

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PENNSYLVANIA

NEXTGEN MEDSTAFF, LLC,	:	
Plaintiff,	:	CV-22-01,029
	:	
vs.	:	
	:	
EMBASSY LOYALSOCK, LLC, d/b/a	:	
EMBASSY OF LOYALSOCK,	:	CIVIL ACTION - LAW
Defendant.	:	

OPINION AND ORDER

AND NOW, this 28th day of April 2023, upon consideration of the Defendant's Petition to Open/Strike Default Judgment, it is hereby ORDERED that the petition to strike default judgment is GRANTED and that the petition to open default judgment is DISMISSED as moot, for the reasons set forth below.

I. BACKGROUND

Plaintiff Nextgen Medstaff, LLC commenced this action by Complaint filed October 20, 2022, in which Plaintiff alleges that it provided certain services to Defendant pursuant to a written agreement, that it invoiced Defendant for those services, that Defendant failed and/or refused to remit payment to Plaintiff in the amount of \$54,105.80 in accordance with the terms of the agreement, that Defendant thereby breached its agreement with Plaintiff, and that Plaintiff is entitled to appropriate damages. The Complaint, which did not contain a notice to defend, was not served by the Sheriff, as required by the Pennsylvania Rules of Civil Procedure; however, Defendant received actual knowledge of the Complaint at some point not specifically disclosed in the record.¹

¹ At argument, the attorneys for the parties agreed upon certain background information: that the Complaint was not properly served upon the Defendant; that the Defendant was in transition, the facility where the Complaint was served having been sold, and Defendant was in the process of moving out while the new owner/operator was in the process of moving in; that the Defendant

Defendant did not file a responsive pleading within twenty days after service of the Complaint, as ordinarily required by the Rules. Plaintiff thereafter served a ten-day notice of default upon the Defendant on November 28, 2022 by first class mail. When no responsive pleading was filed, Plaintiff filed a Praecipe for Entry of Judgment by Default for Failure to Plead on January 12, 2023, and the Prothonotary duly entered a default judgment against Defendant on the same day in the amount of \$62,155.31. Plaintiff served the Praecipe upon Defendant by certified mail, return receipt requested.

On February 15, 2023, Defendant filed an Answer with New Matter to the Complaint. On the next day, February 16, 2023, Defendant filed the instant Petition to Open/Strike the Default Judgment.

II. APPLICABLE LAW

Rule 1007, Pennsylvania Rules of Civil Procedure,² permits a plaintiff to commence an action against a defendant by complaint. Rule 1026³ provides that subsequent pleadings⁴ are due within twenty days after service of the preceding

actually received the Complaint at some time on or before December 9, 2022; that on December 9, 2022, Defendant forwarded the Complaint and the 10 day notice of default that had been issued by that point to counsel; that Defendant's counsel contacted Plaintiff's counsel on December 9, 2022 and told Plaintiff's counsel he expected to file an answer on or before December 31, 2022; that Plaintiff's counsel agreed not to praecipe for a default judgment before December 31, 2022; that Defendant did not, in fact, file an answer by December 31, 2022 because of transition and communication issues; that Plaintiff's counsel did not serve a copy of the praecipe to enter a default judgment on the Defendant's counsel because Defendant's counsel had not yet entered his appearance in the case; that Defendant's counsel was able to and did file an answer by February 15, 2023; that Defendant's counsel thereafter became aware of the default judgment when he reviewed the docket, whereupon he promptly filed a petition to open/strike the default judgment. The Court will not consider this background for reasons set forth in this opinion. See, *infra*, n.15.

² Pa. R.C.P. 1007(2): "An action may be commenced by filing with the prothonotary ... a complaint."

³ Pa R.C.P. 1026(a): "Except as [otherwise] provided ..., every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead."

