PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Southern Tabernacle Missionary Baptist Church, a Nonprofit Corporation
O.C. No. 1841 NP of 2009
Control No. 102398

O P I N I O N

Factual Background

On July 21, 2010, Metro Impact LLC ("Metro") filed a petition for a default judgment against Lopez Thompson, Esquire, Brass Key Realty and Raymond Barber for failure to respond to a Citation "with a response date of January 25, 2010" to Show Cause why the conveyance of two properties at 1000 and 1002 South Nineteenth Street should not be set aside.[1] No opposition was filed to Metro's petition for default and by decree dated July 27, 2010, a default judgment was entered against Lopez T. Thompson, Esquire, Brass Key Realty and Raymond Barber.

A little more than a month later, on August 30, 2010 Lopez Thompson, Esquire, and Brass Key Realty filed a petition to vacate the default judgment. The request to vacate the default judgment entered on July 27, 2010 does not clarify whether petitioners seek to open or strike that judgment. This is a critical distinction in this case. While the petitioners fail to meet the standard for opening the judgment, because of procedural defects on the record there is a basis for striking the default judgment.

A. The Petition of Lopez Thompson and Brass Key Realty Fails to Satisfy the Standard for Opening A Default Judgment

The standards for opening a default judgment are well-established. To open a default judgment, the petitioner must "(1) promptly file a petition to open the default judgment, (2) show a meritorious defense, and (3) provide a reasonable excuse or explanation for its failure to file a

[1] See 7/21/10 Metro Petition for Default. The Metro petition for a citation was filed December 2, 2009.

responsive pleading. Allegheny Hydro No. 1 v. American Line Builders, Inc., 1998 Pa. Super. LEXIS 3905, 722 A.2d 189, 191 (Pa. Super. 1998). The petitioners offered a substantive defense to Metro's initial December 2, 2009 petition, but they provided no explanation whatsoever for their failure to respond to Metro's December 2, 2009 petition and the citation issued in response to it. Moreover, their petition to vacate the default judgment was filed a little more than a month after the default order was entered, which, on its face and without any explanation, would be untimely. Generally, courts conclude that a petition to open a default judgment is timely when filed within a month of the decree:

> In evaluating whether the petition to open judgment has been promptly filed, "[the] court does not employ a bright line test….[The Court focuses] on two factors: (1) the length of delay between discovery of the entry of a default judgment, and (2) the reason for the delay." *Allegheny Hydro 1, 722 A.2d at 193(quoting Quatrichi v. Gasters, 251 Pa. Super. 115, 380 A.2d 404, 407 (Pa. Super. 1977).* Appellant did not file the petition until four months after learning that Appellee was not going to stipulate to the opening of the judgment. In the past, we have held that delays of as little as twenty-one days have been untimely. *See B.C.Y., Inc. Equipment Leasing Assocs. v. Bukovich, 257 Pa. Super. 121, 390 A.2d 276 (Pa. Super. 1978)(twenty-one day delay is not prompt); Allegheny Hydro 1, 722 A.2d at 194 (forty-one day delay is not prompt).* In cases where we have held that the filing was prompt, the period of delay was generally less than one month. *See Alba v. Urology Assocs. of Kingston, 409 Pa. Super. 406, 598 A.2d 57, 58 (Pa. Super. 1991)(fourteen day delay is timely);Fink v. General Accident Ins. Co., 406 Pa. Super. 294, 594 A.2d 345, 346 (Pa. Super. 1991)(five day delay is timely).*
> Dumoff v. Spencer, 2000 Pa. Super. 176, 754 A.2d 1280, 1282 (2000).

Since petitioners offered no explanation either for the delay in filing the petition to vacate the default judgment or for their failure to respond to Metro's December 2010 petition, they failed to meet the criteria for opening the judgment.

