NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP Appellee v. DIANE C. YODER AND GARY L. YODER AND THE UNITED STATES OF AMERICA Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1465 MDA 2013

Appeal from the Order Entered July 22, 2013
In the Court of Common Pleas of Berks County
Civil Division at No(s): 13-2845

BEFORE: GANTMAN, P.J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED APRIL 14, 2014**

Appellants, Diane C. Yoder and Gary L. Yoder and the United States of America, appeal from the order entered in the Berks County Court of Common Pleas, which denied their petition to open a default judgment entered in favor of Appellee, Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP. We affirm.

The relevant facts and procedural history of this appeal are as follows. On December 21, 2009, Appellants obtained a mortgage, which the lender later assigned to an entity succeeded by Appellee. Appellants ceased making mortgage payments in January 2011. On March 1, 2013, Appellee

filed a foreclosure complaint. Appellee served Appellants on March 8, 2013, but Appellants did not timely respond. On May 15, 2013, Appellee entered a default judgment against Appellants in the amount of $363,123.73. The *praecipe* for entry of judgment included a certification that Appellee mailed or delivered to Appellants a written notice of intention to file the *praecipe*.

Appellants filed a petition to open judgment on July 10, 2013. In it, Appellants claimed to have lost the foreclosure complaint following service. At the time of service, Appellants "were devastated due to the loss of their son," and "were in a state of mourning." (Petition to Open Judgment, filed 7/10/13, at 2). Appellants insisted they did not find the foreclosure complaint until June 2013, they immediately forwarded the document to counsel, and they did not learn about the default judgment until counsel reviewed their case. On July 22, 2013, the court denied Appellants' petition to open judgment, concluding the petition failed to plead an adequate excuse for the delay in answering the complaint.

Appellants timely filed a notice of appeal on August 12, 2013. On August 16, 2013, the court ordered Appellants to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellants subsequently complied with the court's order.

Appellants raise one issue for our review:

> WHETHER THE [TRIAL] COURT ERRED IN DENYING APPELLANTS' MOTION TO OPEN?

(Appellants' Brief at 2).

A petition to open a default judgment is an appeal to the court's equitable powers, and absent an error of law or an abuse of discretion, this Court will not disturb that decision on appeal. ***Reid v. Boohar***, 856 A.2d 156 (Pa.Super. 2004).

> Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.

Miller v. Sacred Heart Hosp., 753 A.2d 829, 832 (Pa.Super. 2000) (internal citations omitted).

On appeal, Appellants contend their son died around the time Appellee served the foreclosure complaint. Appellants assert they lost the complaint while mourning the loss of their son. Appellants maintain they found the complaint in June 2013 and obtained counsel, who immediately entered his appearance and reviewed Appellants' case file. Appellants claim counsel experienced a delay in receiving all of the paperwork for their case, which further postponed the filing of the petition to open judgment. Appellants insist counsel attempted to file the petition to open judgment as early as June 24, 2013, but the court did not accept it due to certain deficiencies.

Despite the delayed filing of the petition to open judgment, Appellants emphasize that Appellee did not file a response to their petition. Because their petition was "apparently unopposed," Appellants aver the court should not have denied it. (Appellants' Brief at 5). Further, Appellants argue

Appellee failed to establish that it is a holder in due course of the mortgage and note; therefore, Appellee is not entitled to judgment in its favor.[1] Appellants conclude the court erred in denying their petition to open judgment. We disagree.

To open a default judgment, the petitioner must (1) promptly file a petition to open, (2) offer a justifiable excuse for the delay that caused the default, and (3) aver a meritorious defense that, if proved at trial, would afford relief. ***Reid, supra*** at 160. To succeed, the petitioner must meet all three requirements. ***US Bank N.A. v. Mallory***, 982 A.2d 986, 995 (Pa.Super. 2009). Further, "A petition for relief from a judgment of…default entered pursuant to Rule 237.1 shall have attached thereto a verified copy of the complaint or answer which the petitioner seeks leave to file." Pa.R.C.P. 237.3(a).

With respect to the first element of the test for opening a default judgment, requiring the prompt filing of a petition to open, courts do not employ a bright line test; instead, courts focus on (a) the time between discovery of the default judgment and filing the petition to open the judgment and (b) the reason for the delay. ***Flynn v. America West***

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[1] Appellants acknowledge this argument does not appear in the petition to open judgment, "because Appellants tried to file in a timely manner and had not yet received the response to their Qualified Written Request, which was received on August 12, 2013, though it was sent on June 14, 2013." (Appellants' Brief at 7).