⁴ An answer to a complaint is a subsequent pleading. See Pa. R.C.P. 1017(a)(1).

pleading. Rule 1037(b),⁵ in appropriate circumstances and upon praecipe of the plaintiff, requires the Prothonotary to enter judgment by default against a defendant when the defendant has not timely filed a responsive pleading. Prior to entry of default judgment, Rule 237.1⁶ requires a plaintiff, after the defendant's failure to plead to the complaint and at least ten days prior to entry of judgment by default, to certify that he has served upon the defendant written notice of his intention to seek entry of default judgment. "The notice and certification required by this rule may not be waived."⁷ Upon entry of judgment by default, a defendant may file a petition for relief therefrom pursuant to Rule 237.3.⁸

III. ANALYSIS

"A petition to open a default judgment and a petition to strike a default judgment seek distinct remedies and are generally not interchangeable."⁹ A petition to open a default judgment appeals to the court's equitable powers and will be granted or denied within the court's sound discretion,¹⁰ provided, however, that a default judgment must be opened if the petition to open is filed within ten days

⁵ "The prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend...." Pa. R.C.P. 1037(b).

⁶ Pa. R.C.P. 237.1(a)(2)(ii): "No judgment ... 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 ... after the failure to plead to a complaint and at least ten days prior to the date of the filing of the praecipe to the party against whom judgment is to be entered and to the party's attorney of record, if any...."

⁷ Pa. R.C.P. 237.1(a)(4).

⁸ Pa. R.C.P. 237.3(a) & (b)(2): "A petition for relief from a judgment of non pros or by default entered pursuant to Rule 237.1 shall have attached thereto a copy of the complaint, preliminary objections, and/or answer which the petitioner seeks leave to file. All grounds for relief shall be raised in a single petition.... If the petition is filed within ten days after the entry of a default judgment on the docket, the court shall open the judgment if one or more of the proposed preliminary objections has merit or the proposed answer states a meritorious defense."

⁹ *Stauffer v. Hevener*, 881 A.2d 868, 870 (Pa. Super. 2005).

¹⁰ *Graziani v. Randolph*, 856 A.2d 1212, 1223 (Pa. Super. 2004), *alloc. denied*, 875 A.2d 1075 (Pa. 2005).

after entry of the default judgment and if the defendant states a meritorious defense.¹¹

Conversely, a petition to strike a default judgment is a demurrer to the record and “may be granted only for a fatal defect or irregularity appearing on the face of the record.”¹² A fatal defect on the face of the record denies the prothonotary the authority to enter judgment, whereupon that judgment is rendered void *ab initio*.¹³ “A judgment is void on its face if one or more of three jurisdictional elements is found absent: jurisdiction of the parties; subject matter jurisdiction; or the power or authority to render the particular judgment.”¹⁴

A review of the record here discloses at least two defects on the face of the record.¹⁵ First, Plaintiff’s Complaint filed of record does not contain a notice to defend, and, secondly, the record contains no evidence that Plaintiff’s Complaint was properly served upon the Defendant.

¹¹ Pa. R.C.P. 237.3(b)(2); see, *supra*, n.8.

¹² *Green Acres Rehabilitation and Nursing Center v. Sullivan*, 113 A.3d 1261, 1267 (Pa. Super. 2015) (quoting *Midwest Financial Acceptance Corp. v. Lopez*, 78 A.3d 614, 622–23 (Pa. Super. 2013)).

¹³ *Erie Ins. Co. v. Bullard*, 839 A.2d 383, 388 (Pa. Super. 2003).

¹⁴ *Green Acres*, *supra*, 113 A.3d at 1268 (quoting *Flynn v. Casa Di Bertacchi Corp.*, 449. 606, 674 A.2d 1099, 1105 (Pa. Super. 1996)).

