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

CASSANDRA HAYES	:	
Plaintiff,	:	AUGUST TERM 2005
	:	
v.	:	NO: 2880
	:	
MANAYUNK BREWING COMPANY,	:	CONTROL NO: 021475
HARRY RENNER IV, and	:	
PHILADELPHIA BEER WORKS, INC.	:	COMMERCE PROGRAM
Defendants.	:	

O R D E R

AND NOW, this 20th day of April, 2006, upon consideration of Defendants Manayunk Brewing Company and Philadelphia Beer Works, Inc.'s Petition to Strike/Open Default Judgment, and response thereto, it is hereby ORDERED and DECREED as follows:

1. Defendants' Petition to Strike Default Judgment is GRANTED as to defendant Harry Renner, IV only. The judgment against Harry Renner, IV is hereby STRICKEN.
2. Defendants' Petition to Strike Default Judgment is DENIED as to defendants Philadelphia Beer Works, Inc. and Manayunk Brewing Company.
3. Defendants' Petition to Open Default Judgment is DENIED.

BY THE COURT,

_____
HOWLAND W. ABRAMSON, J.

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OPINION

Defendants Manayunk Brewing Company and Philadelphia Beer Works, Inc. ("defendants") have filed a Petition to Strike/Open Default Judgment.[1] For the reasons set forth in this Opinion, said Petition is granted in part and denied in part.

BACKGROUND

Plaintiff Cassandra Hayes ("plaintiff") commenced this action by complaint on August 17, 2005. Plaintiff filed an amended complaint on September 7, 2005, which was served upon defendants on September 8, 2005. On September 29, 2005, plaintiff sent a Notice of Default to defendants. See Defendants' Petition to Strike/Open, at ¶ 22. On November 14, 2005, plaintiff filed a praecipe for entry of default against defendants for failure to file an answer to the amended complaint. A judgment by default was entered against defendants by the Prothonotary on November 15, 2005. On February 21, 2006, defendants filed a Petition to Strike/Open Default Judgment.

DISCUSSION

Defendants have filed a combined petition to strike/open the default judgment.

[1] Manayunk Brewing Company is not a separate entity, but is rather a trade name for Philadelphia Beer Works, Inc. See Petition to Strike/Open Default Judgment, at FN1.

The Pennsylvania Supreme Court has stated that "a petition to strike and a petition to open are two distinct forms of relief, each with separate remedies." Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 546 Pa. 98, 105, 683 A.2d 269, 273 (1996). Accordingly, each will be discussed in turn.

Petition to Strike Judgment

A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. Resolution Trust Corp., 546 Pa. at 106, 683 A.2d at 273. A petition to strike a judgment may only be granted when there is an apparent defect on the face of the record. Germantown Savings Bank v. Talacki, 441 Pa. Super. 513, 519, 657 A.2d 1285, 1288 (1995). A court's order that strikes a judgment "annuls the original judgment and the parties are left as if no judgment had been entered." Resolution Trust Corp., 546 Pa. at 106, 683 A.2d at 273.

Defendants assert two grounds for striking the default judgment. Defendants' first ground for striking the judgment is that one of the defendants, Henry Renner, IV ("Renner"), passed away before the complaint was filed, so he cannot be a proper party to this action. In support thereof, defendants attach a copy of the death certificate of Renner to their Petition to Strike/Open, showing that Renner passed away on December 14, 2003, which was before the Complaint and Amended Complaint were filed. See Exhibit "A" to Defendants' Petition to Strike/Open. Both parties agree with the proposition that a dead person cannot be a party to an action. See Lange v. Burd, 2002 Pa. Super. 158, *P14, 800 A.2d 336, 341 (2002). However, plaintiff claims that she did not know that Renner was deceased at the time of the filing of the Complaint and Amended Complaint, and she only became aware of his death when defendants filed their Petition to Strike/Open. In

support thereof, plaintiff attaches to her response to the Petition to Strike/Open current printouts from the Pennsylvania Department of State listing Renner as a corporate officer of Philadelphia Beer Works, Inc. and owner of the fictitious name Manayunk Brewing Company. See Exhibit "B" to Plaintiff's Response to Petition to Strike/Open. Plaintiff further states that mail addressed to Renner has not been returned as undeliverable and/or deceased.

