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

GRIT DREXEL, LLC **Plaintiff/Appellee** **vs.** **CRESCENT ABSTRACT, LLC** **Defendant/Appellant**	**PHILADELPHIA COUNTY** **COURT OF COMMON PLEAS** **APRIL TERM, 2023** **NO. 01466** **3091 EDA 2023**

OPINION

Patrick, J. **April 12, 2024**

Defendant/Appellant Crescent Abstract filed an appeal from this Court's Order dated August 17, 2023, granting Grit Drexel Default Judgment. This Court now submits the following Opinion in support of its ruling and in accordance with the requirements of Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure. For the reasons set forth below, this Court's decision should be affirmed.

FACTUAL/PROCEDURAL HISTORY

On or about March 23, 2022, Plaintiff/Appellee Grit Drexel, LLC ("Appellee") purchased property located at 3725 Lancaster Avenue, Philadelphia, PA 19104[1] with the intent to build a multi-unit apartment building on the property.[2] Prior to purchasing the property, Appellee also secured title insurance for this new property.[3]

[1] Appellee's May 26, 2023, Amended Complaint, ¶ 4.
[2] Appellee's May 26, 2023, Amended Complaint, ¶ 5.
[3] Appellee's May 26, 2023, Amended Complaint, ¶ 6.

1st JUDICIAL DISTRICT OF PA
RECORDS
2024 APR 12 PM 2:55
OPFLD-Grit Drexel Llc Vs Fidelity National Title Insuran
23040146600051

COPIES SENT PURSUANT TO Pa.R.C.P. 236(b) D. KELLY 04/17/2024

Appellee purchased the policy from Fidelity National Title Insurance Company.[4] Defendant/Appellant Crescent Abstract, LLC ("Appellant") worked as an agent for Fidelity.[5] The policy states three relevant portions in part that relate to this lawsuit.

First, "[t]his Policy covers [Appellee's] actual loss from any risk described under Covered Risks if the event creating the risk exists on the Policy Date."[6] Second, Covered Risks include "someone else has an easement" on the property.[7] Third, Appellee "is not insured against loss…resulting from [e]asements…that an accurate and complete survey would disclose."[8] More importantly, there is no mention anywhere within the policy that either Fidelity or Appellant would provide Appellee with a property survey to discover any pre-existing Covered Risks.[9] Despite this, Appellant communicated to Appellee they would survey the property to discover any potential pre-existing easements attached to the property.[10] Appellant conducted a survey on the property and found no easements.[11] These findings were communicated to Appellee and Appellee subsequently purchased the property.[12]

However, in May 2022, Appellee learned a significant easement did exist on the property[13] dating back to July 15, 1975, which was recorded on both deed and survey.[14] This easement prevented Appellee from building their multi-unit apartment as intended.[15] On July 29, 2022,

---

[4] Appellee's May 26, 2023 Amended Complaint, Exhibit 1.
[5] Appellee's May 26, 2023 Amended Complaint, ¶ 3.
[6] Appellee's May 26, 2023 Amended Complaint, Exhibit 1, pg. 1.
[7] Appellee's May 26, 2023 Amended Complaint, Exhibit 1, pg. 2.
[8] Appellee's May 26, 2023 Amended Complaint, Exhibit 1, Title B, pg. 3.
[9] *See* Appellee's May 26, 2023 Amended Complaint, Exhibit 1.
[10] Appellee's May 26, 2023 Amended Complaint, ¶ 8 ("Upon information and belief, [Appellant]…performed a title search for the Property before [Appellee] purchased it.")
[11] Appellee's May 26, 2023 Amended Complaint, ¶ 9.
[12] *See* Appellee's May 26, 2023 Amended Complaint, ¶ 17-18.
[13] Appellee's May 26, 2023 Amended Complaint, ¶ 10.
[14] Appellee's May 26, 2023 Amended Complaint, Exhibit 2.
[15] Appellee's May 26, 2023 Amended Complaint, ¶ 11.

Fidelity sent Appellee a letter confirming they were insured against loss for this undiscovered easement.[16]

On April 14, 2023, Appellee filed this lawsuit against both Fidelity and Appellant[17] for breach of contract, bad faith insurance practices, and declaratory judgment.[18] Further Appellee alleges a single $75,000 negligence claim against Appellant for their failure to discover the pre-existing easement.[19]

On May 1, 2023, Appellee attempted service of its Original Complaint upon both Fidelity and Appellant.[20] Fidelity was served the Original Complaint.[21] Appellant was not served the Original Complaint, due to an incorrect address filed with the Court.[22] Four days later, on May 5, 2023 at 10:00 a.m., Fidelity filed Preliminary Objections to Appellee's Original Complaint.[23]

On May 26, 2023, Appellee filed their Amended Complaint in response to the Defendant Fidelity Preliminary Objections.[24] Within the Amended Complaint, all claims against Fidelity were dropped.[25] The Court likewise notes that "Fidelity…is removed as an active party to this action. The party was not named as a defendant in the Amended Complaint."[26] However, the negligence claim against Appellant persisted. The Amended Complaint named Appellant the sole defendant within this matter, repeating a negligence claim identical to the Original Complaint.[27]

---

[16] Appellee's May 26, 2023 Amended Complaint, Exhibit 2.
[17] Appellant's 1925(b) Statement, ¶ 3.
[18] Appellant's 1925(b) Statement, ¶ 3.
[19] Appellee's May 26, 2023 Amended Complaint, ¶ 19.
[20] Appellee's Response to Appellant's Petition to Strike/Open Default Judgment, ¶ 9.
[21] Appellee's Response to Appellant's Petition to Strike/Open Default Judgment, ¶ 9.
[22] Appellee's Response to Appellant's Petition to Strike/Open Default Judgment, ¶ 9.
[23] *See* Court Docket May 5, 2023.
[24] *See* Court Docket May 26, 2023, Amended Complaint Filed.
[25] *See* Appellee's May 26, 2023 Amended Complaint.
[26] *See* Court Docket May 26, 2023, Notice Filed.
[27] *See* Appellee's May 26, 2023 Amended Complaint.

