However, the owners must be informed of the basis of the builder's claim to prepare a defense. "Surely, the invoices and dates of delivery or installation of each nail and board are matters of evidence and can best be obtained by discovery, but defendants are entitled to know at least what general items contribute to the total in a cost plus or quantum meruit contract." *Starcu Construction and Real Estate Co. vs. Kresge and Metzger*, 30 Lehigh Co., L. J. 201, 204 (1963). As to what was required to be put into the premises under the contract, that document though not necessarily required to be pleaded as we will discuss later, affords each party with a record of what was to be done. As to the additions, there may be questions that require them to be enumerated. As we said earlier, at trial an evaluation must be made of the goods and services rendered by the builder in terms of money. And since we have found that the correct measure of damages is the reasonable value of all the owners have received by the performance of the contract in terms of the amount for which such services and material could have been purchased from one in the builder's position at the time they were rendered, the builder must provide the owners with information on what he deems to be extras by listing them and stating generally what was contemplated and what was done. Accordingly we will require a more specific Complaint on this point as requested.

FAILURE TO ATTACH A COPY OF THE CONTRACT

Pa. R.C.P. 1019(h) requires plaintiff to attach a copy of a writing to the Complaint if the claim is based upon a writing. In these cases there were written contracts between the builder and the owners and each of the owners has asked us to strike the Complaint because the contracts are not attached. In *Gilson v. Twin Trailer Sales of Sharon, Inc.*, 53 D & C2d 211 (1971), the Plaintiff alleged a breach of contract but was seeking recission of the contract itself rather than damages. The Court held that Rule 1019(h) did not require the attachment of the agreement unless it was to be relied on as an element in the case and that the terms of the contract are probably irrelevant where the Plaintiff seeks to rid himself of the contractual obligation. In these cases the builder does not base his recovery on the contracts. Instead he is treating them as rescinded. As his claim is not based on the contracts, they need not be attached to the Complaint.

The remaining preliminary objections have either been discussed and decided within the preceding sections or have no merit and are therefore denied.

ORDER OF COURT

NOW, March 29, 1978, the Defendants' preliminary objections are denied, except the motion for a more specific complaint is granted as to an itemization of the extra or additional work done by the Plaintiff as outlined in the opinion. The Plaintiff is given twenty (20) days from this date to file an amended complaint or suffer non pros.

WYCKO v. EASTLAND MOTORS, INC., C.P., Franklin County Branch, A.D. 1977-570

Default Judgment - Pa. R.C.P. 209 - Petition and Order to Open Judgment - Pulisevich Petition

1. The Court's opinion in *Pulisevich Petition*, 63 D&C 357 (1948), holding that Pa. R.C.P.209 would not be followed in the 39th Judicial District, is specifically limited to matters involving custody of children.

2. A default judgment in an action in trespass will be opened where all of the following factors are present: (1) the failure of a defendant to answer or appear is due to an inadvertent mistake by his insurer (2) the plaintiff takes a judgment in default, without notice of his intention to do so, shortly after the expiration of the answer's due date; (3) the defendant moves promptly to petition for the judgment to be opened; and (4) the prejudice to the defendant by not opening the judgment would be out of proportion and greater than that caused to the plaintiff by opening the judgment.

Lawrence C. Zeger, Esq., Attorney for Plaintiff

Robert C. Schollaert, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., March 13, 1978:

This action in trespass was commenced by the filing of a complaint in the office of the Prothonotary on October 21, 1977. A true copy of the complaint was served upon the treasurer of the defendant at its place of business by a deputy sheriff on October 21, 1977 at 4:15 P.M. A praecipe for default judgment was filed in the Prothonotary's Office at 8:29 A.M. on November 14, 1977, and judgment was entered against the defendant. Counsel for the defendant presented a petition to open judgment on November 23, 1977, and an order was entered the same date granting a rule upon the plaintiff to show cause why the judgment should not be opened. The rule was

served by mailing a true copy to counsel for the plaintiff on November 23, 1977. An answer to defendant's petition was filed December 7, 1977, and a true copy served upon counsel for the defendant. On motion of counsel for the defendant, a hearing was scheduled for 10:30 A.M. on January 23, 1978, continued until January 30, 1978, at 2:30 P.M. and on that date held.

