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

HOTEL FURNITURE LIQUIDATORS OF PHILADELPHIA, INC.,	:	December Term 2014
Plaintiff,	:	No. 855
v.	:	
CASTOR AVENUE PROPERTIES, LLC,	:	COMMERCE PROGRAM
Defendant.	:	
	:	2377 EDA 2015
	:	2075 EDA 2015

OPINION

This opinion is submitted relative to two appeals taken by defendant Castor Avenue Properties, LLC from this court's order dated May 27, 2015 and docketed on May 28, 2015 denying defendant's petition to open default judgment and this court's entry of a finding on June 25, 2015 and docketed on June 26, 2015 assessing damages against defendant in the amount of $375,388.24. The instant action arises from a lease dispute between the parties. The tenant is plaintiff Hotel Furniture Liquidators of Philadelphia, Inc. (hereinafter "Tenant"). The landlord is defendant Castor Avenue Properties, LLC (hereinafter "Landlord"). On December 31, 2010, the tenant and landlord entered into a lease agreement for 50,000 square feet of rental space located at 2222-2230 Castor Avenue, Philadelphia, Pa. 19134. The property consisted of three separate rental units, the leased property and two other rental units. Paragraph 1 of the lease provided that tenant is permitted to use the leased premises for the purpose of warehouse storage and selling furniture and fixtures to other businesses and the public. Paragraph 2 of the lease provided as follows:

> Compliance with Law. Each party, its officers, employees, agents and servants, shall comply fully and promptly with all applicable laws…..

The lease was for a period of five (5) years, commencing on August 15, 2010 and expiring on October 31, 2015 with a five year option. On October 15, 2012, the City of Philadelphia commenced a lawsuit against landlord in the Court of Common Pleas of Philadelphia County under docket number October Term 2012 No. 1842 in code enforcement. The court found landlord in violation of the City of Philadelphia Code and Fire Code and stated the following:

> "The subject premises with existing Fire Code and other violations, poses a serious fire hazard, safety threat, and immediate serious danger to any occupants of the subject premises. The structure is therefore in a seriously dangerous condition due to inadequate maintenance, and may result in potential serious injury to persons occupying the subject building."

On March 17, 2014, the City of Philadelphia Department of Licenses and Inspections directed tenant to vacate the leased premises on four hours' notice. Tenant was ordered to remove all furniture and other items warehoused at the leased premises. Tenant leased vehicles to remove its inventory from the leased premises, employed personnel to remove the inventory and employed fire watch personnel from an outside professional security company trained in and devoted to fire watch services. Tenant vacated the premises with as much inventory as could be removed on short notice.

On May 1, 2014, tenant leased a facility which was much smaller than the leased property. The new space at 4343 Widacor Avenue in Philadelphia was 25, 000 square feet. As a result, tenant was forced to leave some of its inventory at the leased premises, discard some and donate some. Sixty percent of its inventory was dumped, donated or recycled. Forty percent was transported to the new space. The new space was not as visible or accessible as the leased property to the public and walk in traffic declined significantly.

On September 15, 2014, counsel for tenant notified landlord that it was in default of the lease for failing to comply with Philadelphia Code Ordinances. Tenant inquired into the status of its expected compliance with the ordinances as well as informed the landlord that it suffered damages for which it would seek reimbursement. On December 3, 2014, tenant filed the instant complaint against landlord alleging breach of lease, breach of implied covenant of quiet enjoyment and constructive eviction. According to the Affidavit of Service filed with the court, landlord was served with the complaint on December 24, 2014 by personal service at 203 Meserole Avenue, Brooklyn, New York. Landlord did not file an answer to the complaint or otherwise plead. On January 13, 2015, tenant served a ten day letter of notice to take a default for failing to answer or otherwise plead to the complaint to the same address where the complaint was served. Landlord once again did not answer or file a response. On February 24, 2015, tenant filed a praecipe to enter default judgment against landlord for failure to answer the complaint and a default judgment was entered against landlord. In the meantime, the court scheduled an assessment of damages hearing. Landlord's General Counsel received notice of the assessment and at that time contacted local counsel to file a petition to open the default judgment.