On June 12, 2023, Appellant's address was corrected, and they were served the Amended Complaint by a local sheriff, with a Notice to Defend attached to it.[28] Appellant does not allege any defects with the Amended Complaint's service.[29] However, Appellant failed to make any appearance with the trial court after proper service.[30] Appellee then served a Notice of Praecipe to Enter Default Judgment be entered to Appellant on July 12, 2023.[31] However, Appellant alleges it never received this Notice,[32] but offers no evidence, affidavits, or declarations to support this claim. On August 17, 2023, default judgment was entered against Appellant.[33]

On September 29, 2023, Appellant files a Petition to Strike/Open Default Judgment.[34] This petition is denied on November 2, 2023.[35] Then on December 3, 2023, Appellant filed this instant appeal to the Superior Court.[36]

ISSUES

On December 22, 2023, Appellant filed a 1925(b) Statement raising the following issues in their Statement of Matters Complained of on Appeal:

1. The trial court erred by denying the Petition to Strike Default Judgment because it did not have personal judgment over Appellant, as Appellee failed to serve Appellant with original process within the Commonwealth within thirty (30) days after the issuance of the writ or the filing of the complaint as required by Pa. R.C.P. No. 401(a).

2. The trial court erred by denying the Petition to Strike Default Judgment because Appellee did not submit an affidavit setting forth facts showing that Appellant is not in the military service as required by Phila. Civ. R. 1037.1.

3. The trial court erred by denying the Petition to Strike Default Judgment because Appellee did not file an Amended Complaint within twenty (20) days

[28] Appellee's Response to Appellant's Petition to Strike/Open Default Judgment, ¶ 1.
[29] *See* Appellant's 1925(b) Statement.
[30] Appellant's 1925(b) Statement, ¶ 22.
[31] Appellant's 1925(b) Statement, ¶ 16; Appellee's Response to Appellant's Petition, Exhibit A.
[32] Appellant's 1925(b) Statement, ¶ 17; Appellee's Response to Appellant's Petition, Exhibit A.
[33] Appellant's 1925(b) Statement, ¶ 21.
[34] Appellant's 1925(b) Statement, ¶ 22.
[35] Appellant's 1925(b) Statement, ¶ 24.
[36] Appellant's 1925(b) Statement, ¶ 25.

after service of Fidelity's preliminary objections as required by Pa. R.C.P. No. 1028(c).

4. The trial court erred by denying the Petition to Strike Default Judgment because Appellee did not seek Appellant's consent or the trial court's leave before filing their Amended Complaint as required by Pa. R.C.P. No. 1033.

5. The trial court erred by denying the Petition to Strike Default Judgment because Appellee improperly discontinued litigation against Fidelity without Appellant's written consent or the trial court's leave by motion as required by Pa. R.C.P. 229.

6. The trial court erred by denying the Petition to Strike Default Judgment because Appellant promptly filed their Petition to Strike/Open Default Judgment, has a meritorious defense, and the failure to appear in court can be excused.

DISCUSSION

I. THIS COURT PROPERLY DENIED APPELLANT'S PETITION TO STRIKE DEFAULT JUDGMENT BECAUSE PERSONAL JURISDICTION WAS OBTAINED (ISSUE 1).

On appeal, Appellant claims this Court erred by denying the Petition to Strike Default Judgment because this Court lacked personal jurisdiction over Appellant, as Appellee failed to serve Appellant with original process within thirty (30) days after filing its Complaint as is required by Pa. R.C.P. 401(a). Appellant's claim must fail. As noted in the Factual/Procedural history of this opinion and the Court's docket, the Amended Complaint was filed on May 26, 2023, and served on Appellant on June 12, 2023, well within the thirty (30) day window as required by the rule. Therefore, this Court properly denied Appellant's Petition to Strike Default Judgment because personal jurisdiction was obtained and service was not fatally defective, as a matter of law.

Further, "[c]ourts acquire personal jurisdiction by service of process that satisfies the Pennsylvania Rules of Civil Procedure… [for] original process." *Sharpe v. McQuiller*, 206 A.3d

1179, 1184 (Pa. Super. Ct. 2019). "Original process shall be served...within thirty (30) days after...the filing of the complaint...by the sheriff or a competent adult." PA. R.C.P. 400(a), 401(a), 402(a). These requirements for original process "assure that a defendant will receive actual notice of the commencement of an action against him and of his duty to defend." *Cope v. Ins. Comm'r*, 955 A.2d 1043, 1055 (Pa. Commw. Ct. 2008).

In *McCreesh v. City of Philadelphia*, the Pennsylvania Supreme Court outlined a test governing when a court should strike a default judgment for defective service. If "a plaintiff fails to perfect service but has supplied the defendant with actual notice of the litigation, the court should only dismiss the complaint 'where plaintiffs have demonstrated an intent to stall the judicial machinery or where plaintiffs' failure to comply with the Rules of Civil Procedure has prejudiced defendant.'" *Harris v. Couttien*, 261 A.3d 527, 530 (Pa. Super. Ct. 2021) (citing *McCreesh v. City of Philadelphia*, 888 A.2d 664, 674 (Pa. 2005)). This is to avoid "punishing a plaintiff for technical missteps." *McCreesh v. City of Philadelphia*, 888 A.2d 664, 674 (Pa. 2005).

