

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARTIN L. MESSNER, Trustee of : No. 01-01751
the MESSNER LIVING TRUST, :
Plaintiff :
 :
 :
vs. : CIVIL ACTION - LAW
 :
 :
DALE E. SHELLENBERGER and :
CYNTHIA L. SHELLENBERGER, :
Defendants : Motion to Open Judgment

OPINION AND ORDER

This matter came before the Court on the Defendants' Motion to Open Judgment. The Court heard testimony on Defendants' Motion on July 23, 2002 and September 30, 2002. The relevant facts are as follows.

Plaintiff owns land, which abuts Defendants' three (3) acre parcel of real estate. On or about August 11, 1990, Defendants conveyed to the Plaintiff an easement or right-of-way across Defendants' land. On or about October 23, 2001, Plaintiff filed an Equity Complaint, in which Plaintiff claimed that Defendants violated the easement by stacking timber on the right-of-way and posting no trespassing signs on the right-of-way. Plaintiff sought an Order enjoining Defendants from interfering with the right-of-way. Prior to filing the Complaint, Plaintiff's counsel Charles Szybist sent Defendants a letter dated July 27, 2001 (Plaintiff's Exhibit 1), which requested Defendants cease interfering with the

right-of-way. The letter warns Defendants that failure to comply could lead to the filing of a court action.

It is undisputed that Defendants signed a "Declaration of Easement" on August 1, 1990, which created the easement in favor of Plaintiff over Defendants' land. The easement is described as fifty (50) feet in width and approximately 381.17 feet in length. The written easement is permanent since it extends to the record owners of the land, and also, heirs, assigns and successors in interest. Defendants' Exhibit 4, Declaration of Easement.

Plaintiff's Complaint contained the required Notice to Defend, which warned Defendants of the need to answer the Complaint within twenty (20) days or a judgment may be entered against them. The notice also contains the required information about obtaining a lawyer. Plaintiff's Exhibit 2, Complaint cover sheet. The Lycoming County Sheriff served the Complaint on Defendants on or about October 30, 2001. Defendants did not respond to the Complaint, and Plaintiff's counsel sent them a ten (10) day default notice on or about November 30, 2001. See Plaintiff's Exhibit 3. Plaintiff filed a second ten (10) day default notice on December 13, 2001. Plaintiff's Exhibit 4. When the second ten (10) day notice did not produce a response from Defendants, Plaintiff filed a Praecipe for Judgment for Failure to File an Answer

and a Notice of Entry of Judgment on December 31, 2001.

Although Defendants do not remember specifically receiving all the notices and judgment, they do not contest receiving the default notices and Notice of Entry of Judgment.

In fact, Mrs. Shellenberger testified she could not recall receiving a specific notice, because they received so many notices from the Plaintiff.

On or about February 12, 2002, Attorney Szybist filed a Motion to Enjoin Defendants from interfering with the right-of-way based upon the default judgment. The Motion to Enjoin included a proposed order specifically stating the Defendants could not interfere with the right-of-way. Attorney Szybist sent a letter dated March 1, 2002 to each Defendant informing them that a hearing on the motion was scheduled in front of the Court on April 2, 2002 at 9:00 a.m. in Courtroom 2. Plaintiff Exhibits 6 and 7.

On April 2, 2002, at the time scheduled for the hearing, Plaintiff, Plaintiff's counsel and Mrs. Shellenberger appeared before the Court. Mr. Shellenberger did not appear. Mrs. Shellenberger opposed the proposed order requested by Plaintiff. In light of her opposition, the Court reserved ruling on the Motion to Enjoin. In the presence of Plaintiff, Plaintiff's counsel and Mrs. Shellenberger, the Court dictated an Order, which indicated Mrs. Shellenberger acknowledged

receiving notice of the default judgment, but she claimed she didn't understand the paperwork.¹ The Court indicated that the only remedy it could potentially see for the Shellenbergers would be to file a Motion to Open Judgment. The Court gave Mrs. Shellenberger thirty (30) days to file a Motion to Open Judgment and the Court specified that, if no such motion was filed, it would sign the order as requested by the Plaintiff.

On or about April 26, 2002, Attorney Jonathan Butterfield filed an entry of appearance on behalf of Mr. and Mrs. Shellenberger. Attorney Butterfield filed a Motion to Open Judgment on or about April 30, 2002.

