

DAVID ANDREW COOPER, Plaintiff, v. BRUNO E. IOCONA and  
CATHERINE D. BUSH, Defendants, C.P. Franklin County Branch,  
Docket No. 1999-20028

*Petition to open default judgment under Pa.R.C.P. 237.3*

1. The court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.
2. The petitioner has the burden of demonstrating a meritorious defense and the record must contain sufficient evidence of that defense.
3. Although the defendants need not prove every element of their defense, they must set forth their defense in precise, specific, clear and unmistakable terms; a bald or summary denial of the complaint's allegations is insufficient.
4. The court evaluates the petition to open according to the same standard which applies to a directed verdict: the court views all the evidence in the light most favorable to the petitioner and accepts as true all evidence and proper inferences which support the defense and rejects the adverse allegations of the party who obtained the judgment.
5. The willful rendering of imperfect performance under a contract constitutes bad faith. In particular, the lack of good faith cooperation is a meritorious defense to a buyer's action to recover escrow monies arising from an unconsummated real estate sale where a mortgage contingency clause in the sales agreement required such cooperation.
6. Where a prospective purchaser of real estate places funds in escrow in connection with an agreement of sale, a prospective seller has the right to retain the funds where the agreement contains a mortgage contingency clause requiring the purchaser to cooperate in good faith with the mortgage application process or risk forfeiting those funds.
7. Where a real estate sale is unconsummated and the purchaser sues the seller to recover his deposit alleging that his financing was withdrawn despite his good faith cooperation because he lost his job shortly before settlement, the defendants raise a meritorious defense to the suit by alleging that the plaintiff contrived his job loss to avoid having to purchase the property.
8. Where the defendants allege that the plaintiff twice delayed the settlement, that he represented that he received a letter terminating his employment on a legal holiday when presumably no mail could have been delivered to him, that a notice from the bank withdrawing the mortgage commitment was alleged by the plaintiff to have been dated on a legal holiday when presumably no bank business could have been conducted, and the letter's receipt and the notice's date occurred the same day as the plaintiff's morning pre-settlement inspection of the property, settlement was to occur three days later, and the plaintiff refused to give any additional information about his job loss, the defendants raised sufficient issues of material fact to constitute a meritorious defense to the plaintiff's action for recovery of his deposit such that the judgment could be opened.

Appearances:

*Matthew L. Guthrie, Esq.*, counsel for plaintiff  
*J. McDowell Sharpe, Esq.*, counsel for defendants

OPINION

HERMAN, J., December 6, 2000

Introduction

Before the court is the defendants' petition to open a default judgment. The court issued a rule on the plaintiff to show cause why the judgment should not be opened and the plaintiff filed an answer opposing that relief.<sup>1</sup> Argument was held and the matter is ready for decision.

Background

The plaintiff and the defendants signed an agreement of sale on November 26, 1997, whereby the plaintiff agreed to purchase a piece of real estate located in Hamilton Township, Franklin County, from the defendants. The transaction was contingent upon the plaintiff obtaining a mortgage and cooperating in the mortgage application process. By February 1, 1998, the plaintiff had deposited \$15,000.00 toward the purchase into an escrow account pursuant to the agreement. The sale did not take place, however, because approximately three days before the scheduled settlement, the mortgage company withdrew the financing which on February 5, 1998, they had extended to the plaintiff. When the defendants refused to return the escrow funds to the plaintiff as provided by the mortgage contingency provision, the plaintiff filed a complaint on January 21, 1999, to recover the funds. The plaintiff alleged in the complaint that the mortgage company withdrew financing because his employment was terminated effective February 20, 1998, as stated in a letter which the plaintiff received from his employer on February 16, 1998.

A default judgment was entered on March 17, 2000, after the defendants failed to answer the complaint.<sup>2</sup> The defendants then filed a petition to open the judgment on March 27, 2000. The petition avers that the mortgage company revoked the financing commitment because of uncooperative, bad faith conduct on the part of the plaintiff and that such conduct entitles the defendants to retain the escrow funds.<sup>3</sup>

<sup>1</sup> Depositions were also taken but have not been made part of the record because counsel agreed at oral argument that the court can decide the matter based solely on the defendants' petition to open and their proposed answer to the complaint attached thereto.

<sup>2</sup> After being reinstated twice, the complaint was served pursuant to a January 31, 2000, Order of Court authorizing service by publication under Pennsylvania Rule of Civil Procedure 430(b). The complaint was published in the Franklin County Legal Journal and in a newspaper of general county circulation on February 11 and 12, 2000, respectively. Service is not an issue before the court.

<sup>3</sup> The defendants' answer also contains a counterclaim for \$15,000.00 in costs which they allegedly incurred due to the plaintiff's failure to consummate the sale.

## Discussion

Pennsylvania Rule of Civil Procedure 237.3(b) governing the opening of judgments provides that “the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.”<sup>4</sup> A petition to open a default judgment is an appeal to the court’s equitable powers. *Himmelreich v. Hostetter Farm Supply, Inc.*, 703 A.2d 478 (Pa.Super. 1998). The petitioner has the burden of demonstrating a meritorious defense and the record must contain sufficient evidence of that defense. *County of Somerset v. George*, 587 A.2d 360 (Pa.Cmwlth. 1991). Although the defendants need not prove every element of their defense, they must set forth their defense in precise, specific, clear and unmistakable terms. *Id.* A bald or summary denial of the complaint’s allegations is insufficient. *Castings Condominium Association v. Klein*, 663 A.2d 220 (Pa.Super. 1995).