First, an intent to stall the judicial machinery of a claim's progress exists when "an inordinate amount of time had elapsed without any effort to perfect service, [and] actual notice of the commencement of litigation had not been provided within the applicable statute of limitations." *Frick v. Fuhai Li*, 225 A.3d 573, 578 (Pa. Super. Ct. 2019).

Second, "[i]n order to demonstrate prejudice, a party must show that the delay hampered the party in the preparation or litigation of its case." *Colonial Sch. Dist. V. Romano's Sch. Bus. Serv.*, 545 A.2d 473, Footnote 4.

In this case, original process was satisfied. Appellee's Amended Complaint, written in response to Fidelity's Preliminary Objections, was filed and served upon Appellant within thirty (30) days of its filing. The Amended Complaint was hand-delivered by a local sheriff. A Notice to Defend,

alerting Appellant to the action's commencement and its duty to defend, was attached to the Amended Complaint. Under the Pa. R.C.P. 401(a)'s plain language, all requirements of original process were clearly satisfied. Therefore, the trial court did obtain personal jurisdiction over Appellant.

Pennsylvania jurisprudence clearly says that where an original complaint's service is defective, the amended complaint may satisfy original process instead.[37] Additionally, Appellant's assertion that reinstating the Original Complaint was necessary to accomplish original process is not supported by the law.[38] However, these two issues are tangential. Regardless of any argument raised, this Court should not strike the default judgment for defective service because Appellant cannot satisfy the *McCreesh* test.

First, actual notice of the litigation must be provided to Appellant to even trigger *McCreesh's* test. Here, Appellee did provide Appellant with actual notice of the litigation by successful service of the Amended Complaint in accordance with the rules for original process.

Next, the record must be analyzed to determine whether Appellant can successfully demonstrate either that Appellee acted with intent to stall judicial machinery or that Appellant felt any prejudice from Appellee's service. Neither can be satisfied.

The intent to stall judicial machinery cannot not demonstrated, since Appellee provided Appellant with actual notice well within the negligence claim's statute of limitations and Appellee did not delay an inordinate amount of time to perfect service upon Appellant. Concerning the first

---

[37] *See* Reichert v. TRW, Inc. Cutting Tools Div., 611 A.2d 1191 (Pa. 1992); Brooks v. B&R Touring Co., 939 A.2d 398 (Pa. Super. Ct. 2007); Maxine Jacoby & Assoc. v. Graf, 44 Pa. D. & C. 4th 566 (2000), *aff'd by* Jacoby v. Graf, 776 A.2d 302 (Pa. Super. Ct. 2000) ("The amended complaint was not, as plaintiff contends, a secondary pleading...which could properly be served by mail. It was *original process*.") (emphasis in original).

[38] *See* Hoover v. Davila, 862 A.2d 591, 594 (Pa. Super. Ct. 2004) ("The reinstatement of a[n original] complaint simply continues the complaint's ***validity*** from the time of the original filing until the time service is made."); *But see* Reichert, 611 A.2d at 1193 ("[S]ervice of an amended complaint ***invalidates*** the original complaint for purposes of taking a default judgment.") (emphasis added).

prong, Appellee's claim's statute of limitations still has not passed yet. Rather, it expires in May 2024. From this fact alone, Appellant cannot demonstrate Appellee's intent to stall judicial machinery. However, Appellant also cannot demonstrate the second prong either. After Fidelity filed Preliminary Objections, Appellee revised, filed, and served its updated Amended Complaint on Appellant all within one month after the first attempt at serving its Original Complaint failed. Under these facts, there was no inordinate delay in attempting to perfect service upon Appellant. In fact, the record suggests Appellee acted very promptly to revise, file, and re-serve original process upon Appellant within the span of one month. Both required sub-elements of an intent to stall judicial machinery, such as providing actual notice beyond the statute of limitations period and an inordinate amount of time without any effort to perfect service, are unsatisfied.

Moreover, Appellant also cannot demonstrate any prejudice. Nothing within the record suggests that Appellee's service of original process hampered Appellant's preparation or litigation of the case. For example, the Amended Complaint and Original Complaint allege identical negligence claims, so Appellant was not blindsided or surprised by new claims to defend against. The statute of limitations has not even passed yet, so Appellant is not burdened with defending against an otherwise untimely claim. The Amended Complaint's Notice to Defend provided Appellant with twenty (20) days to enter an appearance in court and file preliminary objections; thus, Appellant did not lose that procedural right. Moreover, whatever issue of Appellee's defective service can be asserted, cannot explain Appellant's absence from court for almost four (4) months after receiving actual notice from Appellee on June 12, 2023. Appellant has also not alleged any facts that would contradict this.

Appellant cannot satisfy either prong which would permit a trial court to strike for defective service. Therefore, this Court properly denied Appellant's Petition to Strike Default Judgment

because personal jurisdiction was obtained, and Appellant cannot satisfy the *McCreesh* test for defective service. Accordingly, Appellant's claim should be dismissed.

II. THIS COURT PROPERLY DENIED APPELLANT'S PETITION TO STRIKE DEFAULT JUDGMENT BECAUSE THE FAILURE TO ATTACH A CERTIFICATE OF NON-MILITARY SERVICE WAS NOT A FATAL DEFECT (ISSUE 2).