When deciding a motion to open a default judgment, a court must examine three factors: (1) the petition to open must be promptly filed; (2) the petitioner must show a meritorious defense to the underlying action; and (3) the failure to appear or file an answer must be reasonably explained. See King v. Evans, 281 Pa.Super. 219, 421 A.2d 1228 (1980); Telles v. Rose-Tex, Inc., 233 Pa.Super. 181, 335 A.2d 440 (1975). The Court cannot conclude that the evidence presented in support of Defendants' Motion to Open Judgment satisfies the requirements for opening of judgment. While the Court is satisfied that Defendants arguably raise a

¹ The Order is inadvertently dated April 3, 2002.

meritorious defense,² they have not presented evidence that the petition was promptly filed or that the failure to appear or answer is based on a justifiable excuse.

Clearly the Defendants have not promptly filed the Motion to Open Judgment. Judgment was entered on or about December 31, 2001, after Defendants received a notice to defend and two default notices. The Motion to Open was not filed until approximately four (4) months later. Even if the Court does not include the time from April 2, 2002 when the Court deferred its decision on the Motion to Enjoin until April 30, 2002 when the Motion to Open was filed, the remaining three (3) month period is not consistent with prompt filing of the motion. See Pappas v. Stefan, 451 Pa. 354, 304 A.2d 143 (1973) (finding a petition to open filed 55 days after notice of default was not promptly filed); McCoy v. Public Acceptance Corp., 451 Pa. 495, 500, 305 A.2d 698, 700 (1973), (delay of 2 and ½ weeks before filing Petition to Open

² The Defendants, in their defense, claim that Mr. Messner told them he only wanted permission to haul logs across their property. They claim the written easement they signed was a document Plaintiff represented was necessary for him to have this permission. The Defendants claim the easement they signed was contrary to the statements of Plaintiff because it provided for a fifty (50) foot wide permanent easement over the Defendants' land. Thus, despite the written easement document which they signed, the Defendants claim they were fraudulently misled by the oral statements made by Plaintiff and they were induced into signing the easement by the Plaintiff's fraudulent misrepresentation.

The Defendants further claim that the Plaintiff has failed to maintain the easement as he had promised, and that they received no consideration in return for their grant of the easement. The Defendants complain that they own a 2 and ¼ acre lot, and that the easement goes through their backyard, not far from their residence. Therefore, they argue that the easement should be void and of no effect.

"can hardly be considered prompt"); Flynn v. American West Airlines, 742 A.2d 695, (Pa.Super. 1999) (Petition to Open filed 24 days after default judgment entered was untimely); Schutte v. Valley Bargain Center, Inc., 248 Pa.Super. 532, 375 A.2d 368 (1977)(lower court abused its discretion in finding delay of 47 days was prompt filing of Motion to Open); B.C.Y. Inc. Equipment Leasing Associates v. Bukovich, 257 Pa.Super. 121, 390 A.2d 276 (1978)(where Motion to Open was filed 21 days after Notice of Judgment, filing could not be considered prompt). Certainly, the three (3) or four (4) monthly delay in filing in the instance case cannot be considered prompt filing of the Motion to Open.

Additionally, the Court cannot find, based on the record before it, that the failure of Defendants to appear or answer was based on a justifiable excuse. While the Defendants are not sophisticated in their understanding of the law, they clearly understood early on that important property rights were at stake and that they needed to obtain counsel and answer the Complaint to protect those rights. In the case of Telles v. Rose-Tex, Inc., supra, the Pennsylvania Superior Court states:

Our Court has stated that 'mere ignorance or inexperience with the legal process is by itself an insufficient justification for a default' even where the petitioners who ignored legal process had only a sixth grad education.

233 Pa.Super. at 185, 335 A.2d at 443 citing Milgallow v. Kutna, 226 Pa.Super. 323, 326 n.5, 310 A.2d 396, 398 n.5 (1973). Mr. Shellenberger testified to his limited education and reliance on his wife to protect his interest. He acknowledged he understood he needed to obtain a lawyer to protect his interest and that the Complaint was a serious matter. He testified he allowed his wife to look after their interest by contacting an attorney. Mr. Shellenberger acknowledged he himself made no effort to contact a lawyer.

Mrs. Shellenberger is a high school graduate who works as a nursing assistant in a nursing home. Upon receiving the notices from Plaintiff, she went to Attorney William Hebe's office and spoke with his secretary. She estimates she did this sometime between Thanksgiving and Christmas. She claimed Attorney Hebe's secretary called her back and told her Mr. Hebe could not represent her because he had previously represented Mr. Messner. Mrs. Shellenberger went to the law firm of Cox and Stoker in January or February 2002. She met a lawyer in this office, who she did not know. She claimed that this lawyer told her there was nothing he could do for her at this point. She testified she figured they were "stuck" so she made no further effort to contact lawyers or respond to the lawsuit. She did nothing else until she appeared for the hearing before the Court on April 2,

2002. After the April 2 proceeding, she made contact with Attorney Jonathan Butterfield. On cross-examination, Mrs. Shellenberger admitted she had some understanding of the Complaint, but she didn't understand what a judgment was. She did, however, understand that she could lose valuable property rights as a result of the Complaint. She admitted she made no effort to contact a lawyer from the time frame after meeting with a lawyer in February 2002 until April 2, 2002 after she appeared in Court.