At the inception of this hearing, the Court inquired of counsel why the procedure prescribed by Pa. R.C.P. 209 had not been followed and why the Court should not apply the admission provisions of Pa. R.C.P. 209(b) in the case at bar. Counsel advised that they had proceeded in reliance upon *Pulisevich Petition*, 63 D&C 357 (1948), a case decided by the Honorable Edmund C. Wingerd, then president judge of this Court. Judge Wingerd concluded that Pa. R.C.P. 209 would not be followed in this Judicial District by reason of the then well-known and well-recognized practice of the court hearing evidence on petitions and answers, or by the appointment of an examiner rather than proceeding by deposition.

The decision in *Pulisevich Petition*, supra, was absolutely correct and a practical and reasonable solution for the time when it was rendered. However, the court's schedule and the demands upon the time of clients, witnesses, lawyers and judges in recent years has led to the increased use of depositions, masters and examiners in lieu of formal court proceedings on many issues raised by petition and answer. The hearing in the instant case was held because counsel had in good faith relied upon an earlier decision of this Court, and were present with their clients and witnesses prepared to proceed. It would have been unconscionable to do otherwise. We do, however, at this time specifically limit the decision in *Pulisevich Petition*, supra, to matters involving custody of children and conclude that Pa. R.C.P. 209 shall hereafter be followed in both branches of this judicial district unless otherwise provided.

We make the following findings of fact:

1. The vice president and general manager of the defendant received a letter from the plaintiff of July 26, 1977 advising of his claim against defendant.

2. Charles E. Yeagley, a claim adjuster for defendant's insurance carrier, was assigned to handle plaintiff's claim on August 1, 1977.

3. On August 4, 1977 Dennis A. Zeger, Esq., counsel for plaintiff, wrote to defendant advising of his representation of plaintiff.

4. On August 12, 1977 Mr. Yeagley and Mr. Zeger conferred by telephone concerning the claim. Mr. Zeger was requested to submit documentation of plaintiff's claim.

5. On August 22, 1977 Attorney Zeger mailed the information he believed was requested by the claims adjuster to him, and it was received on August 23, 1977 by Mr. Yeagley, who felt the information was incomplete.

6. On September 12, 1977 Attorney Zeger again wrote to the adjuster requesting a response to plaintiff's demend, and it was received on September 13, 1977.

7. Mr. Yeagley attempted to contact Attorney Zeger by telephone on September 14, 1977, and testified that he left a message requesting the attorney to return the call. Mr. Zeger did not receive the message.

8. The claims adjuster made no further effort to contact the plaintiff or his counsel.

9. The plaintiff's complaint was served on defendant on October 21, 1977, and delivered to defendant's vice president and general manager on October 25, 1977. A legally sufficient notice to plead within twenty (20) days of service was attached to the copy of the complaint served on defendant.

10. The defendant's vice president and general manager on October 25, 1977 personally notified Edward C. Zimmerman, President of McDowell Insurance Inc., of service of the complaint upon defendant. McDowell Insurance Inc. is the local insurance agent for defendant.

11. Pursuant to Mr. Zimmerman's instruction, defendant's vice president and general manager delivered the complaint to Mr. Zimmerman on October 26, 1977.

12. McDowell Insurance Inc. on October 26, 1977, forwarded plaintiff's complaint by regular mail to the Pittsburgh Office of Federal Insurance Co., Attention: Claims Dept., 1 Oliver Plaza, Pittsburgh, Pennsylvania.

13. The complaint forwarded by the local insurance agency to defendant's insurance carrier was never received, and no explanation for its non-delivery can be given.

14. No action was taken in response to plaintiff's complaint by the defendant, McDowell Insurance Agency, Federal Insurance Co. or the insurance carrier's adjuster.

