

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

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TURNER CONSTRUCTION COMPANY	:	March Term, 2018
	:	
<i>Plaintiff</i>	:	Case No. 01727
	:	
<b>v.</b>	:	Commerce Program
	:	
ASSOCIATED INDUSTRIES INSURANCE COMPANY, INC.	:	
	:	
<i>Defendant</i>	:	3288 EDA 2018

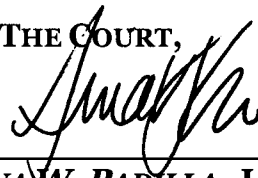
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**OPINION**

Defendant Associated Industries Insurance Company, Inc. has appealed the Order of this Court dated October 10, 2018, which Order had denied defendant's petition to open judgment entered by default. For the reasons explained in the footnoted Order of October 10, 2018, and in the instant Opinion, this Court respectfully suggests that the Order be affirmed on appeal.

Dated: 1/31/19

BY THE COURT,



NINA W. PADILLA, J.



## OPINION

Defendant Associated Industries Insurance Company, Inc. (“Defendant”), has filed a 1925(b) statement of matters complained of on appeal. The statement argues that this Court committed several errors in denying Defendant’s petition to open judgment by default. This Court respectfully submits that its Order of October 10, 2018 refutes all of the arguments advanced by Defendant. Nevertheless, one issue raised by Defendant requires this Court to expand on the reasons why it denied Defendant’s petition to open judgment by default.

In the Order dated October 10, 2018, this Court explained that Defendant had failed to file a responsive pleading to the complaint, as required under PA. R.C.P. 1026. The Court explained that Defendant had additionally failed to timely file its petition to open default judgment, as required under PA. R.C.P. 237.3(b)(2).

In the statement of matters complained of on appeal, Defendant has challenged these explanations by asserting that this Court incorrectly interpreted the text of PA. R.C.P. 237.3(b)(2) –a provision instructing the Court to open a default judgment if the petition to open is filed within ten days of the judgment, and if the petitioner has also filed a responsive pleading containing at least one meritorious defense. Instead, Defendant argues that this Rule—

indicates that if a Petition [to open default judgment] is filed within ten (10) days after the default judgment is entered, and states a meritorious defense, the ... requirement of showing a reasonable excuse / failure for filing a responsive pleading is dispensed with. Under the law, a Petition [to open default judgment] may still be deemed as promptly / timely file even if it is filed beyond the ten (10) day period indicated in PA. R.C.P. 237.3(b)(2).<sup>1</sup>

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<sup>1</sup> Statement of matters complained of on appeal, ¶ 3.

To address the issue presented by Defendant's argument, this Court begins with a reading on the pertinent Rule of Civil Procedure. PA. R.C.P. 237.3(b)(2) states as follows:

[i]f the petition is filed within ten days after the entry of a default judgment on the docket, the court shall open the judgment if one or more of the proposed preliminary objections has merit or the proposed answer states a meritorious defense.<sup>2</sup>

This clear language leaves no doubt: a trial court is required to open judgment entered by default if the petition to open is filed within ten days of the entry of judgment, and the proposed answer to plaintiff's complaint, or preliminary objections thereto, allege at least one meritorious defense. In this case, judgment by default was entered on the docket on May 15, 2018, after Defendant had failed to file a responsive pleading to the complaint. Eventually, Defendant did file a petition to open the judgment on August 8, 2018, and included thereto a proposed answer to the complaint. However, the afore-mentioned dates reveal that the petition to open default judgment was not filed within ten (10) days from the docketing date of the judgment, as required under PA. R.C.P. 237.3(b)(2), but was filed eighty-five (85) days thereafter. Based on the foregoing, this Court concluded that PA. R.C.P. 237.3(b)(2), did not apply to the facts at hand; therefore, this Court sought additional guidance from the Rules of Civil Procedure, and specifically from the comments to PA. R.C.P. 237.3(b)(2).

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<sup>2</sup> PA. R.C.P. 237.3(b)(2) (2018).

The Explanatory Comment—1994 to that Rule instructs that Pennsylvania case law—

has imposed three requirements for opening a judgment by default:

a petition timely filed,

a reasonable explanation or legitimate excuse for the inactivity or delay, and

a showing of a meritorious defense.<sup>3</sup>

Specifically, illustration 5 to this comment advises that **if** a petition to open default judgment is filed more than ten days after the date of entry of judgment on the docket, then—

[t]he petition to open is **not within the scope of Rule 237.3(b)** which requires that the petition be filed within ten days after the entry of the judgment on the docket. [In such a case] ... **defendant must proceed pursuant to case law and meet the standards of Schultz v. Erie Insurance Exchange, 477 A.2d 471 (Pa. 1984) (“Schultz”).**<sup>4</sup>

Based on the foregoing, this Court analyzed whether the judgment could nevertheless be opened pursuant to the standards articulated in Schultz.

