hospital, Inc., 422 Pa. 124, 221 A.2d 185, **187 (1966). Accord Neff v. Tribune Printing Company, 421 Pa. 122, 218 A.2d 756, *757-58 (1966); Burger v. Borough of Ingram, 697 A.2d 1037, *1041 (Pa. Cmwlth. 1997).

While service of the Rule 2958.1 Notice is not essential for obtaining jurisdiction, it is essential for providing notice of the triggering of the 30-day response period for filing a petition to open or strike a confessed judgment. In fact, the comment to Rule 2958.1 emphasizes that the imposition of a notice requirement prior to execution on a confessed judgment was one of two major revisions to the rules of civil procedure governing confessions of judgment.¹³

The process of confessing judgment is draconian due to the byzantine nature of its rules. As the Pennsylvania Superior Court has observed, "the law does not favor confession of judgment in general." Drum v. Leta, 354 Pa.Super. 448, 512 A.2d 36, 38 (1986). In a more recent decision, that court emphasized:

Confession of judgment is a powerful tool, because it effectively prevents the debtor from having his day in court. Such power must be exercised fairly and with exacting precision. PNC Bank v. Bolus, 440 Pa. Super. 372, 655 A.2d 997, 1000 (1995).

¹³See Explanatory Comment - 1996 following Rule 2950. According to the explanatory comment, the notice provisions "are intended to aid the bench and bar in complying with Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994)." Id. The Third Circuit in Jordan concluded, inter alia, that a judgment creditor who uses state procedures to enlist state officials to execute on a confessed judgment may be liable under §1983 depending on the facts of a particular case, especially relating to whether the debtor waived his constitutional rights to notice and a hearing.

In light of these concerns and the particular facts of this case, the School District's failure to adhere to Pa.R.C.P. 405 (a)(d) & (e) by filing an affidavit or return of service of the Rule 2958.1 Notice "forthwith" with the prothonotary tips the balance in favor of finding Commonwealth's Petition to be timely filed. See, e.g., Azzarrelli v. City of Scranton, 655 A.2d 648, 650-52 (1995)(failure to file return of service when linked with improper service of writ by constable rather than sheriff results in improper service).¹⁴ Consequently, balancing all the equities in light of the unique facts of this case and where the Rule 2958.1 Notice and the Petition to Open or Strike the Confessed Judgment are both filed on the same day, July 13, 2001, the Petition should not be dismissed as untimely.

Conclusion

The record, as a whole, supports the conclusion that Commonwealth's Petition should not be dismissed as untimely. It is, therefore, necessary to schedule an additional hearing to address the issue whether the Petition of Commonwealth to Open or Strike the Judgment Confessed should be granted.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

¹⁴In Americans Be Independent v. Commonwealth, 14 Pa. Cmwlth. 179, 321 A.2d 721 (1974), the Commonwealth Court concluded that failure to file an affidavit of service could be corrected even after an appeal was taken. That case is easily distinguishable on various scores. In Americans Be Independent, none of the parties mentioned this failure to file the affidavit during the hearing on a petition for civil contempt. In fact, the defendants did not deny receiving notice of the hearing. Here, however, both parties have vigorously raised the notice issue, and Commonwealth denies receiving the requisite Rule 2858.1 Notice prior to July 13, 2001. Finally, Americans Be Independent is also not a confession of judgment case that implicates the particular notice requirements of Rule 2958.1.