¹⁵ For purposes of the Petition to Strike the Default Judgment, the Court considers only the information that was available to the Prothonotary at the time the default judgment was entered on January 12, 2023. In entering a default judgment upon praecipe by a party, a prothonotary acts in a ministerial and not in a judicial capacity. As such, a default judgment not clearly authorized by the rules of civil procedure is a nullity. *Pa. Institutional Health Services, Inc. v. Commw., Dep’t of Corrections*, 647 A.2d 692, 694 (Pa. Commw. 1994) (citing *Maiorana v. Farmers & Merchants Bank*, 466 A.2d 188, 190-91 (Pa. Super. 1983)). “In such a sensitive area as the taking of judgment by default, substantial compliance with the rule is required.” *Gangi v. Delco Cab Co.*, 411 A.2d 798, 800 (Pa. Super. 1979) (striking a default judgment entered after failure to answer interrogatories served in aid of garnishment which failed, in violation to the applicable rule of civil procedure, to include a notice advising the garnishee that failure to answer could result in entry of a default judgment).

A. Failure of the Complaint to contain a notice to defend.

The Complaint here does not contain a notice to defend.¹⁶ Rule 1018.1, Pennsylvania Rules of Civil Procedure, requires a plaintiff to file a notice to defend with his complaint.¹⁷ After a complaint is filed, a defendant may oppose the relief sought therein by filing a responsive pleading, but “no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead.”¹⁸

Rule 1037(b) provides that “[t]he prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint *which contains a notice to defend....*”¹⁹ Thus, a complaint must contain a notice to defend in order for the prothonotary to enter a judgment by default against a defendant, which makes sense because a defendant is under no obligation to respond to a complaint that does *not* contain a notice to defend. Since the Complaint here does not contain a notice to defend, the Defendant was under no obligation to plead to it, and the Prothonotary lacked authority to enter judgment by default against the Defendant. Thus, a jurisdictional element prerequisite to entry of default judgment is missing from the record.²⁰

¹⁶ The Court raises this issue *sua sponte* because it is jurisdictional in nature.

¹⁷ Pa. R.C.P. 1018.1(a): “Every complaint filed by a plaintiff ... shall begin with a notice to defend....”

¹⁸ Pa. R.C.P. 1026(a).

¹⁹ Pa. R.C.P. 1037(b) (emphasis added).

²⁰ See, *supra*, n.14. See also *Gangi, supra*, 411 A.2d at 800. *Gangi* involved interrogatories served in aid of garnishment. The notice served upon the garnishee advised that the interrogatories must be answered within 20 days, but failed to state that failure to answer may result in entry of a default judgment. The Superior Court held that the default judgment that was entered failed to comply substantially with the applicable rule of civil procedure, which provided that such interrogatories were required to include a notice to plead advising the garnishee, *inter alia*, that failure to answer within 20 days could result in entry of a default judgment. Since the interrogatories did not advise garnishee of the possible default judgment, it was held to be void. *Id.*

B. Improper service of the Complaint.

Proper service is necessary for the court to adjudicate a matter, because absent service the court lacks jurisdiction over the defendant.

Service of process is a mechanism by which a court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed. Without valid service, a court lacks personal jurisdiction of a defendant and is powerless to enter judgment against [the defendant].²¹

With certain limited exceptions inapplicable to the instant matter, Rule 400(a) requires original process to be served within Pennsylvania by the Sheriff.²² The court file does not contain a return of service indicating that the Defendant was served by the Sheriff or in any other manner authorized by the Rules of Civil Procedure. As such the court lacked jurisdiction over the Defendant at the time the Prothonotary entered judgment by default against it.²³ Accordingly, a second jurisdictional element prerequisite to entry of default judgment is missing from the record.²⁴

C. Conclusion.

Because the record discloses at least two defects on its face, the Prothonotary lacked authority to enter judgment by default against the Defendant. As such, the default judgment entered against the Defendant on January 12, 2023

²¹ *Penn National Mutual Casualty Ins. Co. v. Phillips*, 276 A.3d 268, 274 (Pa. Super. 2022) (citing *Cintas Corp. v. Lee's Cleaning Services, Inc.*, 700 A.2d 915, 917-18 (Pa. 1997) (citing *Sharp v. Valley Forge Medical Ctr. and Heart Hosp., Inc.*, 221 A.2d 185 (Pa. 1966) and *U.K. LaSalle, Inc. v. Lawless*, 618 A.2d 447 (Pa. Super. 1992))).

