

NCO PORTFOLIO MANAGEMENT, INC., ASSIGNEE OF MBNA AMERICA BANK,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
Plaintiff	:	CIVIL ACTION – LAW
	:	
vs.	:	NO. 03-01,944
	:	
STEVEN A. WICKS,	:	
	:	
Defendant	:	PETITION TO STRIKE/OPEN JUDGMENT

Date: June 7, 2004

OPINION and ORDER

Before the Court for determination is the Petition to Strike Off/Open Judgment of Defendant Steven A. Wicks (Wicks) filed March 17, 2004.

Plaintiff NCO Portfolio Management, Inc (NCO Portfolio) instituted the present suit by filing a Complaint on November 21, 2003. The Complaint sought to recover from Wicks the balance of an unpaid credit card debt. On February 12, 2004, NCO Portfolio filed a Praecipe for Judgment on the basis that Wicks had failed to file a response to the Complaint. Included in the Praecipe for Judgment was a certification by NCO Portfolio’s counsel that a written notice of the intention to file the Praecipe was mailed or delivered to Wicks and his attorney of record ten days prior to the filing of the Praecipe. On February 12, 2004, the Lycoming County Prothonotary entered judgment against Wicks.

On February 20, 2004, Wicks filed an Answer with New Matter and Cross-Claim Against Additional Defendants. The Answer denied a majority of NCO Portfolio’s assertions on the basis that the defendant was without knowledge or information sufficient to form a belief to the truth or accuracy of the allegations. The Answer did admit that NCO Portfolio had made a demand upon Wicks for the payment of the \$4,038.68 due, but Wicks has

failed to and refuses to pay all or sum of the debt. In the New Matter, Wicks asserts that NCO Portfolio's claim is barred by the statute of limitations, the doctrine of laches, and the doctrine of usury.¹ In the Cross-Claim, Wicks asserts that any financial loss suffered by NCO Portfolio was solely due to the actions of Stanley Wicks. Wicks avers that Stanley Wicks maintained exclusive control and possession over the credit card issued by MBNA America Bank, NCO Portfolio's assignor of the debt. Wicks further alleges that he did not use the card for any transaction, and that Stanley Wicks used the credit card without Wick's consent. As such, Wicks seeks judgment in his favor, but if liability is found against him, then Stanley Wicks should be found solely and/or jointly and severally liable. Wicks also demands that if there is any verdict recovered against him that a judgment be entered in his favor over and against Stanley Wicks by way of contribution and/or indemnification.

The record reflects that two Sheriff's returns were filed. The first was on March 12, 2004, which indicated that NCO Portfolio's Complaint was served on Wicks on December 18, 2003. The second Sheriff's Return was also filed on March 12, 2004, and it indicated that Wick's Answer was served on Additional Defendant Stanley Wicks on February 24, 2004.

In the Petition to Strike/Open Judgment, Wicks seeks to have the default judgment entered against him on February 12, 2004 stricken or in the alternative opened. Wicks argues that the default judgment should be stricken because the praecipe to enter default judgment is defective. Wicks contends that the defect is NCO Portfolio's failure to enter on the

¹ Wick's New Matter also reserved the right to interpose any additional defenses as continuing investigation, discovery, and trial may impose.

docket service of the Complaint. Wicks also contends that the record is defective because it does not indicate that notice of entry of default judgment was mailed to him pursuant to Pa.R.C.P. 236. In the alternative, Wicks argues that the default judgment should be opened because his Answer was filed only eight days after the Prothonotary entered default judgment and the Answer pleads the meritorious defense of the statute of limitations and contains a cross-claim against the additional defendant, Stanley Wicks, which demands indemnification for any judgment entered against Wicks.

In response, NCO Portfolio contends the default judgment should not be stricken nor opened. NCO Portfolio argues that the record is not defective and does support the entry of default judgment against Wicks. NCO Portfolio asserts that a current, updated docket shows that the required notices and affidavits have been made of record. As such, this moots Wicks argument since the updated recorded indicates by way of the Sheriff's Return filed March 12, 2004 that service of the Complaint was made upon Wicks on December 18, 2003, prior to the entry of default judgment. Therefore, NCO Portfolio contends that the default judgment should not be stricken.

NCO Portfolio also contends that the default judgment should not be open. NCO Portfolio argues that the Petition to Open does not meet the requirements that would permit a court to open a default judgment. NCO Portfolio argues that a petition to open must be filed within a reasonable length of time after the notice of judgment. Here, NCO Portfolio asserts that default judgment not filed within a reasonable length of time after the judgment was entered against Wicks. NCO Portfolio argues that the Wicks' Answer does not present a meritorious defense to the claims asserted in the Complaint because the statute of limitations

defense does not apply here since Wicks made a payment to the creditor on December 8, 1999 and the cross-claim is merely a speculative claim for indemnity and contribution. NCO Portfolio finally argues that Wicks has not presented a reasonable excuse for his failure to plead. NCO Portfolio asserts that the fact that the docket may not have earlier reflected all the filings in the case is not a reasonable excuse when Wicks was in fact served with the Complaint and was apprised of the claims asserted by NCO Portfolio.

The Court is faced with two issues: whether the default judgment entered on February 12, 2004 against Wicks should be stricken and whether the default judgment should be opened. The Court will address the issue of whether the default judgment should be stricken first. The Court will grant the Petition to Strike Off Judgment for the reasons discussed *infra*. The granting of the Petition to Strike moots the Petition to Open and the Court will not address the issues raised therein.

