

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

UNIVERSITY OF PENNSYLVANIA, NEW	:	IN THE SUPERIOR COURT OF
BOLTON CENTER,	:	PENNSYLVANIA
	:	
Appellee	:	
	:	
v.	:	
	:	
HARVEY BITLER,	:	
	:	
Appellant	:	No. 1101 EDA 2013

Appeal from the Order entered on March 14, 2013
in the Court of Common Pleas of Chester County,
Civil Division, No. 2011-05337

BEFORE: FORD ELLIOTT, P.J.E., WECHT and MUSMANNNO, JJ.

MEMORANDUM BY MUSMANNNO, J.:

FILED APRIL 14, 2014

Harvey Bitler (“Bitler”) appeals from the Order denying his Petition to Strike and/or Open Judgment by Default. We affirm.

The University of Pennsylvania, New Bolton Center (“New Bolton Center”), filed a collection action against Bitler on May 19, 2011.¹ In its Complaint, New Bolton Center averred that it had provided veterinary services for the benefit of Bitler. Complaint, 5/19/11, at ¶¶ 3-4. In exchange for veterinary services, New Bolton Center asserted, Bitler agreed to pay \$53,255.30, plus a monthly service charge on amounts not paid within 30 days. *Id.* at ¶ 5. Finally, the Complaint averred that Bitler has refused to tender the outstanding balance of \$53,255.30 for services

¹ New Bolton Center reinstated its Complaint in August 2011.

rendered, plus \$3,409.19 each month in service charges accrued through August 8, 2007. *Id.* at ¶¶ 7-8.

New Bolton Center served Bitler with its Complaint on August 24, 2011. On October 6, 2011, the trial court entered a default judgment against Bitler, in the amount of \$96,133.52. On June 4, 2012, Bitler filed a Petition and an Amended Petition to Strike and/or Open Judgment by Default. New Bolton Center filed an Answer to Bitler's Petition. On March 14, 2013, the trial court denied Bitler's Petition. Thereafter, Bitler filed the instant appeal followed by a court-ordered Pa.R.A.P. 1925(b) Concise Statement of Errors Complained of on Appeal ("Concise Statement").

Bitler presents the following claims for our review:

- A. Did [Bitler] fail to preserve any issues for review by eliciting in his [Concise Statement] that[,] under the facts and circumstances of his case, the trial court erred in denying relief?
- B. Did [Bitler] satisfy the three-prong test for relief to open default judgment where[,] under the facts, circumstances and equities present in his case, [Bitler's] Petition was timely, a meritorious defense was established, and his failure to file an answer was excusable?
- C. Was there a defect of record in [New Bolton Center's] entry of judgment such that [Bitler's P]etition to [S]trike should have been granted?

Brief of Appellant at 7.

Bitler first challenges the trial court's conclusion that Bitler has waived appellate review of his claims by not filing a sufficiently detailed Pa.R.A.P. 1925(b) Concise Statement. *Id.* at 17. Bitler claims that his Concise

Statement “followed the spirit” of Rule 1925(b), “and served to winnow the already limited subject matter that was at issue in this case.” **Id.** According to Bitler, his Concise Statement “identified that under the facts, circumstances and equities of his case, his Petition ... was, in fact timely, it contained a meritorious defense, and he maintained a reasonable excuse for the delay in filing for such relief.” **Id.**

Bitler directs this Court’s attention to the Note accompanying Rule 1925(b), which clarifies that the judge is permitted to ask for a concise statement “(i) if the record is inadequate and (ii) the judge needs to clarify the errors complained of.” **Id.** at 18. Bitler contends that no clarification was necessary, “since [the judge] already had sufficient clarification of the issues since he had understood the limited issues within which to formulate a footnote opinion.” **Id.** Finally, Bitler claims that the trial court’s reliance on its March 14, 2013 Order, to support its Opinion, is inconsistent with the trial court’s finding of waiver. **Id.** at 18-19.

In summary, Bitler contests the trial court’s conclusion that his Concise Statement was legally insufficient to preserve his claims for appellate review. “On questions of law, our standard of review is *de novo*, and our scope of review is plenary.” **Lugo v. Farmers Pride, Inc.**, 967 A.2d 963, 970 (Pa. Super. 2009).

Pennsylvania Rule of Appellate Procedure 1925(b) provides, in relevant part, as follows:

If the judge entering the order giving rise to the notice of appeal (“judge”) desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal (“Statement”).