On appeal, Appellant claims this Court erred by denying their Petition to Strike Default Judgment because Appellee failed to file "an affidavit...setting forth facts showing that defendant is not in the military service." (Petition, ¶ 28). Appellant's claim must fail.

First, Appellant is not a human being (but a title company) thus cannot be an active member of military service. Under both Phila. Civ. R. 1037.1(1)(A)'s plain language and case law, Appellant is completely barred from asserting this claim. Therefore, this Court properly denied Appellant's Petition to Strike Default Judgment because Appellant is plainly barred from using a failure to attach an affidavit of non-military service as grounds to strike default judgment. Appellant's claim that Appellee failed to attach a Certificate of Non-Military Service is insufficient to strike default judgment. First, Appellee did, in fact, file its "Affidavit of Non-Military Service [had been] filed" on August 17, 2023. So, for Appellant to allege that this was not done is disingenuous to the Court.

Second, as a matter of law, Appellant's argument is barred by both Rule 1037(1)(A)'s plain language and policy purpose. The rule's plain language uses the phrase 'he or she.' This gendered phrase indicates that Rule 1037(1)(A)'s requirement to attach a non-military certificate only applies to a human defendant. In this case, Appellant is not a person. Appellant is a private

company. A private company cannot be active within military service. Under the rule's plain language, Appellant simply does not qualify for the rule's protection.

Second, allowing Appellant to invoke Rule 1037(1)(A) would undermine its policy purpose. Under *Tabas*, only a defaulting defendant who is actually active within military service may invoke Rule 1037(1)(A)'s special protections. Appellant has not asserted any facts showing it is, in fact, active within military service.

Since Rule 1037(1)(A) is designed solely to protect persons engaged in military service from prejudicial default judgments, allowing a non-military active, non-injured Appellant to take advantage of the rule would directly undermine the rule's policy purpose. Therefore, this Court properly denied Appellant's Petition to Strike Default Judgment. Accordingly, Appellant's claim should be dismissed.

III. THIS COURT PROPERLY DENIED APPELLANT'S PETITION TO STRIKE DEFAULT JUDGMENT BECAUSE APPELLEE'S FAILURE TO FILE THEIR AMENDED COMPLAINT WITHIN TWENTY (20) DAYS AFTER PRELIMINARY OBJECTIONS WAS NOT A FATAL DEFECT (ISSUE 3).

On appeal, Appellant claims the trial court erred by denying its Petition to Strike Default Judgment because Appellee filed its Amended Complaint beyond the twenty (20) days provided by the Pennsylvania Rules of Civil Procedure. Appellant's claim must fail. Appellant has failed to demonstrate how any alleged untimeliness has prejudiced them in any way. Moreover, any alleged lateness of Appellee's failure to strictly comply with the Rules of Civil Procedure was not a fatal defect, and Appellant has not suffered any prejudice from it.

Pa. R.C.P. 1028(c)(1) states: "A party may file an amended pleading as a course within twenty days after service of a copy of preliminary objections." However, "the allowance of an amendment

to a pleading is a matter of judicial discretion." *Berman v. Herrick*, 227 A.2d 840, 841 (Pa. 1967). "[S]uch amendments are liberally permitted except where surprise or prejudice to the other party will result." *Id.* In *Slaybaugh v. Newman*, the appellate court upheld an Amended Complaint which was "filed two days late." 441 A.2d 429, 430 (Pa. Super. Ct. 1982). In *Slaybaugh*, the plaintiff did not even "offer any reasonable excuse justifying their tardiness." *Id.* However, the Superior Court still upheld the Amended Complaint's validity, because there was "no demonstration whatsoever of any possible prejudice to the defendants by virtue of plaintiffs having filed their amended complaint two days late." *Id.*

The time period in this case is briefer than the allowance of delay provided in *Slaybaugh.* Whereas the plaintiff in *Slaybaugh* filed their amended complaint two days late, Appellee filed their Amended Complaint less than one day late. Specifically, Fidelity filed its Preliminary Objections on May 5, 2023, at 10:00 a.m. Appellee filed its Amended Complaint on May 26, 2023, at 7:45 a.m. Therefore, Appellee's Amended Complaint was late by 21 hours and 45 minutes. However, this technical defect is not fatal, since Appellant has failed to demonstrate how this brief tardiness surprised or prejudiced them. Accordingly, Appellant's claim should be dismissed.

IV. THIS COURT PROPERLY DENIED APPELLANT'S PETITION TO STRIKE DEFAULT JUDGMENT BECAUSE APPELLEE'S FAILURE TO OBTAIN APPELLANT'S CONSENT OR THE TRIAL COURT'S LEAVE BEFORE FILING THEIR AMENDED COMPLAINT WAS NOT A FATAL DEFECT.

On appeal, Appellant claims the trial court erred by denying its Petition to Strike Default Judgment because Appellee also did not seek Appellant's consent or the trial court's leave to file their Amended Complaint. Appellant's claim must fail. Obtaining either Appellant or the court's permission to file an Amended Complaint was not required here, since Appellant had never been

served the Original Complaint. Pa. R.C.P. 1028(c)(1) states: "A party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections." Outside this situation, "A party, either by filed consent of the adverse party or by leave of court, may at any time...amend the pleading." Pa. R.C.P. 1033(a). However, "if the [original] complaint was not served, and is a nullity, there is no need to get permission or approval to amend it." *Sheets v. Liberty Homes, Inc.*, 823 A.2d 1016, 1019 (Pa. Super. Ct. 2003).