In Schultz, plaintiff, an “Insured,” filed a complaint in assumpsit against defendant, (“Erie”). The complaint was received by Erie at its office in Erie, Pennsylvania, on February 14, 1979, and was transmitted to counsel in Philadelphia, Pa. on March 8, 1979. On March 14, 1979, twenty-eight days after service of the complaint, the trial court entered judgment by default against the Erie, and Erie filed a petition to open the judgment. In the petition, Erie averred at paragraph 14 that it had been unable

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<sup>3</sup> Id., Explanatory Comment—1994, ¶ 3.

<sup>4</sup> Id., Illustration 5.

to file a responsive pleading to the complaint because its attorney “had not been [timely] informed ... so that ... [the attorney] could not take appropriate action by responding to the Complaint.”<sup>5</sup> The trial court issued upon the Insured a Rule-to-Show-Cause why the judgment should not be opened, and the Insured filed a response to the petition. In the response, the Insured failed to respond to the defense asserted by Erie in paragraph 14. Nevertheless, on October 5, 1979, the trial court denied the petition to open the judgment: Erie appealed this decision, the Pennsylvania Superior Court reversed, and the Insured appealed to the Pennsylvania Supreme Court. Preliminarily, the Supreme Court determined that the Insured’s failure to respond to the defense asserted in paragraph 14 constituted an admission of that paragraph. Nevertheless, the Supreme Court reversed the Superior Court’s decision because Erie did not justifiably explain why it had failed to respond to the complaint.<sup>6</sup> Explaining the reasons for this decision, the Supreme Court stated that—

[t]he facts set forth in Erie’s petition, though uncontroverted, are nevertheless inadequate to provide a justifiable *explanation* why it failed to comprehend the applicable time limits and respond in a timely fashion.

\* \* \*

As the lower court correctly concluded that Erie [had] failed to plead an adequate explanation of the cause of the delay in answering the Complaint ... [the lower court’s] refusal to open the default judgment was not abuse of discretion....<sup>7</sup>

Thus, the Schultz decision stands for the proposition that when judgment by default is entered and the petition to open is untimely filed, then a trial court may open the judgment only if the petitioner pleads an adequate, justifiable explanation for its failure to timely file a responsive pleading. Applying the standards of Schultz to the

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<sup>5</sup> Schultz v. Erie Insurance Exchange, 477 A.2d 471, 472 (Pa. 1984).


<sup>6</sup> Id.

<sup>7</sup> Id. at 472-473.

instant case, this Court notes that Defendant's petition had attempted to explain its failure to file a responsive pleading on grounds that the complaint had been improperly served upon Defendant at "a location ... not intended to receive service of process of suits."<sup>8</sup> However, this Court rejected such an explanation as inadequate and unjustifiable because the complaint had been properly served upon Defendant at one of its offices or usual places of business, pursuant to the Pennsylvania Rules of Civil Procedure, 402-404.<sup>9</sup> Stated another way, this Court refused to open the judgment because Defendant had failed to file its petition within ten (10) days from the entry of judgment, and had failed to articulate therein an explanation capable of meeting the standards provided in Schultz.

For the reasons articulated in the Order of October 10, 2018 and in the instant Opinion, this Court respectfully suggests that its Order of October 10, 2018 be affirmed on appeal.

DATED: 1/31/19

BY THE COURT,  
  
\_\_\_\_\_  
NINA W. PADILLA, J.

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<sup>8</sup> Petition to open default judgment, ¶ 27.

<sup>9</sup> See, Order dated October 10, 2018. This Order contains an expansive footnote explaining *inter alia* why this Court found Defendant's explanation inadequate and unjustifiable.

DOCKETED

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

R. POSTELL  
COMMERCE PROGRAM

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TURNER CONSTRUCTION COMPANY	:	March Term, 2018
	:	
<i>Plaintiff</i>	:	Case No. 01727
	:	
v.	:	Commerce Program
	:	
ASSOCIATED INDUSTRIES INSURANCE COMPANY, INC.	:	
	:	
<i>Defendant</i>	:	Control No. 18081092

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**ORDER**

AND NOW, this 10<sup>th</sup> day of October, 2018, upon consideration of defendant's petition to open judgment entered by default, the response of plaintiff, the respective memoranda of law, and the reply brief of defendant, it is **ORDERED** that the petition is **DENIED**.<sup>1</sup>

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<sup>1</sup> The complaint of herein plaintiff, a general contractor, alleges that it is a named defendant in an underlying action stemming from economic damage suffered by the underlying plaintiff. The instant complaint alleges that plaintiff was an additional insured of defendant, an insurance provider, when the underlying plaintiff suffered its loss. According to the plaintiff in this action, defendant has improperly refused to provide a legal defense in the underlying action.