²² Pa. R.C.P. 400(a): "... [O]riginal process shall be served within the Commonwealth only by the sheriff."

²³ The Court notes that personal jurisdiction is waivable. *See, e.g., Wagner v. Wagner*, 768 A.2d 1112, 1119 (Pa. 2001) (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982)). A party who makes a filing or appears in court waives any objection to the court's jurisdiction on the basis of personal jurisdiction. *Mallory v. Norfolk Southern Ry. Co.*, 266 A.3d 542, 548 (Pa. 2021) (citing *Ins. Corp. of Ireland, supra*, 456 U.S. at 702-03). Thus, when Defendant filed an answer to the Plaintiff's Complaint on February 15, 2023, Defendant waived defective service and submitted to personal jurisdiction of this Court.

²⁴ *See, supra*, n.14.

is void *ab initio* and must be stricken.²⁵ In rendering this decision, the Court has construed the Rules of Civil Procedure strictly, notwithstanding the general rule that “[t]he rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable....”²⁶ The Court takes this approach (1) because “[i]n such a sensitive area as the taking of judgment by default, substantial compliance with the rule is required,”²⁷ (2) because “[t]he law is clear that generally, default judgments are disfavored,”²⁸ and (3) because although the Court may disregard any error or defect of procedure at any stage of a proceeding, it may do so only when the error or defect does not affect the substantial rights of the parties,²⁹ which would be the case here were the Court to disregard the errors in procedure noted above and to permit entry of default judgment against the Defendant.

Since the Court has granted the Defendant’s petition to strike default judgment, it is unnecessary to address the Defendant’s petition to open default judgment. The Court, therefore, declines to do so and will dismiss the Petition to open default judgment as moot.

²⁵ A judgment that is void *ab initio* is a legal nullity, *Oswald v. WB Public Square Associates, LLC*, 80 A.3d 790, 797 (Pa. Super. 2013) (citing *Erie Ins. Co. v. Bullard*, 839 A.2d 383, 388 (Pa. Super. 2003) (citing *Mullen v. Slupe*, 360 Pa. 485, 62 A.2d 14, 16 (1948) (quoting *Long v. Lemoyne Borough*, 222 Pa. 311, 71 A. 211, 212 (1908))), and “must be stricken without regard to the passage of time.” *Id.* (quoting *Jones v. Seymour*, 467 A.2d 878, 880 (Pa. Super. 1983) and citing *Helms v. Boyle*, 637 A.2d 630, 632 n.2 (Pa. Super. 1994)).

²⁶ Pa. R.C.P. 126: “The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.”

²⁷ *Gangi v. Delco Cab Co.*, *supra*, 411 A.2d at 800.

²⁸ *AmeriChoice Federal Credit Union v. Ross*, 135 A.3d 1018, 1026 (Pa. Super. 2015) (citing *Attix v. Lehman*, 925 A.2d 864, 866 (Pa. Super. 2007)).

²⁹ Pa. R.C.P. 126.

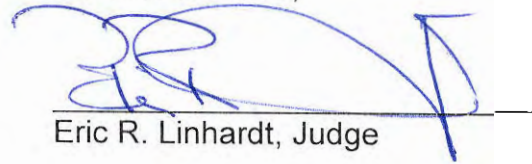
IV. ORDER

Accordingly, it is hereby ORDERED and DIRECTED as follows:

1. The Defendant's petition to strike default judgment filed February 16, 2023 is hereby GRANTED;
2. The default judgment entered against the Defendant on January 12, 2023 is hereby STRICKEN;
3. The Defendant's petition to open default judgment filed February 16, 2023 is hereby DISMISSED as moot; and
4. The Prothonotary shall mark the record accordingly.

IT IS SO ORDERED,

BY THE COURT,



Eric R. Linhardt, Judge

ERL/bel

cc: Blake C. Marks, Esq.
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Burns White Center, 48 26th Street, Pittsburgh, PA 15222
Gary Weber, Esq. (Lycoming Reporter)
Prothonotary