In *Sheets v. Liberty Homes, Inc.*, the Superior Court held that appellee was not required to obtain Appellants' consent or the court's leave to file an amended complaint, where the original complaint had never been served in the first place. In *Sheets*, the appellee filed an original complaint but never served it on appellants because "counsel realized he had omitted a count for strict liability." 823 A.2d at 1017. More than a month later, appellee filed and served the amended complaint upon appellants, according to the rules of original process. *Id.* The amended complaint "repeat[ed] what was in the original, and add[ed] a strict liability count." *Id.* This Court rejected appellants' attempts to strike the amended complaint and default judgment and held where the original "complaint was not served, and is a nullity, there is no need to get permission or approval to amend it." *Id.*

Here, Appellee filed its Amended Complaint 21 hours and 45 minutes beyond the twenty-day period provided by Rule 1028(c)(1). Under normal circumstances, Appellee would be required to obtain Appellant's consent or the court's leave before filing its Amended Complaint, as per Rule 1033(a). However, this general rule does not apply. Like *Sheets*, the original complaint was never served on Appellant and therefore became a nullity after Appellee filed its amended complaint. Also just like in *Sheets*, the first time Appellant even knew a negligence claim existed against them was when Appellee served them the Amended Complaint. The Amended Complaint was

Appellant's original process and actual notice. Most importantly, like *Sheets*, Appellant has again failed to demonstrate how this technical defect prejudiced them in any way. Therefore, under *Sheets*, the Appellee's failure to obtain Appellant's consent or the court's leave before filing its Amended Complaint late by 21 hours and 45 minutes is not a fatal defect and is not even required.

Therefore, this Court properly denied Appellant's Petition to Strike Default Judgment because Appellee was not required to seek Appellant's consent or the court's leave to file an Amended Complaint where the Original Complaint had not been served, and further, Appellant failed to demonstrate any prejudice from this technical defect. Accordingly, Appellant's claim should be dismissed.

V. THIS COURT PROPERLY DENIED APPELLANT'S PETITION TO STRIKE DEFAULT JUDGMENT BECAUSE APPELLEE OBTAINED THE COURT'S IMPLICIT LEAVE TO DISMISS FIDELITY AS A DEFENDANT (ISSUE 5).

On appeal, Appellant claims the trial court erred by denying its Petition to Strike Default Judgment because Appellee did not obtain either Appellant's written consent or the court's leave before discontinuing Fidelity as a defendant. Appellant's claim must fail. Appellee did, in fact, obtain the court's implicit leave to discontinue Fidelity as a defendant on May 26, 2023. Moreover, Appellant fails to demonstrate how Fidelity's discontinuance has unfairly disadvantaged them. Appellant's petition was properly denied because its claim is unsupported by the record, and Appellant has also failed to show any unfair disadvantage.

Appellant also alleges that the Court erred because Appellee improperly "discontinued" the case against them. This argument is without merit. "A discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff before the commencement of the trial." Pa. R.C.P. 229(a). "[A] discontinuance may not be entered as to less

than all defendants except upon the written consent of all parties or leave of court upon motion of any plaintiff." Pa. R.C.P. 229(b)(1). "The court, upon petition and after notice, may strike off a discontinuance order to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense, or prejudice." Pa. R.C.P. 229(c). Further, "[a] discontinuance must be founded on the express or implied leave of the court." *Fancsali v. University Health Ctr.*, 761 A.2d 1159, 1162 (Pa. 2000) (quoting *Schuylkill Bank v. MacAlester*, 6 Watts & Serg. 147, 149 (Pa. 1843). An implied leave "is taken without the formality of an application, but subject to be withdrawn on cause shown for it; that is the whole difference." *Id.* "The causes which will move the court to withdraw its assumed leave and set aside the discontinuance are addressed to its discretion, and usually involve some unjust disadvantage to the defendant." *Id.*

Appellee obtained the trial court's implicit leave to discontinue Fidelity's involvement in this case on May 26, 2023 when Appellee filed its Amended Complaint which removed all claims or mentions of Fidelity entirely. The trial court observed Appellee's actions and noted within their docket: "Fidelity...is removed as an active party to this action. The party was not named as a defendant in the Amended Complaint filed on May 26, 2023."

Most importantly, it was Appellant's burden to show why the implied leave unjustly disadvantaged them. Appellant has failed to do so in this case.

At most, Appellant claims that Fidelity is a necessary party to this litigation.[39] However, Appellant's claim is problematic for two reasons. First, Appellant's petition failed to allege any facts showing how failure to join Fidelity would unjustly disadvantage or prejudice them in any way, beyond merely reciting the basic legal definition of what a necessary party is as a conclusory

[39] Appellant's September 29, 2023, Petition to Strike Default Judgment, ¶¶ 62 – 71.

statement.[40] Second, what few facts Appellant does raise to merely establish that Fidelity could qualify as a necessary party contradict the record. Namely, Appellant claims "Fidelity is a necessary party because its contractual duty to indemnify [Appellee] for title defects is squarely at issue … [Appellee's] Amended Complaint continually references … [Appellee's] reliance on [Fidelity's] title insurance policy."[41] However, this is misleading. Appellee's Amended Complaint does not mention Appellee's reliance on Fidelity's policy's promises. Rather, Appellee mentions relying on Appellant's promise to survey the property, a promise which is mentioned nowhere within Fidelity's Policy at all. It is difficult to understand how Fidelity's policy is squarely at issue when the policy never even mentions Appellant performing a survey… a performance which is at the heart of Appellee's negligence claim. From this showing, it was well within the trial court's discretion to uphold the validity of Fidelity's discontinuance.