Although apparently unbeknownst to plaintiff at the time of the filing of the Complaint and Amended Complaint, it is clear, based on the death certificate, that Renner died before the commencement of this action. "A dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect." Valentin v. Cartegena, 375 Pa. Super. 493**,** 495, 544 A.2d 1028, 1029 (1988). Since Renner died before the commencement of this action, there cannot be a judgment against him. Therefore, the judgment against Renner is stricken. Plaintiff may opt to file a new lawsuit against Renner's estate if she so chooses. See Lange, 2002 Pa. Super at *P14, 800 A.2d at 341 ("If a plaintiff commences an action against a person who has previously died, the only recourse is to file a new action naming the decedent's personal representative as the defendant").

Defendants' second argument for striking the default judgment is that since the default judgment was collectively entered against the three defendants by a single praecipe, the default judgment is, *in toto*, a legal nullity. The Court disagrees. First, plaintiff cites no legal authority for this proposition. Second, when a default judgment is taken against *all* of the defendants in the case (as was done here), the Prothonotary enters a single praecipe as to all of the defendants. Therefore, a single praecipe for the entry of

default judgment against all of the defendants was not defective (except as against Renner, as discussed *supra*).

In sum, the Petition to Strike Default Judgment is granted as to Renner only and the judgment against Renner is stricken; however, the Petition to Strike Default Judgment is denied as to defendants Manayunk Brewing Company and Philadelphia Beer Works, Inc.

Petition to Open Judgment

It is well settled that a petition to open a default judgment "is addressed to the equitable powers of the court and the trial court has discretion to grant or deny such petition." Castings Condominium Association v. Klein, 444 Pa. Super. 68, 72, 663 A.2d 220, 222-23 (1995). To succeed on a petition to open a default judgment, the moving party must establish the following three elements: (1) the petition to open was promptly filed; (2) the default can be reasonably explained or excused; and (3) there is a meritorious defense to the underlying claim. Stauffer v. Hevener, 2005 Pa. Super 287, *P7, 881 A.2d 868, 871 (2005). "All three factors must appear before a court is justified in opening a default judgment." McCoy v. Public Acceptance Corp., 451 Pa. 495, 498, 305 A.2d 698, 700 (1973).

With regard to the first element, there is no bright line test that must be applied to determine whether a petition to open a judgment is timely. Flynn v. America West Airlines, 1999 Pa. Super. 296, *P6, 742 A.2d 695, 698 (1999). In other words, "the law does not establish a specific time period within which a petition to open a judgment must be filed to qualify as timely." Castings Condominium Ass'n, 444 Pa. Super. at 73, 663 A.2d at 223. Instead, the Court focuses on two factors: "(1) the length of the delay

between discovery of the entry of the default judgment and filing the petition to open judgment, and (2) the reason for the delay." Flynn, 1999 Pa. Super. at *P6, 742 A.2d at 698.

In the case at bar, the default judgment was entered on November 15, 2005. Notice of the entry of the default judgment was sent to each party pursuant to Pa. R.C.P. 236.[2] Defendants did not file their Petition to Open until February 21, 2006, some ninety-eight (98) days after the entry of the default judgment. In cases where courts have found that a petition to open was promptly filed, the period of delay was normally less than one month. See Castings Condominium Ass'n, 444 Pa. Super. at 74, 663 A.2d at 223 (finding that a delay of three months did not constitute a prompt filing); Fink v. General Accident Ins. Co., 406 Pa. Super. 294, 297, 594 A.2d 345, 346 (1991) (period of five days was timely); Duckson v. Wee Wheelers, Inc. 423 Pa. Super. 251, 256, 620 A.2d 1206, 1209 (1993) (one day was timely); Alba v. Urology Associates of Kingston, 409 Pa. Super. 406, 409, 598 A.2d 57, 58 (1991) (fourteen days was timely); Pappas v. Stefan, 451 Pa. 354, 358, 304 A.2d 143, 146 (1973) (period of fifty-five days was not prompt); Quatrochi v. Gaiters, 251 Pa. Super. 115, 124, 380 A.2d 404, 408-09 (1977) (period of sixty-three days was not prompt); Schutte v. Valley Bargain Center, Inc., 248 Pa. Super. 532, 537-38, 375 A.2d 368, 371 (1977) (period of forty-seven days was not prompt). Moreover, defendants have offered *no* explanation for their delay in filing the Petition to Open. Based on the fact that the Petition to Open was filed ninety-eight (98) days after the default was entered, and that no excuse has been provided by the defendants for this delay, the Court finds that the Petition to Open was not promptly filed.