2. A Motion to Strike a Judgment May Be Granted Where a Fatal Defect in the Judgment Appears on the Face of the Record

Petitioners' motion to vacate the default judgment could be construed as a petition to strike the judgment. A petition to strike and a petition to open a default judgment seek two different remedies "which are not generally interchangeable." Pennwest Farm Credit v. Hare,

410 Pa. Super. 422, 430, 600 A.2d 213, 217 (1991). Nonetheless, since each such motion seeks a different remedy, the denial of one does not preclude the subsequent filing of the other. Id., 410 Pa. Super. at 430 , 600 A.2d at 217.

As a general principle, a petition to strike a judgment "will not be granted unless a fatal defect in the judgment appears on the face of the record." Fleck v. McHugh, 241 Pa. Super. 307, 361 A.2d 410, 412 (1976). In the instant case, the fatal flaw on the record is that Metro seeks a default judgment against Lopez Thompson and Brass Key Realty based on a citation and petition it amended prior to filing its petition for default. An outline of the relevant procedural facts demonstrate why the July 27, 2010 default decree against Lopez Thompson and Brass Key Realty should be stricken.

On December 2, 2009, Metro filed its petition seeking a citation against specifically named respondents to show cause why the sale of two vacant lots to Stradausa should not be set aside. Lopez Thomas and Brass Key Realty did not respond to this initial December 2, 2010 petition and citation, but three other respondents filed preliminary objections that Metro lacked standing to assert a claim to rescind the two conveyances based on *cy pres*. These preliminary objections were sustained, but Metro was given the opportunity to file an amended petition, which it did on June 2, 2010. In that petition, Metro sought citations directed against the same respondents cited in its initial December 2, 2009 petition, which included Lopez Thompson and Brass Key Realty. In essence, it reasserted an amended claim against them. As Metro subsequently admitted, however, no citation was issued pursuant to this June 2, 2010 amended petition.[2] No proof of service appears on the record. Nearly two months after filing its new, amended petition against Lopez Thompson and Brass Key Realty, Metro filed a petition for

[2] See 8/18/10 Metro Brief at 2 ("As of August 17, 2010, the Court has not authorized citations to respond to the amended petition).

default for their failure to file a response to the December 2, 2009 petition. As a practical matter, however, that December 2, 2009 petition had been superseded by the June 2, 2010 amended petition. Through inadvertence—or a defect in the record—no citations have yet issued in response to the June 2, 2010 amended petition. No party was therefore obliged to respond to it, although StradaUSA opted to waive the lack of service by filing preliminary objections to the amended petition which are sustained by a contemporaneously issued separate order and opinion.

The facts are therefore similar to those set forth in Advance Building Serv. Co. v. F. & M Schaefer Brewing Co., 252 Pa. Super. 579, 384 A.2d 931 (1978). In Advance Building, a default judgment was stricken based on "a fatal defect, readily apparent from the face of the record." Id., 252 Pa. Super. 82, 384 A.2d 932. In that case, preliminary objections were filed to a complaint, but before they were ruled upon, an amended complaint was filed. When the defendant did not respond to the amended complaint or request argument on its preliminary objections, the plaintiff took a default judgment. That default judgment was subsequently stricken, however, because the initial preliminary objections were still pending. As the court reasoned in striking the default judgment, "the presence of preliminary objections which have not been disposed of is a fatal defect, readily apparent from the face of the record, which is sufficient to permit the striking of a default judgment." Id., 252 Pa. Super. at 582, 384 A.2d at 932.

Similarly, in the instant case, the default judgment against Lopez Thompson and Brass Key Realty should be stricken because it was premised on failure to respond to the December 2, 2009 Petition for a Citation which subsequently was amended by Metro in June 2, 2010 to name Lopez Thomas and Brass Key Realty once again as defendants. The defect of allowing a default judgment based on a petition that was subsequently amended is apparent on the face of the

record. Another defect apparent on the record was the failure to order the issuance of citations based on that amended petition. Since Stadausa, LLC, waived that defect by filing preliminary objections—to which Metro filed a response—this defect is waived as to those claims, and this court properly sustained Stradausa's preliminary objections. As for the remaining defendants cited in the amended petition, citations are awarded by a contemporaneously issued decree.

Date: December 14, 2010 BY THE COURT:

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John W. Herron, J.