Therefore, this Court properly denied Appellant's Petition to Strike Default Judgment because Appellee obtained implied leave to discontinue Fidelity as a party. Accordingly, Appellant's claim should be dismissed.

VI. THIS COURT PROPERLY DENIED APPELLANT'S PETITION TO OPEN DEFAULT JUDGMENT BECAUSE APPELLANT DOES NOT SATISFY ANY OF THE THREE ELEMENTS REQUIRED TO OPEN DEFAULT JUDGMENT (ISSUE 6).

On appeal, Appellant claims the trial court erred by denying its Petition to Open Default Judgment because they "promptly filed [this] Petition, ha[ve] a meritorious defense, and its failure

---

[40] *See* Appellant's September 29, 2023, Petition to Strike Default Judgment, ¶ 71 ("This Court cannot completely resolve this controversy and render complete relief without Fidelity."); York-Adams County Constables Asso. V. Court of Common Pleas, 474 A.2d 79, 81 (Pa. Commw. Ct. 1984) ("Necessary parties are those whose presence, while not indispensable, is essential if the Court is to *completely resolve the controversy before it and render complete relief*.") (emphasis added).

[41] Appellant's September 29, 2023, Petition to Strike Default Judgment, ¶¶ 67 – 68.

to appear can be excused." (Petition, ¶ 37). Appellant's claim must fail. Appellant fails all three elements required to open default judgment.

First, its petition to open default judgment was not filed promptly. Second, Appellant raised three different defenses, none of which are pled meritoriously as they are mere conclusions of law, unsupported by facts from the record. Last, Appellee's failure to appear in court cannot be excused, as a matter of law.

Further, "the standard of review for...the opening of a default judgment is well settled." *Dumoff v. Spencer*, 754 A.2d 1280, 1282 (Pa. Super. Ct. 2000). "A petition to open default judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court, and we will not overturn that decision absent a manifest abuse of discretion or error of law." *Id.* "An abuse of discretion is not a mere error of judgment[.] [B]ut if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused." *Id.* "However, we will not hesitate to find an abuse of discretion if, after our own review of the case, we find that the equities clearly favored opening the judgment." *Id.*

There is a "tripartite test ... to balance the equities when considering whether to grant a petition to open a default judgment." *ABG Promotions v. Parkway Publ'g, Inc.*, 834 A.2d 613, 618 (Pa. Super. Ct. 2003). Under the tripartite test, "a default judgment may be opened when the moving party establishes three requirements: (1) a prompt filing of a petition to open the default judgment; (2) a meritorious defense; and (3) a reasonable excuse or explanation for its failure to file a responsive pleading." *Dumoff*, 754 A.2d at 1282. "[W]here some showing has been made with regard to each part of the test, a court should not blinder itself and examine each part as though it

were a watertight compartment." *Allegheny Hydro No. 1 v. American Line Builders*, 722 A.2d 189, 192 (Pa. Super. Ct. 1998). Instead, a court should "consider each part in light of all the circumstances and equities of the case." *Id.* "Where the equities weigh strongly in favor of granting the Petition to Open, this Court will find an abuse of discretion in denying such a petition." *Flynn v. Casa Di Bertacchi Corp.*, 674 A.2d 1099, 1102 (Pa. Super. Ct. 1996).

As under *Allegheny Hydro*, this memorandum will consider all three elements to open a default judgment in light of all the circumstances and equities of this case:

A. ***APPELLANT DID NOT PROMPTLY FILE THEIR PETITION TO STRIKE/OPEN DEFAULT JUDGMENT (ELEMENT 1).***

Appellant claims it promptly filed its petition to Strike/Open Default Judgment. Appellant's claim fails. Appellant did not file its petition until seventy-seven days after it was served Notice of Default Judgment. As a matter of law, seventy-seven days is decidedly not prompt. Moreover, Appellant's excuse for delay is unreasonable.

"A petition to open default judgment must be promptly filed." *Pappas v. Stefan*, 304 A.2d 143, 145 (Pa. 1973). "Timeliness is measured from the date that notice is received of the entry of default judgment." *Ruczynski v. Jersey Constr. Corp.*, 326 A.2d 326, 328 (Pa. 1974). "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 v. Klein*, 663 A.2d 220, 223 (Pa. Super. Ct. 1995). "Instead, the court must consider the length of time...and the reason for delay." *Kelly v. Siuma*, 34 A.3d 86, 92 (Pa. Super. Ct. 2011).

i. ***LENGTH OF TIME (PRONG ONE).***

Regarding length of time, Courts have "found a 'prompt' and timely filing [when]...the period of delay was normally less than one month." *Id.* By contrast, "periods of less than three

months...were not prompt." *Id.* (citing *Pappas v. Stefan*, 304 A.2d 143 (1973) ("fifty-five days"); *Quatrochi v. Gaiters* ("sixty-three days"); *Schutte v. Valley Bargain Center, Inc.*, 375 A.2d 368 (Pa. Super. Ct. 1977) ("forty-seven days").