15. The plaintiff filed his praecipe for a default judgment at 8:29 A.M. on November 14, 1977, and judgment was entered thereon in favor of the plaintiff and against the defendant.

16. November 14, 1977 was the first day following the expiration of the twenty (20) day period after service when the Franklin County Court House was open and it was possible for the plaintiff to take a default judgment.

17. Neither plaintiff nor his counsel gave oral or written notice of intention to take a default judgment to the defendant, McDowell Insurance Inc., Federal Insurance Co. or the claims adjuster.

18. The petition to open judgment was presented to the Court on November 23, 1977, the ninth day following the entry of judgment.

19. The defendant alleged in its petition that it was a meritorious defense to the plaintiff's complaint.

20. The defendant alleged in its petition that the plaintiff will be neither prejudiced or harmed by the opening of the judgment. The plaintiff offered no evidence to the contrary.

DISCUSSION

A petition to open a judgment by default is essentially an equitable proceeding ruled by equitable principles and is addressed to the sound discretion of the court. *Richmond v. A. F. of L. Medical Service Plan of Philadelphia*, 415 Pa. 561, 562, 204 A. 2d 271, (1964); *Toplovich v. Spitman*, 239 Pa. Super. 327, 361 A. 2d 425, 426 (1976). A default judgment should be opened only when both of the following requirements have been fulfilled: (1) the defendant has promptly filed his petition to open judgment; and (2) the defendant can reasonably excuse or justify his failure to appear or answer. *Balk v. Ford Motor Co.*, 446 Pa. 137, 285 A. 2d 128 (1971); *Day v. Wilkie Buick Co.*, Pa. Super. ,361 A. 2d 823 (1976).

The failure of a defendant to appear or answer because of some error or lapse on the part of his insurer has been asserted as grounds for opening judgment in petitions in many cases. The courts of the Commonwealth have gone both ways on this issue under various cirsumstances, and a brief review of the law on this point is necessary.

In *Namie v. Stephenson*, 38 Wash. 46 (1957), the complaint in an action in trespass for personal injuries was served upon the defendants on June 22, 1956. They delivered it to their insurance agent on the same day, and he assured them that the matter would be looked after and taken care of. For some reason the matter was ignored by the insurer and nothing was done. A default judgment was entered forty-one days after service of the complaint. Two and one half months after that a petition to open judgment was submitted. The Court, in refusing to open judgment, stated at p. 49:

> "When this action was brought, the complaint was also promptly delivered to the same agent, which was sufficient notice that suit had been entered. . . . So far as the plaintiffs are concerned, their judgment was legally obtained, the Rules of Civil Procedure were fully complied with, and to deprive them of their fruits of their judgment would be improper and unjust. . . . The difficulty in which the defendants find themselves was not in any way of their own making, but is due to their insurance carrier. In any event it is not the responsibility of the plaintiffs."

In *Colacioppo v. Holcombe*, 166 Pa. Super. 186, 70 A. 2d 452 (1949), the Superior Court refused to reverse an order dismissing a petition to open default judgment where the failure to appear was due to an error on the part of the defendant's insurer, because there was not a clear abuse of discretion by the trial court.

In *Murphy v. Smith*, 415 Pa. 512, 204 A. 2d 275 (1964), the pertinent facts were as follows: On November 20, 1962 the plaintiffs caused a summons in trespass to be served upon the defendant. The defendant gave it to his insurance agent, who advised him that " There must be some mistake. Forward it to me and I will take care of it once more." (Opinion, at p. 513) The defendant followed these instructions and heard nothing more about the matter until he learned, quite by accident, that a default judgment had been entered on June 26, 1963. On July 18, 1963, defendent's petition to open default judgment was filed. In affirming the order dismissing the petition, the Court stated, at p. 514:

> "The court below properly held that the failure of the insurance broker to take steps to protect the defendant, though perhaps giving rise to a cause of action by the defendant against the broker and/or insurance carrier, could not deprive the plaintiffs of their right to judgment in reliance on the defendant's non action. . . . Since the broker and/or insurance company is not hired to protect the defendant

generally in their litigation and necessarily would have the desire to limit their consideration to insurance coverage only, the defendant should have taken further steps to insure protection of his rights. As between defendant and the plaintiffs the responsibility for the broker's actions must remain on the defendant. . . ."

