

Around January 26, 2008, Maven executed an agreement to borrow up to \$100,000 from MVP, payable for four years thereafter on or before January 27, 2010, for which Shaw personally guaranteed repayment. See Plaintiff's Response to Defendant's Petition to Open and/or Strike Default Judgment, Exhibit 1. In accordance with the agreement, MVP lent Maven \$90,000, but defendants failed to repay the loan in full by the January 27, 2010 deadline. See id. As a result, plaintiff filed the Complaint against defendants on May 29, 2013. When defendants failed to file a response to the Complaint, plaintiff served defendants with a Notice of Intention to Take Default (the "10 Day Notice") on July 16, 2013. Approximately one month later, on August 12, 2013, default judgment was entered against defendants for \$90,000 pursuant to plaintiff's Praecipe to Enter Default Judgment. See id., Exhibit 6.

Maven claims it did not become aware of plaintiff's Complaint or intent to seek default judgment until after judgment had been entered. See Defendant's Petition to Open and/or Strike Default Judgment. Maven then filed its first Petition to Open and/or Strike Default Judgment on October 18, 2013. See Plaintiff's Response to Defendant's Petition to Open and/or Strike Default Judgment, Exhibit 10. However, due to Maven's failure to comply with Pa.R.C.P. 237.3(a), this court denied its petition without prejudice on November 13, 2013. See id., Exhibit 12. Then, on February 25, 2014, about three months after this court's order, Maven filed its second Petition to Open and/or Strike Default Judgment, the current action before the court.² For the reasons set forth below, this court denies defendant's second Petition.

dissolved a limited partnership or, if none, the limited partners . . . may wind up the affairs of the limited partnership" 15 Pa.C.S. §8573. Being the sole limited partner of MVP, plaintiff is charged with winding up the affairs of MVP, which includes bringing this action.

² Because Shaw has not had an attorney make an appearance on her behalf, provide a response to plaintiff's Complaint and Praecipe, or formally join Maven's Petition, the term "defendant" will hereinafter only refer to Maven.

DISCUSSION

Petitions for relief from default judgments are governed by Pennsylvania Rule of Civil Procedure 237.3, which states the following:

(a) A petition for relief from a judgment of nonpros or of default entered pursuant to Rule 237.1 shall have attached thereto a verified copy of the Complaint or Answer which the Petitioner seeks leave to file.

(b) If the petition is filed within ten (10) days after the entry of the judgment on the docket, the Court shall open the judgment if the proposed Complaint or Answer states meritorious cause of action or defense.

Pa.R.C.P. 237.3. It is within the court's purview to decide whether to grant a petition to open a judgment. See Schultz v. Erie Ins. Exch., 505 Pa. 90, 477 A.2d 471, 472 (1984). "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." Id. citing Balk v. Ford Motor Co., 446 Pa. 137, 285 A.2d 128, 130 (1971). The defendant is required to establish all three prongs in order to justify opening the judgment. See Flynn v. Casa Di Bertacchi Corp., 449 Pa. Super. 606, 674 A.2d 1099, 1102-03 (1996).

A petition to strike, on the other hand, functions as a demurrer to the record and "may be granted only for a fatal defect or irregularity appearing on the face of the record." See Resolution Trust Corp. v. Copely Qu-Wayne Assocs., 546 Pa. 98, 683 A.2d 269, 273 (1996). Moreover, "[a] petition to strike does not involve the discretion of the court....Matters outside of the record will not be considered, and if the record is self-sustaining, the judgment will not be stricken." Keller v. Mey, 2013 Pa. Super. 79, 67 A.3d 1, 4 (2013) quoting Wells Fargo Bank, N.A. v. Lupori, 8 A.3d 919, 920-21 (Pa. Super. Ct. 2010).