Pa.R.A.P. 1925(b). The rule further provides that “[i]ssues not included in the Statement and/or in accordance with the provisions of this paragraph (b)(4) are waived.” Pa.R.A.P. 1925(b)(4)(vii).

“[A] Rule 1925(b) statement is not in compliance with the Rules of Appellate Procedure if it is so vague and broad that it does not identify the specific questions raised on appeal.” **Hess v. Fox Rothschild, LLP**, 925 A.2d 798, 803 (Pa. Super. 2007).

When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues.

In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all.

Id. at 803-04 (citation omitted).

In his Concise Statement, Bitler identified the following claims:

1. The [trial c]ourt erred in denying [Bitler’s] Petition to Open Judgment by Default where [Bitler] satisfied the three-prong test for such relief in that his Petition to Open was timely filed under the circumstances present, a meritorious defense was established and the failure to file an answer was excusable.
2. The trial c]ourt erred in denying [Bitler’s] Petition to Strike Judgment by Default where defects appear of record with respect to the entry of judgment.

Concise Statement, 4/26/13, at 1.

In determining that Bitler has failed to preserve any claims for appellate review, the trial court stated the following:

[Bitler's Concise Statement] states broadly and generally that [the trial court] erred in denying him relief. [The trial court's] Order included a footnote in which [the court] explained the reasons [why it had] denied [Bitler] relief. [Bitler] has not directed [the court's] attention to any particular claimed error, but simply states that he established a basis upon which to both open and strike the default judgment that was entered in this case. It is respectfully suggested that such a broad statement amounts to nothing more than a claim that the order appealed from was wrong and, as such, preserves no issue for review. ***Lineberger v. Wyeth***, 894 A.2d 141 (Pa. Super.[] 2006)....

Trial Court Opinion, 4/30/13, at 1. We agree with and adopt the reasoning of the trial court, set forth above, and conclude that Bitler waived his challenge to the trial court's denial of his Petition to Open the default judgment.² ***See id.***

Regarding Bitler's Petition to Strike, this Court has observed that

[g]enerally, this Court will decline to address issues not first raised before the trial court. Pa.R.A.P. 302(a). However, [our Court has] long held that a litigant may seek to strike a void

² Even if Bitler had preserved this claim, we would affirm the trial court's Order. In challenging the denial of his Petition to Open, Bitler claims that he filed his Petition within 30 days after notice of the levy on his property. Brief of Appellant at 22. Bitler generally argues that the circumstances and equities "are overwhelming to warrant a finding that [his] Petition was filed promptly." ***Id.*** In particular, Bitler directs this Court's attention to testimony that he contacted New Bolton Center's counsel and offered a horse in payment of his debt. ***Id.***

In its Order, the trial court correctly determined that Bitler is not entitled to relief. Trial Court Order, 3/14/13, at 1-2 n.1. Accordingly, we would have affirmed on the basis of the trial court's reasoning, as set forth in its Order, with regard to this claim. ***See id.***

judgment at any time. This Court also permits litigants to attack allegedly void decrees for the first time on appeal...

Oswald v. WB Pub. Square Assocs., LLC, 80 A.3d 790, 793 n.2 (Pa. Super. 2013).

Bitler claims that the trial court improperly denied his Petition to Strike the default judgment. Brief of Appellant at 29. In support, Bitler asserts that New Bolton Center failed to attach any evidence of its contractual relationship with Bitler, and that his delay "was not caused by blatant ignorance, but by a false sense of security created by virtue of the facts and nature of the action...." **Id.** at 31.

"A petition to strike a judgment raises a question of law and relief thereon will only be granted if a fatal defect appears on the face of the record." **Oswald**, 80 A.3d at 793. On reviewing Bitler's claim, we are cognizant that "if a judgment is sought to be stricken for an irregularity, not jurisdictional in nature, ... the application to strike off must be made within a reasonable time." **Id.** at 797.

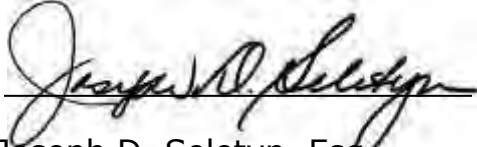
In its Order denying Bitler's Petition to Strike, the trial court addressed this claim and determined that Bitler did not file his Petition within a reasonable time. Trial Court Order, 3/14/13, at 2 n.1. The record supports the trial court's determination, and we agree with the trial court's reasoning, as stated in its Order. Accordingly, we affirm on the basis of the reasoning set forth in the trial court's March 14, 2013 Order with regard to this claim.