A petition to strike default judgment and a petition to open default judgment are distinct and not interchangeable. *Erie Ins. Co. v. Bullard*, 839 A.2d 383, 386 (Pa. Super 2003). A petition to strike default judgment is a demurrer to the record. *Cintas Corp. v. Lee's Cleaning Servs., Inc.*, 700 A.2d 915, 917 (Pa. 1997); *Triangle Printing Co. v. Image Quest*, 730 A.2d 998, 999 (Pa. Super. 1999). A petition to strike will only be granted if a fatal defect or irregularity appears on the face of the record. *Cintas*, 700 A.2d at 917; *Clymire v. McKivitz*, 504 A.2d 937, 938 (Pa. Super. 1986). “ ‘Matters dehors the record will not be considered, and if the record is self-sustaining, the judgment will not be stricken.’ ” *Clymire*, 504 A.2d at 938 (quoting *Kophazy v. Kophazy*, 421 A.2d 246, 247 (Pa. Super. 1980)). A court may only look at the facts of record at the time the judgment was entered to determine if the record supported the

judgment. *Cintas*, 700 A.2d at 917; *Erie Ins. Co.*, 839 A.2d at 386; *Triangle Printing Co.*, 730 A.2d at 999.

Problems and defects with the service of original process are fatal defects in the record that would permit the granting of a petition to strike. *U.K. LaSalle, Inc. v. Lawless*, 618 A.2d 447 (Pa. Super. 1992); *Continental Bank v. Rapp*, 485 A.2d 480 (Pa. Super. 1984). Of particular importance to the case *sub judice* is the case of *Clymire v. McKivitz*, *supra*. In *Clymire*, the Superior Court affirmed an order striking a default judgment because the defendant was never served with the Complaint. The Superior Court held that a fatal defect exists on the record when it does not disclose that the complaint was ever served upon the defendant. *Clymire*, 504 A.2d at 939. Like *Clymire*, a fatal defect existed on the face of the record in that the record, at the time the judgment was entered, did not reflect that Wicks had been served with the Complaint.

While *Clymire* is factually different from the case *sub judice* in that there the defendant was never served with the Complaint while here Wicks was actually served with the complaint, the same result must be reached and the judgment stricken. The focal point of this Court's inquiry is the record as it existed at the time the default judgment was entered. Default judgment was entered on February 12, 2004. The record as of that date did not reflect that Wicks had been served with the Complaint. The record did not reflect service of the Complaint until the Sheriff's return was filed on March 12, 2004. Therefore, the record did not support the entry of default judgment because at the time the record did not indicate service of the Complaint on Wicks.

The fact that Wicks was actually served with the Complaint prior to the entry of default judgment is not relevant to the Court's determination. Wicks was served with the Complaint on December 18, 2003, which was about two months prior to the entry of default judgment. However, the Court when reviewing the Petition to Strike cannot consider this fact, because it is a fact outside of the record as of the date the default judgment was filed. Also not relevant to the Court's determination is the current status of the record, which does reflect service of the Complaint. The Court must look at the record as it existed at the time the default judgment was entered. If the record is fatally defective at that time, then it could not support the entry of judgment and the subsequent remedy of the record would not alter this. With that said, at the time the judgment was entered the record was devoid of proof of service of the complaint, and therefore, did not support the entry of judgment.

While the NCO Portfolio argues that the Petition to Strike was not filed within a reasonable time after the judgment was entered, the Court need not rule on the reasonableness of any alleged delay. The timeliness of a petition to strike is based on whether the judgment is void or voidable. *Erie Ins. Co.*, 839 A.2d at 388. If the judgment is voidable, then the petition must be filed within a reasonable time after entry of the judgment. *Ibid.* If the judgment is void, then the timeliness of the petition is not a factor and the petition will be granted regardless of delay. *Ibid.*

A judgment is void if there is no authority to enter the judgment. *Erie Ins. Co.*, 839 A.2d at 383; *Fountainville Historical Farm Assoc. v. County of Bucks*, 490 A.2d 843, 848 (Pa. Super. 1985). Personal jurisdiction is required to enter judgment against a person and jurisdiction over a person is dependant upon proper service. *U.K. LaSalle*, 618 A.2d at 449;

Dubrey v. Izaguirre, 685 A.2d 1391, 1393 (Pa. Super. 1990). A judgment entered against a person without proper service is void because there was no personal jurisdiction over the party. *Continental Bank*, 485 A.2d at 483.

The timeliness of the Petition to Strike is not an issue because the judgment entered against Wicks is void. There was a fatal defect in the record that would not permit the Prothonotary to enter judgment. At the time the default judgment was entered, the record did not show that service of the Complaint had been made upon Wicks. Therefore, the Prothonotary lacked the authority to enter the judgment because without service there was no personal jurisdiction over Wicks.

Accordingly, the default judgment entered against Wicks shall be stricken.

ORDER

It is hereby ORDERED that Petition to Strike Off/Open Judgment of Defendant Steven A. Wicks filed March 17, 2004 is GRANTED.

The Petition to Strike is GRANTED and the default judgment entered against Steven A. Wicks on February 12, 2004 is hereby STRICKEN.

No action is taken on the Petition to Open Judgment as it has been rendered moot.

BY THE COURT:

William S. Kieser, Judge

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Judges
Christian J. Kalas, Esquire
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