

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EUROOPTICS, LTD,	: NO. 17-0168
	:
Plaintiff,	:
	:
vs.	: CIVIL ACTION
	:
JOSHUA BOHANON, VOLUME DRIVE, INC.	:
and QUADIX, LLC,	:
	: <i>Petition to Strike/Open;</i>
Defendants.	: <i>Preliminary Objections</i>

OPINION & ORDER

FACTS & PROCEDURE

Eurooptics, Ltd. (“Plaintiff”) originally filed the complaint in this action on February 8, 2017. After difficulty effectuating service of the original complaint, this Court allowed Plaintiff to file an Amended Complaint since the original complaint had not been served. On April 25, 2018, Plaintiff filed its Second Amended Complaint. On August 17, 2018, based on Plaintiff’s continued difficulty in locating Joshua Bohanon, Volume Drive, Inc., and Quadix, LLC (“Defendants”), the Court approved service by alternative means. On October 5, 2018 Plaintiff filed an appropriate Affidavit of Service to the Court. And, on November 2, 2018, the Prothonotary entered default judgment against Defendants jointly and severally in the amount of \$32,858.38 based on Plaintiff’s Praecipe to Enter Judgment, which was also filed on November 2, 2018. Plaintiff’s praecipe certified that Defendants were served, attaching a copy of the ten (10) day notice and copies of the front faces of envelopes that were stamped October 5, 2018 and addressed to Defendants. The notices were mailed to Defendants’ addresses at: 9 East Market Street, Wilkes Barre, PA, 18701; 320 Scott Road, Clarks Summit, PA,

18411; 364 East Main Street, Suite 212, Middletown, DE, 19709; 1143 Northern Blvd, Clarks Summit, PA, 18411; and 353 Orchard Street, Old Forge, PA, 18518.

On December 5, 2018, the Court denied Defendants' request that the Court automatically vacate the November 2, 2018 default judgment in this matter pursuant to Pennsylvania Rule of Civil Procedure 237.3. However, the Court granted Defendants' secondary request and stayed the execution or enforcement of the judgment until a hearing could be held. On January 18, 2019, a hearing was held regarding *Defendants' Preliminary Objections, Plaintiff's Preliminary Objection to Defendants' Preliminary Objections, and Defendants' Petition to Strike/Open the November 2, 2018 Default Judgment* ("Defendants' Petition"). The Court reserved decision.¹ The following is the Court's opinion on Defendants' motions.

DISCUSSION

Regarding petitions to open, the Pennsylvania Supreme Court has noted,

A petition to open is an appeal to the court's equitable powers and is a matter for judicial discretion. This Court will not reverse a lower court ruling, either opening or refusing to open a default judgment unless there was an error of law or a clear, manifest abuse of discretion in this class of case. In determining whether a lower court has abused its discretion we have stated that three factors should be considered and must coalesce before a default judgment can be opened: (1) the petition to open must be promptly filed; (2) the failure to appear or file a timely answer must be excused; and (3) the party seeking to open the judgment must show a meritorious defense.²

The Court finds that Defendants' Petition was not timely filed. The Pennsylvania Rules of Civil Procedure require that Defendants file a petition to open a default

¹ On November 27, 2018, Plaintiff filed its *Preliminary Objection to Preliminary Objections filed by the Defendants*, arguing that Defendants' preliminary objections should not be considered because they were untimely. However, Plaintiff withdrew this argument at the hearing. Therefore, Plaintiff's preliminary objection is dismissed as moot.

² *McCoy v. Pub. Acceptance Corp.*, 305 A.2d 698, 700 (Pa. 1973) (internal citations omitted).

judgment ten (10) days after entry of the default judgment.³ In the case *sub judice*, default judgment was entered on November 2, 2018 and Defendants filed their petition on November 30, 2018. Defendants argue that the petition was timely filed because they filed their preliminary objections on November 5, 2018.⁴ The language of Pa.R.C.P. No. 237.3(b) is clear that the *petition* must be filed within ten (10) days of the entry of default.⁵ While the petition should be accompanied by a “complaint, preliminary objections, or answer that the petitioner seeks leave to file,” the rule does not allow the Court to deem the petition retroactively filed because of said pleadings.⁶ That is, the Court is not able to treat the preliminary objections as a place holder for a petition to open.⁷