See id.

J-A30037-13

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014

UNIVERSITY OF PENNSYLVANIA, NEW BOLTON CENTER

Plaintiff

: IN THE COURT OF COMMON PLEAS

: CHESTER COUNTY, PENNSYLVANIA

gm

v.

: NO. 2011-05337

HARVEY BITLER

Defendant

: CIVIL ACTION - LAW

OFFICE OF THE PROTHONOTARY CHESTER CO. PA.

2013 MAR 14 AM 11:57

FILED

SENT MAR 15 2013

Attorney for Plaintiff: Edward L. Berger, Esq. Attorney for Defendant: Thomas A. Rothermel, Esq.

ORDER

AND NOW, this 13th day of March, 2013, upon consideration of the Amended Petition of Defendant to Strike and/or Open Judgment by Default, Plaintiff's answer thereto and Defendant's Memorandum and following argument, it is hereby ORDERED that the Petition is DENIED.1.

BY THE COURT:

[Signature] Edward Griffith, J.

1. "The law is clear with respect to opening of judgments entered by default. A court should exercise its equitable discretion in opening a default judgment only where the following three factors coalesce: (1) the petition has been promptly filed; (2) a meritorious defense can be shown; and (3) the failure to appear or file an answer can be excused." King v. Evans, 281 Pa.Super. 219, 223, 421 A.2d 1228, 1230 (Pa.Super.,1980)(citations omitted). The New Bolton Center instituted this collection action on May 19, 2011 for veterinary services provided to three horses. Personal service of the reinstated Complaint was made on Harvey Bitler on August 24, 2011. A default judgment was entered on October 6, 2011. On January 31, 2012 New Bolton Center transferred the judgment to Berks County. On May 8, 2012 the Berks County Sheriff levied a commercial property; Sheriff's sale was set for June 7, 2012. On June 4, 2012 Bitler took his first action, he filed an Emergency Motion to Stay the Sheriff's Sale and Execution in Berks County. Judge Timothy Rowley granted the stay. On the same day, Bitler filed to strike or open the judgment in Chester County.

Bitler maintains he contacted the New Bolton Center's attorney after receiving the Complaint and advised counsel that he was not personally liable for the debt

as the horses were owned by a corporation. Despite claiming no ownership interest in the horses, Bitler also told the New Bolton Center's attorney that his client could seize one of the horses to clear the debt. Thereafter Bitler ignored the matter until his property was levied.

With regard to the three criteria that must be met to open a default judgment, we note that Bitler failed to take any action to open the judgment until eight months had passed. Thus, Bitler failed to timely petition for relief. "The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief." Flynn v. America West Airlines, 742 A.2d 695, 698 (Pa.Super.,1999). Bitler has alleged a meritorious defense. Finally, Bitler has offered no reasonable excuse or explanation for his failure to file a responsive pleading. The cases Bitler cites to support his explanation, that he simply failed to understand the implications of his inaction, do not support the opening of the judgment. Because all three criteria must be met, the judgment will not be opened.

To prevail on his petition to strike, Bitler must establish that there is a fatal defect or irregularity on the face of the record. Wells Fargo Bank v. Lupori, 8 A.3d 919, 921 (Pa.Super.2010). Bitler cites to New Bolton's failure to attach to the Complaint evidence of a contractual relationship as such a fatal defect or irregularity. The analysis of this claim requires an assessment of:

the nature of the judgment, i.e. whether it was void, voidable or valid, in order to establish whether the timeliness of the petition to strike was a relevant consideration for its ruling. If the judgment was found to be void ... timeliness would not be a factor and the petition to strike would be granted. If the judgment was found to be voidable, timeliness would be a factor and the petition would be granted only if it was filed within a reasonable time.^{FN2}

^{FN2} The general rule is that if a judgment is sought to be stricken off for an irregularity, not jurisdictional in nature, which merely renders the judgment voidable, the application to strike off must be made within a reasonable time, or the irregularity will be held to be waived.

Williams v. Wade, 704 A.2d 132, 134 (Pa.Super.,1997)(citations omitted). The judgment here is merely voidable and thus the application to strike off must have been made within a reasonable time. Gall v. Crawford, 982 A.2d 541, 546 (Pa.Super.,2009)(a default judgment entered on a complaint which is not self-sufficient is voidable only). Having delayed eight months in filing his petition, Bitler has waived any claim he might have had to strike off the judgment.