On April 10, 2015, landlord filed its petition to open the default judgment. On May 27, 2015, the court denied the petition to open the default judgment. On June 11, 2015, an assessment of damages hearing was held wherein testimony was presented and exhibits introduced. On June 25, 2015, the court entered a finding assessing damages against landlord and in favor of tenant in the amount of $375,388.24. Landlord appealed. On June 25, 2015, landlord filed an appeal of this court's order dated May 27, 2015 and docketed May 28, 2015 denying the petition to open the default judgment. On July 24, 2015, landlord filed an appeal of

this court's finding assessing damages against the landlord in the amount of $375,388.24 dated June 25, 2015 and docketed June 26, 2015. This opinion addresses the respective appeals.

DISCUSSION

I. The Petition to Open Default Judgment was Properly Denied.

It is well settled that a petition to open a default judgment is an appeal to the equitable powers of the court, and absent an error of law or a clear, manifest abuse of discretion, it will not be disturbed on appeal. An abuse of discretion occurs when a trial court, in reaching its conclusions, overrides or misapplies the law, or exercises judgment which is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will.[1] A default judgment may be opened if the moving party has (1) promptly filed a petition to open the default judgment, (2) provided a reasonable excuse or explanation for failing to file a responsive pleading, and (3) pleaded a meritorious defense to the allegations contained in the complaint.[2] Moreover, a trial court cannot open a default judgment based on the "equities" of the case when the defendant has failed to establish all three of the required criteria. [3] In the case *sub judice*, landlord failed to meet the requisite criteria necessary to open the default judgment.

With regard to the first prong, whether the petition to open was timely filed, the law does not establish a specific time period within which a petition to open a judgment must be filed to

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[1] *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 175 (Pa. Super. 2009); *US Bank N.A. v. Mallory,* 982 A.2d 986, 994 (Pa.Super.2009).

[2] *McFarland v. Whitham,* 518 Pa. 496, 544 A.2d 929 (1988); *Seeger v. First Union National Bank,* 836 A.2d 163 (Pa.Super.2003). Where a petition to open is filed within ten days of the entry of judgment and is accompanied by a proposed answer offering a meritorious defense, the court shall open the judgment. *See Estate of Considine v. Wachovia Bank,* 966 A.2d 1148 (Pa.Super.2009). In the case *sub judice,* there is no dispute that landlord failed to file its petition to open within ten days of the entry of judgment.

[3] *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 175-76 (Pa. Super. 2009).

qualify as timeliness. Instead, the court considers the length of time between discovery of the entry of the default judgment and the reason for delay. In cases where the appellate courts have found a "prompt" and timely filing of the petition to open a default judgment, the period of delay has normally been less than one month.[4]

Here, default judgment was entered against the landlord on February 23, 2015. Notice of the entry of default judgment was sent on the same date by the court per Pa. R. Civ. P. 236. Landlord filed its petition to open default judgment on April 10, 2015; forty five days after entry of judgment. Landlord acknowledged that the notice of entry of default was entered on February 23, 2015 but avers in the affidavit of its agent, General Counsel, that it never received any other documents from the court until April 6, 2015.[5] Landlord became aware of the default judgment on April 6, 2015 when it received the court's notice scheduling a damages hearing for April 9, 2015.[6] The mailbox rule provides that "depositing in the post office a properly addressed, prepaid letter raises a natural presumption, founded in common experience, that it reached its destination by due course of mail."[7] As the Pennsylvania Supreme Court noted: "The overwhelming weight of statistics clearly indicates that letters properly mailed and deposited in the post office are received by the addressees."[8] Evidence that a letter has been mailed is sufficient to permit a jury to find that the letter was in fact received by the party to whom it was

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[4] *See Duckson v. Wee Wheelers, Inc.*, 423 Pa.Super. 251, 620 A.2d 1206 (1993) (one day is timely); *Alba v. Urology Associates of Kingston,* 409 Pa.Super. 406, 598 A.2d 57 (1991) (fourteen days is timely); *Fink v. General Accident Ins. Co.,* 406 Pa.Super. 294, 594 A.2d 345 (1991) (period of five days is timely).

[5] Affidavit of General Counsel ¶10 attached as Exhibit "B" to landlord's petition to open default judgment.

[6] Id.

[7] *Jensen v. McCorkell,* 154 Pa. 323, 325, 26 A. 366, 367 (Pa.1893) (citation omitted).

