

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

FLORENCE MALOUMIAN and  
STEVEN H. KAPP,

Plaintiffs,

v.

EUSTACE MITA, ROBERT  
CAPOFERRI, SURETY ABSTRACT  
AND SETTLEMENT SERVICES, L.P.  
AND SURETY TITLE COMPANY, LLC:  
Successor by merger to SURETY  
TITLE CORPORATION,

Defendants.

: MAY TERM, 2010  
: No. 00929

:  
: COMMERCE PROGRAM

:  
: Control Number: 11121880

DOCKETED

FEB 28 2012

CLERK OF COURT  
INCL. REGISTRATION

ORDER

AND NOW, this 28<sup>th</sup> day of February, 2012, upon consideration of Defendant Surety Title Company, LLC's Petition to Strike or, in the Alternative, Open Default Judgment, the response thereto, oral arguments conducted on February 28, 2012, and in accordance with the Opinion issued simultaneously, it is HEREBY ORDERED that said petition is DENIED.

BY THE COURT:

Maloumian Etal Vs Mita -ORDOP



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A handwritten signature in black ink, appearing to read "Albert John Snite, Jr.", written over a horizontal line.  
ALBERT JOHN SNITE, JR., J.

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

<b>FLORENCE MALOUMIAN and STEVEN H. KAPP,</b>	:	<b>MAY TERM, 2010</b>
	:	<b>No. 00929</b>
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	<b>COMMERCE PROGRAM</b>
	:	
<b>EUSTACE MITA, ROBERT CAPOFERRI, SURETY ABSTRACT AND SETTLEMENT SERVICES, L.P. AND SURETY TITLE COMPANY, LLC: Successor by merger to SURETY TITLE CORPORATION,</b>	:	<b>Control Number: 11121880</b>
	:	
<b>Defendants.</b>	:	

**OPINION**

Defendant Surety Title Company, LLC filed a Petition to Strike or, in the alternative, Open Default Judgment entered upon praecipe of plaintiffs, Florence Maloumian and Steve H. Kapp. Defendant’s petition must be denied because it is procedurally improper and otherwise deficient.

With regard to the Motion to Strike the Default Judgment, Surety Title Company (STC) argues that Plaintiffs’ Amended Complaint fails to state a cause of action against them. “A rule to strike off the judgment is the proper method to obtain relief from a judgment based upon a statement which does not set forth a good, valid and legal cause of action.” *Waber v. Schaffhauser*, 34 Pa. D. & C. 348 348, 351 (C.P.Phila. 1939). Here, Defendant is disputing the validity of the factual allegations and has not proven that Plaintiffs have failed to state a valid cause of action. STC does not claim that a procedural defect exists on the face of the record.

This Court finds that the facts as pleaded are sufficient to support the claims of negligence, gross negligence or breach of fiduciary duty. Further, the judgment entered is not considered to be unjust, since STC voluntarily held these funds in escrow. As such, it would be improper to strike the default judgment.

With regard to the Petition to Open Judgment, the Petition was not verified, which violates Pa. R. Civ. P. 206.3. This, in and of itself, would be sufficient to deny the petition. Further, a petition for relief from judgment of default entered shall have attached thereto a verified copy of the complaint or answer which the petitioner seeks leave to file. Pa. R. Civ. P. 237.3(b). A defendant who seeks to file a pleading other than an answer is not entitled to the benefit of this rule but must comply with the requirements of *Schultz v. Erie Insurance Exchange*, 477 A.2d 471 (1984). Pa. R. Civ. P. 237.3(b), Note. Preliminary objections are not an appropriate attachment to a petition to open a default judgment. Pa. R. Civ. P. 237.3, Explanatory Comment-2001.

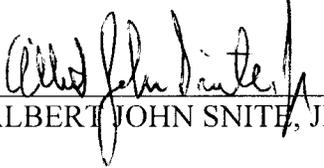
In this instance, Moving Defendant presented Preliminary Objections in the Nature of a Demurrer for Legal Insufficiency of a Pleading Pursuant to Pa. R. Civ. P. 1028(a)(4). As such, Rule 237.3 does not apply and STC must fulfill the requirements set forth in *Schultz v. Erie Insurance Exchange*. “A petition to open a judgment is addressed to the equitable powers of the court and is a matter of judicial discretion. The court will only exercise this discretion when (1) the petition has been promptly filed; (2) a meritorious defense can be shown; and (3) the failure to appear can be excused.” *Schultz*, 477 A.2d at 472. Though the petition was promptly filed, STC’s argument that it did not owe a duty to Plaintiffs is without merit. STC’s lack of communication with Plaintiffs does not absolve it from the fiduciary duty imposed by holding

Plaintiffs' funds in escrow. By accepting these funds, STC assumed a duty of care to protect the funds from undue risk.

STC failed to answer or respond to Plaintiffs' Amended Complaint by the initial deadline, the extended deadline, or the final deadline imposed as a result of Plaintiffs' Notice of Intention to Take Default Judgment upon STC. This failure to respond is inexcusable. Shared counsel for STC and Surety Abstract and Settlement Services (SASS) had already filed an answer on behalf of SASS to the Amended Complaint. Clearly, counsel was aware of the Amended Complaint and any response deadlines associated with it. Errors by counsel's staff members are simply insufficient to prove that a reasonable excuse for delay exists. STC had an opportunity to defend the claims on the merits, but failed to do so in a timely manner.

For all the foregoing reasons, Defendant STC's Petition to Strike or, in the alternative, Open Default Judgment must be denied.

BY THE COURT:

  
ALBERT JOHN SNITE, JR., J.