The Pennsylvania Supreme Court has declared that the issue of improper service, if alleged, must be addressed prior to analyzing the Schultz factors. Cintas Corp. v. Lee's Cleaning Servs., 549 Pa. 84, 700 A.2d 915, 919 (1997) (citations omitted). If valid service has not been made, then the proper remedy is to have the judgment opened, not stricken. See id. Since defendant asserts that plaintiff did not properly serve defendant with the Complaint or the 10 Day Notice, this issue will be addressed first. Pa.R.C.P. 424 permits service of process upon a corporation by handing a copy of the Complaint to "the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity." Pa.R.C.P. 424(2). The record shows that on June 7, 2013, the Montgomery County Sheriff served the Complaint upon Pam Reagan, who was labeled on the Return of Service as the "[a]gent or person in charge of Defendant's office or usual place of business." See Plaintiff's Response to Defendant's Petition to Open and/or Strike Default Judgment, Exhibit 6. The address provided on the Return of Service also matches the address stated on Maven's website. See id., Exhibit 7. Defendant has not contested that the Sheriff's Return of Service states the wrong address, or that Ms. Reagan was not an authorized agent under the Rules.

In order to obtain a default judgment, a party must also act in accordance with Pa.R.C.P. 237.1, which provides that:

(2) No judgment of non pros for failure to file a complaint or by default for failure to plead shall be entered by the prothonotary unless the praecipe for entry includes a certification that a written notice of intention to file the praecipe was mailed or delivered

(ii) in the case of a judgment by default, after the failure to plead to a complaint and at least ten days prior to the date of the filing of the praecipe to the party against whom judgment is to be entered and to the party's attorney of record, if any.

Pa.R.C.P. 237.1(a)(2). The record also includes copies of the 10 Day Notice plaintiff sent to defendants on June 16, 2013 because defendant did not file a timely response to the Complaint. See Plaintiff's Response to Defendant's Petition to Open and/or Strike Default Judgment, Exhibit 6. When defendant failed to file any response, plaintiff filed the Praecipe to Enter Default Judgment on August 12, 2013, which was accompanied by plaintiff's counsel sworn and certified statement that the 10 Day Notice was sent by mail on July 16, 2013. See id.

Based on the evidence, defendant has failed to establish that plaintiff improperly served Maven. Instead of using evidence or sworn testimony to support its claim, defendant relied on bald allegations. The record shows that plaintiff served defendant with the Complaint and the 10 Day Notice as required by Rules 424 and 237.1. Therefore, this court will not open the judgment on grounds of improper service.

Under the Schultz factors, a judgment may be opened if the petition was promptly filed. See Schultz, 505 Pa. at 93. There is no "bright line test" to evaluate whether a petition was promptly filed, but the court should consider two factors: "(1) the length of the delay between discovery of the entry of a default judgment, and (2) the reason for the delay." Allegheny Hydro No. 1 v. Am. Line Builders, Inc., 722 A.2d 189, 193 (Pa. Super. Ct. 1998) quoting Quatrochi v. Gaiters, 251 Pa.Super. 115, 380 A.2d 404, 407 (1977). When a party was deemed to have promptly filed the petition, the length of delay was generally less than one month. See Allegheny Hydro No. 1, 722 A.2d at 193. Here, notice of default was served upon defendant on August 12, 2013, but defendant waited two months before filing its first Petition. Once this court denied defendant's Petition without prejudice on November 13, 2013, defendant subsequently waited *another* three months before filing the current Petition.

A delay may be excusable if the lapse was due to the parties conducting ongoing negotiations. See Butterbaugh v. Westons Shopper City, Inc., 300 Pa. Super. 331, 446 A.2d 641 (1982); Ruggiero v. Phillips, 250 Pa. Super. 349, 378 A.2d 971 (1977). Defendant asserts that Maven took immediate actions to negotiate with plaintiff to have the judgment voluntarily opened, and only filed this action once defendant concluded that plaintiff was unwilling to do so. Yet defendant did not provide evidence to support its claim that its delay was due to ongoing negotiations. Additionally, plaintiff disputes that the two parties were engaged in ongoing negotiations, and asserts that Maven's counsel was informed as early as August 20, 2013 that plaintiff would not open the judgment or dismiss the action against defendant. While the three month lapse between the court's November 13, 2013 Order and the filing of this action might be justifiable if the parties had been conducting negotiations, there is no evidence to support that claim. Therefore, defendant's prolonged delay is not excused.

Because a party is required to establish all three elements under Schultz in order to open a default judgment, it would be superfluous to analyze whether Maven has a meritorious defense. Defendant's petition was not promptly filed, and Maven failed to establish that its failure to appear or file a timely answer was due to improper service.

CONCLUSION

Based on the foregoing, defendant's Petition to Open and/or Strike Default Judgment is denied.

BY THE COURT:


GLAZER, J.