A meritorious defense is one which is sufficient to justify relief if proven at trial. *Miller Block Co. v. United States National Bank*, 567 A.2d 695 (Pa.Super. 1989). The court evaluates the petition to open according to the same standard which applies to a directed verdict — the court views all the evidence in the light most favorable to the petitioner and accepts as true all evidence and proper inferences which support the defense and rejects the adverse allegations of the party who obtained the judgment. *Iron Worker’s Savings and Loan Association v. IWS, Inc.*, 622 A.2d 367 (Pa.Super. 1993).

The defendants aver in their proposed answer that the plaintiff’s ability to recover the deposit was contingent upon him cooperating in good faith with the mortgage application process. It has been held that willful rendering of imperfect performance under a contract constitutes bad faith. *Somers v. Somers*, 613 A.2d 1211 (Pa.Super. 1992). The lack of good faith cooperation is a meritorious defense to a buyer’s action to recover escrow monies arising from an unconsummated sale of real estate where a mortgage contingency clause in the sales agreement requires such cooperation. *Rosen v. Empire Valve and Fitting, Inc.*, 553 A.2d 1004 (Pa.Super. 1989). The defendants aver that the plaintiff caused the real estate settlement to be delayed twice — from January 31, 1998, to February 11, 1998, and then again to February 19, 1998, because “for unknown reasons he needed a release from his spouse

and wanted to settle on the sale of real estate before purchasing defendants’ real estate.” (Paragraph 16). They also aver: “In the morning of February 16, 1998, plaintiff conducted a pre-settlement inspection of the real estate he was to purchase...” (Paragraph 17). “On February 16, 1998, which was a legal holiday, plaintiff claimed to receive a letter terminating his employment with Century Pork L.C. effective February 20, 1998.” (Paragraph 18). Attached to the petition and proposed answer as exhibit A is a letter purportedly from the plaintiff’s employer at Century Pork L.C. terminating his employment. “Defendants, through their real estate agent, received a notice dated February 16, 1998, a legal holiday, that revoked the mortgage commitment.” (Paragraph 19). “Plaintiff refused to give any additional information, however, and became uncooperative in giving any details to verify his versions of events.” (Paragraph 11). “Plaintiff, despite demands, refused to give any additional information to support his position that he was unable to purchase the house due to loss of his employment.” (Paragraph 21). “On information and belief, plaintiff caused the termination of his mortgage commitment because he did not consummate the transaction.” (Paragraph 12). “On information and belief, plaintiff contrived his employment termination to avoid purchasing the subject property.” (Paragraph 22).

The implication of these averments is that it is implausible for the plaintiff to have received the employment termination letter on February 16th, a legal holiday when arguably no mail would have been delivered to him. The averments also suggest that it is peculiar that the mortgage company’s notice revoking the plaintiff’s financing was also dated February 16th, again, a legal holiday when arguably no bank business would have been conducted. In addition, the receipt of the letter and the dating of the notice occurred the same day as the plaintiff’s pre-settlement morning inspection of the property and only three days before settlement was to occur. Along with the plaintiff’s two requests to delay the settlement and his alleged refusal to provide additional details about the circumstances surrounding the loss of his job, the defendants’ claim in essence is that the plaintiff had second thoughts about purchasing the property and that the timing of the events set forth in the above averments was more than mere coincidence.

<sup>4</sup> Rule 237.3 in its entirety provides as follows:

(a) A petition for relief from judgment of non pros or of default entered pursuant to Rule 237.1 shall have attached thereto a verified copy of the complaint or answer which the petitioner seeks leave to file.

(b) If the petition is filed within ten days after the entry of the judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

There is no dispute that the defendants attached a verified answer to the petition to open and that the petition filed ten days after entry of judgment is timely.

The plaintiff does not dispute that the sales agreement required him to cooperate in the mortgage application process.<sup>5</sup> Instead he maintains that the averments of his bad faith during that process are nothing more than mere speculation and are not sufficiently clear and precise to constitute a meritorious defense justifying opening the judgment. We disagree. Although the defendants do not specifically aver the plaintiff himself wrote or forged either the letter from his employer or the notice from the bank, they are entitled to every reasonable inference which can be drawn from the answer's averments, and those averments, when viewed in the light most favorable to the defendants, are sufficient to raise an issue of material fact and a meritorious defense to the plaintiff's action for recovery of his deposit. *Iron Worker's, supra*. The defendants' averments are clearly more than mere bald denials. *Castings, supra*. Whether the defendants will ultimately prevail before a trier of fact remains to be seen.

#### ORDER OF COURT

Now this sixth day of December, 2000, the petition to open judgment is hereby granted.

<sup>5</sup> Paragraph 13(B) of that agreement states:

Should Buyer furnish false or incomplete information to the Seller, Agent for Seller, Agent for Buyer, or the mortgage lender, concerning the Buyer's legal or financial status, or fail to cooperate in the processing of the mortgage loan application, which acts would result in the failure to obtain the approval of a mortgage loan commitment, then, in such case, all deposit monies and other sums paid by the Buyer on account of the purchase price...may be retained by the Seller as liquidated damages...

(Exhibit A attached to the plaintiff's complaint.)

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