By letter dated February 6, 2018, plaintiff informed defendant that it would enforce its alleged rights as an insured by initiating the instant legal action. See Exhibit C to plaintiff's answer in opposition to defendant's petition to open judgment by default. On February 12, 2018, plaintiff also e-mailed a draft copy of its complaint to defendant's counsel. *Id.*, Exhibit D. On March 15, 2018, plaintiff filed the instant complaint against defendant; subsequently, on April 2, 2018, plaintiff mailed the complaint to the principal address of defendant in Boca Raton, Florida. See Affidavit of Service, filed on April 16, 2018. Defendant received the complaint at its principal address in Boca Raton, Florida, on April 9, 2018. *Id.*, (signature of defendant upon receipt of certified mail).

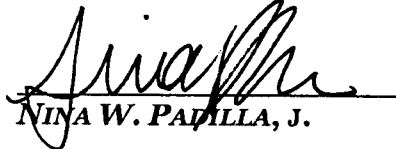
Defendant failed to file an answer to the complaint, and, on May 15, 2018, plaintiff entered judgment by default against defendant. On July 17, 2018, this Court entered an Order requiring the parties to appear for an assessment-of-damages-hearing, to be held on August 12, 2018. On August 8, 2018, defendant filed the instant petition to open judgment entered by default, and this Court promptly cancelled the scheduled assessment-of-damages-hearing. On August 29, 2018, plaintiff filed its response in opposition to the petition, and, on August 31, 2018, defendant filed a reply brief in further support of its petition.

Turner Construction Com-ORDER



The parties shall appear for an assessment-of-damages hearing in Courtroom 630, City Hall, Philadelphia, Pa., on **February 12, 2019 commencing at 11:00 A.M.** The hearing scheduled on October 15, 2018 at 9:30 a.m. is hereby cancelled.

BY THE COURT,

  
NINA W. PADILLA, J.

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The standards for opening a judgment entered by default are well-settled: 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. Myers v. Wells Fargo Bank, N.A., 986 A.2d 171, 175-76 (Pa. Super. 2009) (emphasis supplied).

In the petition to open, defendant asserts that it failed to answer the complaint because service of process was improperly made at defendant's address in Boca Raton, Florida. Defendants specifically contends that the Boca Raton address "is not a location that is set up for, nor intended to receive, service of process of suits...." See petition to open, ¶ 27. This argument is rejected because the Pennsylvania Rules of Civil Procedure instruct that outside of this Commonwealth, service of process may be made by certified mail "**at any office** or usual place of business of the defendant." See PA. R.C.P. 402-404 (emphasis supplied). In this case, plaintiff has included copy of an official document issued by the Department of State of Florida. This document shows that defendant's "principal address" is 903 N.W. 65<sup>th</sup> Street, Boca Raton, Florida –that is, the same address where plaintiff made service of process upon defendant. See, Exhibit G to the response of plaintiff in opposition to the petition to open.

Defendant, nevertheless, explains that service should have been made at a New York, N.Y. address, as listed on the operative policy of insurance, at Endorsement No. CPS-33003. See Exhibit A to the complaint. This argument is likewise rejected as un-meritorious because the pertinent language of that endorsement merely states that—

[s]ervice of process for any suit instituted against [herein defendant]  
concerning this Policy **may be made** ... [at] ... 59 Maiden Lane, 6<sup>th</sup>  
Floor, New York, N.Y. 10038. Id. (emphasis supplied).

The afore-quoted language is permissive or discretionary: it does not require plaintiff to serve process exclusively at the New York, N.Y. address listed above, nor does it nullify the service-of-process requirements contained in PA. R.C.P. 402-404.

In conclusion, defendant failed to file an answer to the complaint within twenty days after proper service thereof, as required by PA. R.C.P. 1026. Defendant subsequently failed to timely file its petition to open the judgment within ten days of the entry of judgment by default, as provided by PA. R.C.P. 237.3(b)(2). Having untimely filed its petition to open the judgment, defendant has additionally failed to articulate a reasonable excuse or explanation for its lateness, and for this reason the petition to open judgment entered by default is denied.