Alternatively, even if the Court were to deem Defendants’ petition timely, Defendants’ argument as to why they did not appear or plead in a timely manner is unavailing. Defendants claim they were not provided the ten (10) day Notice of Default required under Pa.R.C.P. 237.5.⁸ However, as the Pennsylvania Rules of Civil Procedure only require Plaintiff to certify that said notice was mailed prior to entry of default judgment, Defendants’ argument does not present a legal defense.⁹ Plaintiff’s November 2nd Praecipe to Enter Judgment was legally sufficient and the Prothonotary did not err in entering the judgment.

³ Pa.R.C.P. No. 237.3(b).

⁴ Defendants’ Petition at 3.

⁵ Pa.R.C.P. No. 237.3(b).

⁶ Pa.R.C.P. No. 237.3(a). Plaintiff’s new position regarding the timeliness of Defendants’ preliminary objections is related to their filing as a pleading; thus, allowing the Court to consider Defendants’ preliminary objections as if attached to their petition.

⁷ See, e.g., *Peters Twp. Sanitary Auth. v. Am. Home & Land Dev. Co.*, 696 A.2d 899, 900, 902 (Pa. Commw. Ct. 1997) (reversing the denial of a petition to open when preliminary objections and later petition to open were filed within the ten (10) day window pursuant to Pa.R.C.P. No. 237.3).

⁸ *Id.* at 3-4.

Finally, Defendants have failed to proffer a meritorious defense in the instant matter. In fact, Defendants have not even filed an answer. For these reasons, Defendants' *Petition to Open* is **DENIED**.¹⁰ Concomitantly, Defendants' *Petition to Strike* is also **DENIED** as there is no fatal defect on the face of the record.¹¹ Accordingly, since the Court will not be opening or striking the default judgment in this matter, Defendants' Preliminary Objections are **DISMISSED** as moot.¹²

ORDER

AND NOW, having denied Defendants' petition to open or strike the default judgment and dismissing Defendants' preliminary objections as moot, the Court's December 5, 2018 stay of the execution or enforcement of the judgment underlying this matter is hereby **LIFTED**.

⁹ Pa.R.C.P. 237.1(a)(2) ("No judgment of non pros for failure to file a complaint or by default for failure to plead shall be entered by the prothonotary unless the praecipe for entry includes a certification that a written notice of intention to file the praecipe was mailed or delivered.").

¹⁰ The Court also notes that service of the complaint through alternative means was approved by the Court on August 17, 2018. See Pa.R.C.P. No. 430. Plaintiff filed an appropriate Affidavit of Service to the Court on October 5, 2018; thus, service of the complaint was proper.

¹¹ *Resolution Tr. Corp. v. Copley Qu-Wayne Assocs.*, 683 A.2d 269, 273 (Pa. 1996) ("petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record"). While Defendants title their Petition as involving striking or opening the default judgment, the petition section dealing with the motion to strike also provides argument for opening the default judgment. Defendants' Petition to Strike or Open Default Judgment at 3 (Nov. 30, 2018) (hereinafter "Defendants' Petition"); *Stauffer v. Hevener*, 881 A.2d 868, 870 (Pa. Super. Ct. 2005) ("A petition to open a default judgment and a petition to strike a default judgment seek distinct remedies and are generally not interchangeable. A petition to open a default judgment is an appeal to the discretion of the court which will only be granted if there is a manifest abuse of discretion or error of law. On the other hand, a petition to strike a default judgment will only be granted where there is a fatal defect or irregularity that is apparent from the face of the record.").

¹² See *generally* Preliminary Objections of the Defendants, Joshua Bohanon, Volume Drive, Inc. & Quadix, LLC, to the Second Amended Complaint of Eurooptics, Ltd. (Nov. 5, 2018).

IT IS SO ORDERED this 8th day of February 2019.

BY THE COURT:

Eric R. Linhardt, Judge

cc: William P. Carlucci, Esq.
Andrew J. Katsock, III, Esq., *15 Sunrise Drive, Wilkes-Barre, PA 18705*
Suzanne M. Fedele, Lycoming County Prothonotary
Gary Weber, Esq. (Lycoming Reporter)