Airlines, 742 A.2d 695, 698 (Pa.Super. 1999). Given an acceptable reason for the delay, one month or less between the entry of the default judgment and the filing a petition for relief from the judgment typically meets the time requirement for a prompt filing of a petition for relief. ***Myers v. Wells Fargo Bank, N.A.***, 986 A.2d 171, 176 (Pa.Super. 2009). ***See also US Bank N.A., supra*** (comparing cases and rejecting eighty-two day interval between default judgment and petition for relief as tardy).

On the second element requiring a justifiable excuse for the failure to respond to the original complaint, courts look to the specific circumstances of the case to see if the petitioner offered a legitimate explanation for that lack of response. ***Flynn, supra***. "While some mistakes will be excused, …mere carelessness will not be…." ***Bahr v. Pasky***, 439 A.2d 174, 177 (Pa.Super. 1981). For example, the petitioner's unintentional failure to act due to a defective mail receipt system was not considered a legitimate explanation for the delay that led to entry of the default judgment. ***Flynn, supra*** at 699. Similarly, a mortgagor's lack of legal knowledge or sophistication generally does not constitute a reasonable excuse for the failure to answer a complaint. ***US Bank N.A., supra***.

Instantly, the trial court evaluated Appellants' claim as follows:

> In the case at bar, the default judgment was entered on May 15, 2013. On that same date, pursuant to [Pa.R.C.P.] 237.1, notice of the intent to enter default judgment was sent to [Appellants]. The petition to open judgment was not filed until July 10, 2013, some fifty-five (55) days after the entry of the default judgment. In cases where courts

> have found that a petition to open judgment was promptly filed, the period of delay was normally less than one month. Here, based on the fact that the petition to open judgment was filed fifty-five (55) days after default was entered, the [c]ourt finds that the petition was not promptly filed. Therefore, [Appellants] have failed to satisfy the first element of the tripartite test.
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> As to the second element of the test, [Appellants] have failed to offer a reasonable explanation or excuse for their failure to timely answer the complaint.
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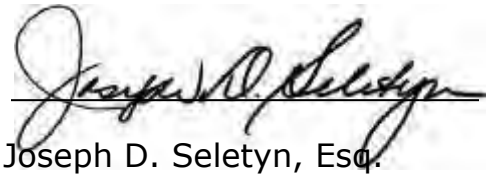
> * * *
>
> In this case, [Appellants] admit that the mortgage foreclosure papers were lost after having been served…. [Appellants] do not place the blame of **losing** the paperwork on anyone but themselves. As a result, [the trial court] believes that in order to satisfy the element of reasonable excuse, [Appellants] need to show that they acted to protect their interest.
>
> Here, [Appellants] advance no showing that they acted to protect their interests after having been served with the complaint. [Appellants] state that they lost their papers while being in a state of mourning. However, no information is given as to **when**, during the sixty-seven (67) day period after the complaint was served, their son died, or **how** it affected their ability to reasonably protect their interests. While the court certainly sympathizes with the loss of [Appellants'] son, someone who has served overseas for this country, the [c]ourt cannot ignore established case law on this subject.

(***See*** Trial Court Opinion, filed October 16, 2013, at 3-5) (internal citations omitted) (emphasis in original). We agree that mere negligence in losing a complaint does not constitute a justifiable excuse for failing to pursue a timely response. ***See Flynn, supra***; ***Bahr, supra***. Moreover, the petition to open judgment lacked a **verified** proposed answer to the complaint, in

violation of Rule 237.3(a).[2] Under these circumstances, the trial court properly denied the petition to open judgment. ***See Reid, supra***; ***Miller, supra***. Accordingly, we affirm.[3]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014

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[2] Although the petition included a proposed answer and new matter, it did not include any sort of verification. ***See*** Pa.R.C.P. 1024 (explaining every pleading containing averment of fact not appearing of record or containing denial of fact shall state that averment or denial is true upon signer's personal knowledge or information and belief and shall be verified).

[3] Nevertheless, Appellee has stated it is "willing to review Appellants' [case] to determine if they qualify for a loan modification or other types of loss mitigation." (Appellee's Brief at 7).