Appellant fails to satisfy the first prong. Appellant filed its petition seventy-seven days after receiving Notice of Default Judgment. Specifically, on July 12, 2023, Appellant was first served Notice of Default Judgment against it. However, Appellant failed to make any appearance with the court, let alone file its petition, until September 29, 2023. Under case law, this period of delay is neither prompt nor timely. In their petition to open, Appellant claims they were never actually served a Notice of Default Judgment on July 12, 2023. Rather, Appellant alleges that Appellee filed their Notice to Enter Default Judgment on August 17, 2023, the very same day the trial court entered default judgment against Appellant. (*See* Petition ¶¶ 17 and 21). Not only does this claim not make logical sense, but Appellant offers no evidence, affidavits, or declarations to support these claims. By contrast, Appellee has offered a Certificate of Service showing Appellant was served with a Notice of Default Judgment on July 12, 2023.[42] Therefore, Appellant fails to satisfy this first prong to establish a prompt filing of petition.

ii. <u>REASON FOR DELAY (PRONG TWO).</u>

Regarding reason for delay, "courts have usually addressed the question...in the context of an excuse for failure to respond to the original complaint in a timely fashion." *US Bank N.A.* 982 A.2d 986. Where "the failure to answer was due to an oversight, an unintentional omission to act, or a mistake of the rights and duties of the appellant, the default judgment may be opened." *Flynn v. America West Airlines*, 742 A.2d 695, 699 (Pa. Super. Ct. 1999). However, courts "refuse[] to accept the excuse of justifiable reliance [where] the [appellant] was a sophisticated insured with

[42] *See* Appellee's Response to Appellant's Petition, Exhibit A.

some procedure in place for monitoring claims." *Reid v. Boohar*, 856 A.2d 156 (Pa. Super. Ct. 2004).

Appellant has also failed to satisfy this second prong. As an excuse, Appellant claims that in July 2023, Fidelity promised "it would defend [Appellant]" in this matter. *Id.* It was only when "Fidelity failed to act" that Appellant finally "filed the instant Petition as expediently as practicable" on September 29, 2023. Again, Appellant offers no evidence, affidavits, or declarations supporting their claim that Fidelity allegedly promised to handle their representation in July of 2023. Moreover, as a matter of law, Appellant is barred from even asserting justifiable reliance as an excuse. Appellant is a sophisticated title insurance company, with procedures in place to monitor its own claims. Under *Myers* and *Reid*, asserting justifiable reliance of Fidelity is unreasonable and unpersuasive. Therefore, Appellant also fails to satisfy the second prong of timeliness.

B. APPELLANT ASSERTED THREE DIFFERENT DEFENSES, NONE OF WHICH WERE PLED MERITORIOUSLY (ELEMENT TWO).

Appellant claims they can assert three different meritorious defenses against Appellee's negligence claim. The first defense is that Appellant did not owe Appellee a common law duty when surveying the property. The second defense is that Appellee's negligence claim is barred by the Gist of the Action Doctrine. The third defense is that Fidelity is a necessary party and should be reinstated within the litigation. All three defenses must fail, because Appellant did not allege any facts from the record as support. Rather, Appellant only supplied conclusory statements of law. Appellant did not set forth any defense in precise, specific, and clear terms. As such, Appellant failed to plead any defenses meritoriously.

"[A] default judgment may be opened when the moving party establishes...a meritorious defense." *Dumoff v. Spencer*, 754 A.2d 1280, 1282 (Pa. Super. Ct. 2000). "[I]n order to state a meritorious defense, [appellant] need only allege a defense that entitles him to a judgment in his favor, if proven at trial." *Boatin v. Miller*, 955 A.2d 424, 429 (Pa. Super. Ct. 2008). "If any one of the alleged defenses would provide relief from liability, the moving party will have pled a meritorious defense and will have satisfied the [second] requirement to open the default judgment." *Penn-Delco School v. Bell Atlantic-PA*, 745 A.2d 14, 19 (Pa. Super. Ct. 1999). "Merely asserting...that one has a meritorious defense is insufficient." *Seeger v. First Union Nat'l Bank*, 836 A.2d 163, 166 (Pa. Super. Ct. 2003). Instead, Appellant "must set forth the defense in precise, specific, and clear terms." *Seeger*, 836 A.2d at 166. To assert a defense in precise, specific, and clear terms, Appellant must "alleg[e] facts of record...that support a meritorious defense," not merely "set forth in their petition conclusions of law and challenges to Appellee's proof." *Smith v. Morrell Beer Distribs., Inc.*, 29 A.3d 23, 28 (Pa. Super. Ct. 2011).

In *441 Smithfield St., LLC v. 441 Smithfield Pitt., LLC*, the Pennsylvania Superior Court held that Appellant "failed to adequately allege a meritorious defense." 289 A.3d 76, 84 (2022). In their petition to open default judgment for a repudiation/non-performance of contract claim, Appellant merely asserted the COVID "pandemic...impacted his ability to comply with the terms of the [contract]." *Id.* at 83. In response, the Superior Court held that Appellant's defense "baldly asserted that the pandemic rendered performance of the [contract] impossible or impractical, but [Appellant] failed to show precise, specific, and clear facts as to show how the pandemic did so." *Id.* Pleading insufficient facts, the Court held Appellant's defense was not precise, specific, and clear.

Similarly, in *Shun Da Clothes, Inc. v. Denim Kin New York, Inc.*, Appellant also failed to assert a single meritorious defense. In their petition to open, Appellant "merely state[d] that it 'allege[d] valid defenses, most notably the statu[t]e of limitations defense[,] doctrine of lache[s], equitable estoppels and [Appellee's] own breaches of the contract." 2013 Phila. Ct. Com. Pl. LEXIS 246 *4. However, these multiple defenses were all insufficient. The Court explained "there are no facts to support [Appellant's] assertions...or how/why [Appellee's] claims are barred by the doctrines of laches, unclean hands, or estoppel." *Id.* at *5.