It is clear from the decisions in these cases that a court is not required to open a judgment because of neglect in the office of the defendant's insurer, but it is a well established principle that equity abhors forfeiture, and the equities in each case will be carefully examined and weighed.

It is true, and the plaintiff herein does not contest the fact, that "snap judgments" taken quickly after the expiration of an answer's due date are looked upon with disfavor by the courts of the Commonwealth. *Slott v. Triad Distributors, Inc.*, 230 Pa. Super. 545, 548, 327 A. 2d 151, 152 (1974); *Kraynick v. Hertz*, 443 Pa. 105, 111, 277 A. 2d 144, 147 (1971); *Ruggiero v. Phillips*, Pa. Super. , 378 A. 2d 971, 973-974 (1977). It is equally true that, as stated by the Pennsylvania Supreme Court in *Kraynick*, supra, at p. 147, "The entry of a judgment by default finds its authority in the law (Pa. R.C.P. Sections 1037, 1047, 1511), 12 P.S. appendix. . . ."

As previously noted Pennsylvania courts have also held that failure of a defendant to appear or answer because of some neglect on the part of his insurer will constitute an adequate ground from which to open a default judgment. In *Scott v. McEwing*, 337 Pa. 273, 10 A. 2d 436, 437 (1940), the court held:

> "Here the default occurred through no negligence of either defendant or his counsel, but through an inadvertence on the part of defendant's insurance carrier. As the application for relief was promptly made (petition to open was filed five days after judgment was entered), the court below was of the opinion that to deprive defendant of a jury trial in this case, where the claim is for $20,000.00, would constitute 'a gross miscarriage of justice.' Under the circumstances we cannot say there was an abuse of discretion."

In *Balk v. Ford Motor Co.*, 446 Pa. 137, 285 A. 2d 128, 131-132 (1971), the court stated, after finding that the requirement that the moving party act promptly had been met:

> "The critical question, therefore, is whether an error of this sort by an insurance carrier, viz., losing a customer's court papers, constitutes sufficient legal justification to open a default judgment against the insured. This court has held that it does."

An obvious question arises and must now be confronted: How can decisions as apparently conflicting as those in *Colacioppo* and *Murphy* and with those in *Scott* and *Balk* be reconciled?

A partial answer is presented in *Balk*, supra, at p. 132, where the court refers to the *Colacioppo* and *Murphy* cases and notes that they "appear to be marked by a deliberateness of misconduct on the part of the insurance company which is not present here." Another important factor in *Murphy v. Smith*, supra, was stated by the court at p. 514:

> "If the judgment were permitted to be opened, the plaintiff's cause of action against the corporation would be barred by the statute of limitations."

We are in agreement with Judge Buckingham's analysis in *Bonner v. Markey*, 82 York L. R. 174, 176 (1968), when he states after reviewing the law on this question:

> "It becomes apparent that the courts have generally not opened the judgment where the insurance company was dilatory but have usually opened the judgment where the company's delay in having an appearance entered for the defendant was due to a mistake or a mix-up."

We find that the present case falls within the latter category. The plaintiff's complaint was apparently lost in the mail since it was forwarded by the defendant's local insurance agency to his insurance carrier but was never received by the latter. There was no evidence of deliberate tactics or even of extreme carelessness or neglect by the insurer.

The petitioner did promptly file his petition to open the judgment. The court stated in *Toplovich v. Spitman*, supra, "Filing the petition to open judgment nine days following entry of judgment . . . is prompt action."

The fact that the default judgment was taken without notice of intention to do so at 8:27 A.M. on the first day following the expiration of the twenty day period after service when the Franklin County Courthouse was open, and it was possible for the judgment to be taken, must be taken into consideration. The plaintiff argues strenuously that no attorney had entered an appearance at the time the judgment was taken, and asserts he could not therefore have been expected to give notice of his intention to enter a default judgment. We find it unnecessary to discuss this issue. While notice of such an intention is not required per se, it is a matter of professional

courtesy which could have been accorded the defendant or the defendant's insurance adjuster.