[2] Pa. R.C.P 236 ("Notice by Prothonotary of Entry of Order or Judgment") states, in relevant part: "The prothonotary shall immediately give written notice of the entry of…judgment to each party's attorney of record or, if unrepresented, to each party. The notice shall include a copy of the order or judgment."

Therefore, defendants have failed to satisfy the first element of the tripartite test.

As to the second element of the test, defendants have failed to offer a reasonable explanation or excuse for their failure to timely answer the Amended Complaint or otherwise plead. The Amended Complaint was filed on September 7, 2005 and served upon defendants on September 8, 2005. The default judgment was not entered until over two months after the Amended Complaint was served. In their Petition to Open, defendants simply state, "*Through administrative confusion*, the Amended Complaint was not forwarded to Petitioners' insurance company for a request for defense." See Defendants' Petition Open, at ¶ 21 (emphasis added). No further explanation is given as to what the "administrative confusion" entailed. "Conclusory statements that amount to mere allegations of negligence or mistake, absent more, will not suffice to justify a failure to appear or answer a complaint so as to warrant granting relief from a default judgment." Duckson, 423 Pa. Super. at 257, 620 A.2d at 1210. It also must be noted that defendants are a sophisticated business, as opposed to merely a layperson.[3] Since defendants have failed to reasonably explain the default, they have failed to satisfy the second element of the tripartite test.

The third element of the test is that the moving party must demonstrate that there is a meritorious defense to the underlying claim. "The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief." Flynn, 1999 Pa. Super. at *P7, 742 A.2d at 698.

The underlying claim involves an incident at a restaurant/bar (defendants)

[3] This is also not a case where a complaint is forwarded to an insurance company by an insured and the insurance company delays in answering the complaint, while the insured justifiably believes that his legal interests are being protected. "Generally speaking, a default attributable to a defendant's justifiable belief that his legal interests are being protected by his insurance company is excusable." Duckson, 423 Pa. Super. at 258, 620 A.2d 1210.

whereby an argument ensued between plaintiff, a patron of the restaurant/bar, and defendants' employees. The incident ended in plaintiff being escorted out of the restaurant/bar by the police. As a result of the incident, plaintiff alleges that she was placed on defendants' "Do Not Serve" list, which has potentially caused damage to her reputation. Plaintiff's Amended Complaint alleges two counts against defendants: 1) declaratory judgment; and 2) intentional infliction of emotional distress. As to the declaratory judgment count in the Amended Complaint, plaintiff requests that the Court issue an order requiring defendants to rescind the "Do Not Serve" list. In response, defendants assert that no "Do Not Serve" list exists and that plaintiff is free to patronize the bar/restaurant at any time so long as she comports herself in an appropriate manner. Moreover, defendants assert that plaintiff's allegation that the list is "potentially damaging to her reputation" (see Amended Complaint, at ¶ 27) is purely speculative and does not present an actual controversy. As to the intentional infliction of emotional distress count, defendants offer factual disputes of the incident. Specifically, defendants assert that plaintiff's own behavior was the cause of any damages allegedly suffered by plaintiff. Further, defendants state that the cause of action of intentional infliction of emotional distress alleged in the Amended Complaint fails as a matter of law because plaintiff has not adequately set forth the requisite elements of the tort. These are defenses that, if proven at trial, would provide relief to defendants. Therefore, the Court finds that defendants have asserted meritorious defenses that satisfy the third element of the test.

In sum, although defendants have set forth meritorious defenses, defendants failed to promptly file the Petition to Open and provide a reasonable excuse for the default. Since defendants have not met all three elements necessary to open a default judgment,

defendants' Petition to Open is denied.[4]

CONCLUSION

For all the foregoing reasons, defendants' Petition to Strike Default Judgment is GRANTED as to defendant Harry Renner, IV only; defendants' Petition to Strike Default Judgment is DENIED as to defendants Philadelphia Beer Works, Inc. and Manayunk Brewing Company; and defendants' Petition to Open Default Judgment is DENIED.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

[4] Defendants argue in their Petition to Open that plaintiff will suffer little prejudice if the default judgment is opened. See Defendants' Petition to Open, at ¶ 31. However, "when a trial court has discussed all three elements of the test, it need not specifically set forth its consideration of the prejudices and equities." Flynn, 1999 Pa. Super. at *P11, 742 A.2d at 699-700, citing Allegheny Hydro No. 1 v. American Line Builders, Inc., 722 A.2d 189 (1998).