As a matter of law, Appellant's three defenses were not pled meritoriously. Appellant only asserted each defense as a mere conclusory statement of law but failed to allege any facts of record to support their defenses in precise, specific, and clear terms.

Appellant's first defense concerned duty of care. Appellant states it did not "owe a common law duty of care" towards Appellee during their property survey. (*See* Petition, ¶ 43). However, the subsequent paragraphs 44 – 51 do not assert any facts from the record demonstrating exactly how a common law duty of care did not exist for Appellant or for performing property surveys in general. Appellant does not even offer any facts supporting how they acted in a reasonable manner when performing their title search. Instead, Appellant diverts and discusses facts related to breach of contract claims and the standard for strict liability instead. With no pled facts, Appellant's defense that Appellee cannot establish a common law duty of care stands alone as a mere conclusory statement of law. Appellant has failed to assert its first defense in precise, specific, and clear terms. Therefore, the first argument fails.

Appellant's second defense was that Appellee's claim is barred by the Gist of the Action Doctrine. Again, Appellant offers no facts from the record to support this defense. As consequence,

this defense is also not asserted in precise, specific, and clear terms. Therefore, the second argument fails.

Appellant's third defense is that Fidelity is a necessary party and should be reinstated back into the litigation. However, this opinion has already addressed how the facts Appellant asserts in support of this defense are insufficient to establish Fidelity as a necessary party. Therefore, this defense is also not asserted in precise, specific, and clear terms and is not a meritorious defense.

None of Appellant's three defenses have been pled meritoriously.

C. ***APPELLANT'S FAILURE TO APPEAR CANNOT BE REASONABLY EXCUSED (ELEMENT THREE).***

Appellant claims its failure to appear in court can be reasonably excused, because Appellant reasonably relied on Fidelity's promise to handle litigation on their behalf. Appellant's claim must fail. As a matter of law, Appellant is barred from using reasonable reliance as an excuse because it is a sophisticated company capable of monitoring its own litigations. Appellant has failed to assert a reasonable excuse for its failure to appear.

"To open a default judgment, a party must...offer a legitimate excuse for the delay in filing a timely answer." *Reid*, 856 A.2d at 160. "Whether an excuse is legitimate is not easily answered and depends upon the specific circumstances of the case." *Id.* "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 v. Wee Wheelers, Inc.*, 620 A.2d 1206, 1210 (Pa. Super. Ct. 1993). "Generally speaking, a default attributable to a defendant's justifiable belief that his legal interests are being protected by his insurance company is excusable. However, if the [defendant] fails to inquire of the insurer as to the status of the case after events have occurred which should have reasonably alerted the insured

to a possible problem, the [defendant] is precluded from asserting a *justifiable* belief." *Autologic Inc. v. Cristinzio Movers*, 481 A.2d 1362, 1363 (Pa. Super. Ct. 1984). Moreover, courts "refuse[] to accept the excuse of justifiable reliance [where] the [appellant] was a sophisticated insured with some procedure in place for monitoring claims." *Reid*, 856 A.2d at 161. Only "an unsophisticated layperson unfamiliar with the law" may excuse his failure to appear by justifiable reliance. *Id.* at 160.

As a matter of law, Appellant's excuse is not reasonable. First, Appellant claims that former-defendant Fidelity "stated it would address the Complaint...[then] failed to act" on multiple occasions. (*See* Petition, ¶ 39). However, Appellant offers no proof, affidavits, declarations, or any facts supporting this claim. This amounts to an unsupported conclusory statement, merely alleging that Fidelity acted negligently. This allegation, absent any other proof, is insufficient to justify Appellant's failure to appear.

Second, even if Appellant's claim is believed, it is still an unreasonable excuse, as a matter of law. After Fidelity allegedly promised to handle the litigation, Appellant received both a Notice of Praecipe to Enter Judgment and the Entry of Default Judgment itself. Despite these obvious warnings, Appellant still did not take any action until the end of September. Appellant alleges it repeatedly questioned Fidelity about the status of its case, but that again is also unsupported by any evidence. Since Appellant took no action until a full month after default judgment is entered, it should be barred from asserting justifiable reliance as an excuse.

Third, and most importantly, Appellant is barred from asserting justifiable reliance entirely. Appellant is not an unsophisticated layperson unfamiliar with the law. Appellant is a private insurance company. It is a sophisticated entity with procedure in place for monitoring their own

claims. As a matter of law, Appellant is automatically barred from even asserting justifiable reliance as a legitimate excuse for failure to appear in court.

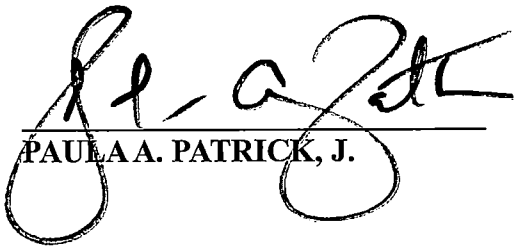
For all these reasons, Appellant has failed to assert a reasonable excuse for its failure to appear in court for seventy-seven days. The third element for opening default judgment has not satisfied.

Therefore, this Court properly denied Appellant's Petition to Open Default Judgment and accordingly, Appellant's claims should be dismissed.

CONCLUSION

For all the foregoing reasons, this Court respectfully requests that its judgment be affirmed in its entirety.

BY THE COURT:



PAULA A. PATRICK, J.