

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DAVID ALAN EVAKICH,

Appellee

v.

TAMMY WINKLEVOSS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 454 WDA 2013

Appeal from the Order of February 8, 2013,
in the Court of Common Pleas of Mercer County,
Civil Division at No. 2012-1242

BEFORE: BOWES, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED: September 24, 2013

This is an appeal from an order denying Appellant's petition to open a default judgment. We affirm.

The trial court summarized the background underlying this matter in the following manner.

[Appellee] commenced this matter by filing a complaint on April 24, 2012. [Appellant] was served with the complaint on May 10, 2012.

[Appellant] believes she gave her attorney J. Jarrett K. Whalen, Esquire, the complaint. [Appellant], at Attorney Whalen's request, began working on an answer.

No answer or preliminary objections were filed to the complaint.

*Retired Senior Judge assigned to the Superior Court.

On May 31, 2012, [Appellee] mailed out the requested Default Judgment notices. A courtesy copy was mailed to Attorney Whalen. [Appellant] and Attorney Whalen received the notice on June 1, 201[2].

On June 13, 2012, [Appellant] filed a PFA petition against [Appellee].

A Default Judgment was entered in this matter on June 15, 2012.

Attorney Whalen began to work on filing a Petition to Open the Default Judgment on June 26, 2012. A representative of his office called [Appellee's] counsel's office on June 28, 2012, to notify counsel of the intent to file a Petition to open and to ask counsel's position.

[Appellant] officially retained Attorney Whalen to represent her in this matter on July 2, 2012.

The Petition to Open Judgment was filed on August 7, 2012. . . .

New counsel entered an appearance on behalf of [Appellant] on October 30, 2012. [On February 8, 2013, the court held a hearing on the Petition to Open.]

The only witness to testify at the hearing on the Petition to Open Default Judgment was [Appellant]. At the conclusion of that hearing, [the trial court] made findings of fact and entered an Order denying the Petition to Open. This appeal followed.

Trial Court Opinion, 04/16/13, at 1-3.

In her brief to this Court, Appellant asks us to consider one question, namely, "Whether the Trial Court erred in Refusing to Open the Default Judgment when Appellant Satisfied the Three-Prong Standard for Opening the Judgment." Appellant's Brief at 2.

Our review of this issue is conducted pursuant to the following:

In general, 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. The standard of review for challenges to a decision concerning the opening of a default judgment is well settled.

A petition to open a 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.

However, we will not hesitate to find an abuse of discretion if, after our o[w]n review of the case, we find that the equities clearly favored opening the judgment.

An abuse of discretion is not a mere error of judgment, but 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.

Smith v. Morrell Beer Distributors, Inc., 29 A.3d 23, 25 (Pa. Super. 2011) (citation omitted).

In denying Appellant's petition to open, the trial court concluded that Appellant offered a meritorious defense. The court, however, determined that Appellant failed to promptly file the petition and to offer a reasonable excuse or explanation for her failure to file a responsive pleading.

In terms of whether Appellant promptly filed her petition to open the default judgment, this Court has stated:

In evaluating whether the petition has been promptly filed, [the] Court does not employ a bright line test. . . . [The Court focuses] on two factors: (1) the length of the delay between discovery of the entry of a default judgment and filing the petition to open judgment, and (2) the reason for the delay.

Allegheny Hydro No. 1 v. American Line Builders, Inc., 722 A.2d 189, 193 (Pa. Super. 1998) (citation and quotation marks omitted).

The default judgment was entered on June 15, 2012. The trial court determined that, on June 28, 2012, Attorney Whalen's office contacted Appellee's counsel and indicated that they were preparing a petition to open on Appellant's behalf. Trial Court Adjudication, 02/11/13, at ¶14. The record supports this determination. N.T., 02/08/13, at 38-40. Thus, at the very latest, Appellant and/or her counsel knew of the entry of the default judgment by June 28, 2012. Yet, Appellant filed the petition to open on August 7, 2012. In other words, Appellant did not file her petition until forty-one days after the latest date she could have discovered the entry of the default judgment.

Furthermore, at the hearing on the petition to open, in questioning Appellant about her counsel's June 28th representations, Appellee's counsel asked Appellant, "And do you know why they didn't file anything until 47 days later?" ***Id.*** at 40. Appellant responded, "No." ***Id.*** While Appellee's counsel miscalculated the number of days between June 28th and August 7th, Appellant clearly had no explanation for the delay in filing the petition to open.

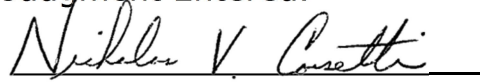
Despite this testimony, in her brief to this Court, Appellant offers a number of bald assertions in an attempt to explain the delay between her discovery of the entry of the default judgment and the filing of her petition to open.¹ For instance, Appellant asserts, "Here, the delay in filing the Petition does not indicate a lack of diligence. No evidence indicates [Appellant] or Attorney Whalen procrastinated and/or avoided presenting a defense." Appellant's Brief at 15. Appellant's bald assertions simply fail to establish why Appellant did not file her petition to open until August 7, 2012.

We can discern no manifest abuse of discretion or error of law in the trial court's conclusion that Appellant failed to promptly file her petition to open. ***See Allegheny Hydro No. 1***, 722 A.2d at 193 ("We have held in the past that delays of less than forty-one days have been untimely.") (citations omitted). This conclusion renders Appellant's remaining arguments moot. For these reasons, we affirm the order denying the petition to open.

Order affirmed.

¹ Appellant's argument in support of her contention that she promptly filed her petition to open is devoid of any citation to the record to support her assertions of fact, in violation of Pa.R.A.P. 2119(c) and (d).

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casetti", is written over a horizontal line.

Deputy Prothonotary

Date: 9/24/2013