[8] *Meierdierck v. Miller,* 394 Pa. 484, 487, 147 A.2d 406, 408 (Pa.1959).

addressed.[9] Here, the docket entries for this matter evidence that the notice of entry of judgment was mailed by the court on February 25, 2015 to landlord to the same address in which the complaint was served.[10] As such, this court finds that the notice of entry of default judgment was received by landlord sometime in February, 2015. Since landlord did not file its petition to open default judgment until April 10, 2015, forty five days after the entry of default judgement, the court finds that the filing of the petition to open judgment was not prompt. [11]

With regard to the second prong, whether an excuse is legitimate depends upon the specific circumstances of the case. The question is usually addressed in the context of an excuse for failure to respond to the original complaint in a timely fashion.[12] Here, landlord lays blame on its New York General Counsel for its failure to timely answer the complaint. According to General Counsel's affidavit, landlord believed that she was handling the matter for them or had obtained Pennsylvania counsel to defend the action. [13] General Counsel claims not to have known of the landlord's entity known as Castor Avenue Properties, LLC, the defendant in the instant action, when she received the complaint and passed it on to other tenants in the building occupied by landlord, her employer. General Counsel's excuse of not recognizing the legal entity sued as one belonging to her client is not reasonable. General Counsel simply had to review the complaint to discover that her client was identified as the landlord, the individual to

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[9] *Shafer v. A. I. T. S., Inc.*, 285 Pa.Super. 490, 428 A.2d 152, 156 (1981) (citations omitted).

[10] Landlord does not dispute having received the complaint at the same address.

[11] Courts have held that delays of less than forty-one days have been untimely. See *B.C.Y. Inc. Equipment Leasing Assoc. v. Bukovich*, 257 Pa. Super. 121, 390 A.2d 276, 278 (Pa. Super. 1978)(twenty-one day delay is not prompt); *Hatgimisios v. Dave's N.E. Mint, Inc.*, 251 Pa. Super. 275, 380 A.2d 485, 485 (Pa. Super. 1977)(thirty-seven day delay is not prompt).

[12] *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 176 (Pa. Super. 2009).

[13] Affidavit of General Counsel ¶9 attached as Exhibit "B" to landlord's petition to open default judgment.

whom notice was to be sent and the address where the notice was to be served was the building owned by her client.[14] General Counsel, hired to handle real estate matters, never questioned landlord as to the identity of the entity nor contacted tenant's counsel. According to General Counsel's affidavit, landlord had knowledge of the lawsuit since it thought General Counsel was handling the situation. Landlord was provided with plenty of opportunities to discover the existence of this lawsuit beginning with tenant counsel's September 15, 2014 letter providing landlord with notice of an impending suit for damages, the complaint and the ten day letter of impending default judgment. There is no reasonable excuse for the failure of landlord to file an answer or otherwise plead. Although, the power to open a default judgment entered as a result of a mistake or oversight by counsel may be exercised when a reasonable excuse is offered, here a reasonable excuse has not been offered. [15] Consequently, since landlord failed to satisfy two of the three requirements necessary to open the default judgment, this court properly denied the petition to open default judgment. Therefore, this court's May 27, 2015 order should be affirmed.

II. Landlord failed to file Post-Trial Motions of this court's Finding dated June 25, 2015 and therefore waived its right to appeal.

Pursuant to Pa. R. Civ. P. 227.1, a party must file post-trial motions at the conclusion of a trial in any type of action in order to preserve claims that the party wishes to raise on appeal. In other words, a trial court's order at the conclusion of a trial, whether the action is one at law or in equity, simply cannot become final for purposes of filing an appeal until the court decides any

[14] Lease Agreement attached to the Complaint as Exhibit "A" ¶ 16.

[15] An attorney's dilatoriness, failure to act with knowledge of the implications, or deliberate decision not to defend are inadequate reasons for his or her failure to answer a complaint. Clerical oversight or the misplacement of papers through no fault of the attorney that results in a failure to file a timely answer are reasonable excuses. See *Shainline v. Alberti Builders, Inc.*, 266 Pa. Super. 129, 403 A.2d 577 (1979).

timely post-trial motions.[16] Pa. R. C. P. 227.1(c) requires the filing of post-trial motions "within ten days after (1) verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial; or (2) notice of nonsuit or the filing of the decision in the case of a trial without jury." Pennsylvania Rule of Appellate Procedure 302(a) states that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."