In any event, the statement in *Kraynick v. Hertz*, supra, applies equally to the instant case:

> "Viewing the totality of circumstances herein presented, particularly the entry of the default judgment at 8:39 on the morning of the twenty-first day--a time when most court offices are not yet open for business--indicates that in good conscience the defendant should be let into a defense."

The plaintiff has not alleged or proved that any prejudice would be done him by the opening of the judgment

We conclude that a default judgment in an action in trespass will be opened where, as in the instant case, all of the following factors are present: (1) the failure of a defendant to answer or appear is due to an inadvertent mistake by his insurer; (2) the plaintiff takes a judgment in default, without notice of his intention to do so, shortly after the expiration of the answer's due date; (3) the defendant moves promptly to petition for the judgment to be opened; and (4) the prejudice to the defendant by not opening the judgment would be out of proportion and greater than that caused to the plaintiff by opening the judgment.

ORDER

NOW, this 13th day of March, 1978, the defendant's petition to open the judgment is granted, the rule issued thereon is made absolute, and the judgment is opened for the purpose of permitting the defendant to enter a defense to the same.

RICKER v. FICKES ET. AL., C.P., Franklin County Branch, No. 54 November Term, 1974

Assumpsit - Permissive Counterclaim - Pa. R.C.P. 1031(a)

1. Under the express language of Pa. R.C.P. 1031(a), counterclaims are permissive and not mandatory, whether or not related to the subject matter of the action.

Harvey C. Bridgers, Jr., Esq., Attorney for Plaintiffs

Kenneth E. Hankins, Jr., Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., September 8, 1975:

The matter before the Court is a demurrer by plaintiffs to a preliminary objection raising the defense of pendency of a prior action.

Plaintiffs are the owners and defendants are the contractors under a contract for the construction of a house. The complaint alleges that the contractors breached the contract by building the roof improperly. The defendants' preliminary objection is a petition raising the defense of pendency of a prior action. Plaintiffs' demurred to this preliminary objection.

Defendants filed a complaint some five months before the present action against the owners based on a breach of the same contract by the latter. The contractor claimed the owners failed to pay sums due under the contract and for extra items and work. The owners filed an answer in that action denying that the contractors had fully performed and specifying several defects including, inter alia, that the roof leaks. It did not include a counterclaim. The narrow question then is whether one who is a defendant in a prior assumpsit action may institute an assumpsit action against the plaintiff in the prior action based on a cause arising out of the subject matter of the earlier action in which he had the option of asserting that cause as a counterclaim.

There appears to be no appellate court authority on this precise question but the lower courts and the commentators unanimously take the position that on such facts as are alleged here, the prior action is no ground for abatement of the later. Under the express language of Pa. R.C.P. 1031(a) counterclaims are purely permissive and not compulsory or mandatory, whether or not related to the subject matter of the action. Cf. F.R.C.P. 13(a) and (b). The choice of whether to counterclaim or not being completely discretionary with the defendant, his failure to do so can constitute no impediment to later assertion of the claim by a separate action, subject, of course, to the constraints of the statute of limitations. *LaRose v. Plastico Industries, Inc.*, 59 D. & C.2d 536, 32 Beaver L.J. 186 (1972); *Schmidt v. Schmidt*, 39 D. & C.2d 473 (1966); *Fritz v. Evans*, 12 Chester 111 (1964); *Lech v. Smith*, 53 Schuy. 30 (1957); *Kaye v. Penn Aluminum Construction Co.*, 2 D. & C.2d 205 (1954); see also *McGowin V. Montgomery*, 44 D. & C.2d 787 (1968); *Gross v. Fantechi*, 15 D. & C.2d 160 (1958); *Deane v. Greenbaum*, 77 D. & C. 569 (1951); Anderson, Sect. 1031.3; Goodrich-Amram, 1031(b)-1.