The Court must reluctantly conclude that the Shellenbergers did not provide a justifiable excuse for not engaging a lawyer and filing a Motion to Open until late in April 2002. The Shellenbergers realized Mr. Hebe could not represent them sometime between Thanksgiving and Christmas. They realized that this was serious matter and that their property interests were at stake. The judgment was obtained at the end of December 2001 and the Shellenbergers would have had notice of this shortly thereafter. Despite realizing that they needed an attorney, the Shellenbergers did not talk to another attorney until approximately February 2002. These sparse efforts to obtain an attorney do not portray a reasonable explanation for their failure to respond to this matter. This case is not akin to cases where a party hires a lawyer and relies upon the lawyer to protect their interest

but the lawyer fails to do what he or she promised. See Texas and Block House Fish and Game Club v. Bonwell Run Hunting and Fishing Corporation, 388 Pa. 198, 130 A.2d 508 (1957)(alluding to custom in Pennsylvania to grant relief from a judgment entered by default where the failure is due to a mistake or oversight of counsel and where application to open is promptly made). Unfortunately, in this case it was the Defendants themselves who did not act promptly or diligently to protect their own interest. Thus, the Court is constrained to deny the Defendants' Motion to Open Judgment since the motion was not promptly filed and there is not a reasonable explanation to explain or excuse the failure to promptly file the Motion to Open.

In light of this ruling, the Court will sign the proposed Order that Plaintiff submitted with their Motion to Enjoin. The Court notes the language in the proposed Order submitted by the Plaintiff tracks the language in the Declaration of Easement signed by Mr. and Mrs. Shellenberger on August 11, 1990. Although the Court will sign Plaintiff's proposed Order, the Court cautions Plaintiff to exercise discretion in his use of the easement. Plaintiff acknowledged he drafted the easement to transport logs from timbering activities on his property. Regrettably, the easement is very close to the Defendants' residence. Mr. Messner, as Trustee

of the Messner Living Trust (the owner of the easement),
should make all reasonable efforts to use the easement in as
limited manner as possible in order not to interfere with the
Shellenbergers' use and enjoyment of their land and homestead.

O R D E R

AND NOW, this day of November 2002, IT IS HEREBY ORDERED AND DECREED that Dale E. Shellenberger and Cynthia L. Shellenberger be and they are hereby enjoined and prohibited from interfering with Plaintiff, as well as its successors and assigns with the egress, ingress and regress across Defendants' land in Jackson Township, Lycoming County, Pennsylvania, for persons, animals, motor vehicles, equipment, material and supplies from SR RT. 1010 in Jackson Township, Lycoming County, Pennsylvania to Plaintiff's land consisting of 28.737 acres to the north of Defendants' land or from interfering with the installation, maintenance, service, repair or replacement of public and private utilities on said right-of-way for service to Plaintiff, their successors and assigns land from SR RT. 1010 to Plaintiffs approximate 28.737 acres in Jackson Township, Lycoming County, Pennsylvania, more particularly described in Record Book 3770, at Page 46 and which said right-of-way is now particularly bounded and described as follows:

A RIGHT-OF-WAY fifty (50) feet in width extending in a northern and eastern direction from the centerline of Route SR1010 which said centerline on Route SR1010 is south 05 degrees 30 minutes 38 seconds west 170.54 feet from a point in

the North Fork of Roaring Branch Creek which in turn is fifty (50) feet north 80 degrees 19 minutes 32 seconds west 326.93 feet of an iron pin and which said centerline on Route SR1010 is also 47 feet northwest of a tie line measured from a nine (9) inch Ash on the northern right-of-way of said Route SR1010 and which said centerline on Route SR1010 is also 32.15 feet along a tie line north of U.P.; thence from said identified centerline of Route SR1010 the following courses and distances along the centerline of right-of-way in fifty (50) feet width as follows: (1) north 82 degrees 7 minutes 29 seconds east 159.50 feet; (2) north 84 degrees 2 minutes 59 seconds east 113.95 feet; (3) north 61 degrees 12 minutes 30 seconds east 25.29 feet and (4) north 33 degrees 12 minutes 59 seconds east 82.43 feet.

By The Court,

Kenneth D. Brown, J.

cc: Charles Szybist, Esquire
Jonathan Butterfield, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)