The Supreme Court of Pennsylvania in *Newman Development Group of Pottstown v. Genuardi's Family Markets, Inc.*, 617 Pa. 265, 52 A.3d 1233 (2012) while recognizing that not all court proceedings constitute "trials" for the purpose of Pa. R.C.P. No. 227.1, nevertheless signaled that a hearing that bears the hallmarks of a trial by requiring or admitting evidence does constitute a "trial" for the purposes of Pa. R.C.P. No. 227.1. Here, after entry of the default judgment by praecipe, the court scheduled an assessment of damages hearing. At the hearing, the parties, presented testimony, introduced exhibits and cross examined witnesses. After the presentation by the parties, the court issued a finding assessing damages in favor of the tenant. Landlord appealed the court's finding without filing post-trial motions as required by the rules. As such, in accordance with Pa. R. Civ. P. 227.1 and *Newman*, landlord waived its right to raise any issues concerning the Finding on appeal and therefore the appeal should be quashed.

III. The Court's finding assessing damages against the landlord was proper.

In the event the Court finds that landlord did not waive any issues on appeal regarding the Finding, the Finding entered on June 25, 2015 and docketed June 26, 2015 assessing damages against the landlord in the amount of $375,388.24 was properly entered and based on the record evidence presented. During the hearing, an officer of tenant testified that in 2013 its net profit

[16] *City of Philadelphia v. New Life Evangelistic Church*, 114 A.3d 472, 477 (Pa. Commw. Ct. 2015).

after unusual expenses was $214,251.00. The officer further testified that prior to the cease and desist order, the first three months of 2014 showed an upward trend in sales. For instance, in January 2014 the growth was 19,151.00, representing a percentage change of 38% from 2013, in February 2014 the growth was $19,162.00, representing a percentage change of 24.17% and in March 2014 the growth was $2,805.00, representing a percentage change of 12%. [17] The officer testified that in April 2014, tenant recorded no sales since it was looking for space to lease and that from May to December 2014, losses were recorded. The losses were attributed to the reduced space available for plaintiff to house inventory as well as the location of the new rental space. The new space leased was one half the space previously leased and was not visible to the public despite tenant's efforts to draw attention to itself. The accountant's testimony was consistent with the testimony of the officer. Based on the testimonial evidence, which the court found credible and the exhibits, the court found that tenant was entitled to an assessment of damages for lost profits for the year 2014[18] in the amount of $265,671.24.[19]

Tenant's officer further testified to the expenses incurred as a result of the move. Tenant's officer testified that it incurred $109,717 in expenses for the move. The expenses were itemized as follows: donated furniture $37, 240; losses on inventory sold on recycling $34,706; moving and storage expenses $7,544, trash removal $3,707 and labor and fire watch costs $26,520. Based on the forgoing, the court found that tenant was entitled to $265,671.24 in lost profits and $109,717 in expenses associated from the move.

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[17] Tenant's Exhibit P-5 tab A identified the growth as $99,934.00 for March 2014. However, the officer of tenant testified that $89,809 should not be included in the growth calculation since this sum was unrelated to the sales of tenant but another business. As such said amount was deducted from the Loss or Growth column and the % Change column was also revised based on the reduction in the Loss or Growth column.

[18] Although tenant requested loss profits for 2015, the court found said damages to be speculative.

[19] This figure represents the 2013 net profit after expenses $214,251 + the average percent change for January 2014, February 2014 and March 2014 which is 25%.

The court further found that tenant was not entitled to recover attorney fees since it failed to provide a basis for same. The attorney fees requested derive from fees associated with counsel's representation of tenant in this action and not as an expense incurred during the lease period. Under the American Rule, applicable in Pennsylvania, a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.[20] The applicable lease did not contain any provision regarding the payment of attorney fees, nor does tenant direct this court to any statutory authority to support its request. Tenant relied upon a non-binding trial court opinion in *3000 B.C. v. Bowman Properties Ltd*, 2008 WL 5544414 (2008) for an award of attorney fees. Although, the court in *3000 B.C.* did award attorney fees, there was no discussion as to basis for the attorney fees; contract or statutory provision. This court elected not to follow *3000 B.C.* as it pertained to the award of attorney's fees.

For the foregoing reasons, this court's order dated May 27, 2015 denying landlord's petition to open judgment and Finding dated June 26, 2015 assessing damages in favor of tenant and against landlord for the sum of $375,388.24 should be affirmed.

Date: 8/28/2015

BY THE COURT,

PATRICIA A. McINERNEY, J.

[20] *Trizechahn Gateway LLC v. Titus*, 601 Pa. 637, 652, 976 A.2d 474, 482-83 (2009), citing *Mosaica Charter Sch. v. Commonwealth, Dep't of Educ.*, 572 Pa. 191, 206–07, 813 A.2d 813, 822 (2002).