

CITIZENS NATIONAL BANK OF SOUTHERN
PENNSYLVANIA, PLAINTIFF vs ENGAY, INC.,
DEFENDANT

Franklin County Branch, Civil Action - Law No. A.D. 1996-98
Mortgage Foreclosure

Citizens National Bank of Southern Pennsylvania v. Engay, Inc.

Petition to open and/or strike judgment; mortgage foreclosure

1. A petition to strike a judgment is proper only when the defect in the original judgment appears on the face of the record.
2. Where two mortgage foreclosure actions are filed, one against the petitioners' corporation and one against the petitioners as individuals, a petition to strike judgment will be denied which contends that the actions should have been consolidated where petitioners never moved for consolidation and where the actions were based on two separate and distinct tracts of real estate.
3. The Court may in its discretion open a judgment where the petitioner promptly requests relief, there was a reasonable explanation as to why the petitioner failed to file the appropriate pleading, and the petitioner can show sufficient evidence of a meritorious defense to the action.
4. Where the petitioner disregarded the complaint and notice of intention to take default judgment in the action against the corporation because he and his counsel mistakenly believed the documents pertained to the action filed against himself and his wife as individuals, but the failure to file the appropriate pleading to prevent foreclosure was the result of confusion and neglect rather than an attempt to delay the proceedings, the Court will consider whether the petitioner has shown sufficient evidence of a meritorious defense to the action.
5. In demonstrating a meritorious defense, the petitioner must show that there are issues of fact and credible evidence that would withstand entry of a directed verdict.
6. Where the petitioner does not challenge evidence that he failed to pay back principal and interest as alleged in the respondent's pleadings, and where the respondent specifically reserved the right to recover these sums under the demand note and security agreement, the petitioner has not demonstrated a meritorious defense to the foreclosure action.

Stephen E. Patterson, Esquire, Counsel for Plaintiff
David C. Cleaver, Esquire, Counsel for Defendant

OPINION AND ORDER OF COURT

HERMAN, J., July 23, 1996

FACTUAL BACKGROUND

Before the Court for decision is the petition to open and/or strike judgment of Engray, Inc., a defendant in a mortgage foreclosure action. The petitioner seeks relief from judgment in

this matter which was entered on May 6, 1996 after the petitioner/defendant (hereinafter "Engay") failed to answer the plaintiff's Citizens National Bank, (hereinafter "CNB") complaint. The action in foreclosure was initiated by CNB after Engay allegedly failed to make payments on a demand note and a security agreement in the amount of \$95,000.00. The note is secured by a mortgage on the real estate located in the Borough of Shippensburg, Franklin County, Pennsylvania. The complaint alleges that Engay failed to make payments on the principal and interest due for the months of December 1995, January 1996 and February of 1996. Under the terms of the note, the bank elected to accelerate payment of all amounts due under the note and sent notice to the president of Engay, Inc., John B. Dymond, on February 26, 1996. A copy of this notice was sent to Paul F. Mower, Esquire, as attorney for Engay. The notice requested the total amount due under the note be paid. The note which is attached as Exhibit C to the complaint in mortgage foreclosure specifically provides for such a remedy.

The record shows that CNB filed the complaint in mortgage foreclosure containing a notice to plead against Engay on March 19, 1996. Engay failed to respond to the complaint within the required time and the CNB sent a ten day notice of intention to take default. This notice was sent to the corporate offices of Engay and to counsel, David C. Cleaver, Esquire, presently representing Engay in this matter. Engay failed to respond to the ten day notice and upon praecipe for entry of judgment, the Prothonotary of Franklin County entered judgment on May 6, 1996.

The petition of Engay filed on May 22, 1996 requested a rule be issued on CNB to show cause why judgment should not be stricken or opened. In addition the rule provided for a hearing on June 24, 1996, the return date for the answer to the petition. Although holding a hearing is procedurally incorrect pursuant to Pa.R.C.P. 206.7, the Court nonetheless allowed the hearing to take place and we will consider the evidence presented pursuant to the authority of subsection (d) of Rule 206.7.

DISCUSSION - PETITION TO STRIKE JUDGMENT

Under Pennsylvania law a petition to strike judgment is proper only when the defect in the original judgment appears on the face of the record. *Equibank N.A. v. Dobkin*, 284 Pa. Super. 143, 425 A.2d 461 (1981). Engay appears to assert several procedural irregularities which it argues would require the court to strike judgment. The first was raised by way of an exhibit attached to the petition to strike. This exhibit is the answer which Engay would have filed if they had timely responded to the plaintiff's complaint. This is required to be attached to the petition for relief from judgment pursuant to Pa.R.C.P. 237.3 Exhibit A is actually a copy of an answer filed in a different cause of action for foreclosure of a mortgage involving John B. Dymond and Nancy G. Dymond as individuals. Exhibit A claims that the judgment suffers from procedural irregularity in that the required notice pursuant to the Housing Finance Agency Law, Section 1680.101 et seq. was not provided to Engay. However, on further review of this issue, we note that Engay did not argue this issue in the written argument required by the Court. Therefore, we must consider this issue has been abandoned and further the position of CNB that this notice is not required under the law is sustained.

Next, the petitioner/defendant Engay, Inc. argues that the failure of counsel for CNB to provide the required ten day notice of default is procedural grounds upon which the Court may grant the petition to strike judgment. The Court is constrained to deny the petition to strike on this ground because the record shows that Engay was served with notice of intention to take default at its corporate address within the appropriate period of time. Further, the record shows that counsel for CNB also mailed a copy of the "10 day notice" to David C. Cleaver, present counsel for Engay. Mr. John B. Dymond, president of Engay, Inc. acknowledged at the hearing held on June 24, 1996 that he received the notice of intention to take default judgment.

The third procedural irregularity which Engay claims requires striking of the judgment is that the present cause of action should not have been filed as a separate cause of action but should have been combined with another cause of action for foreclosure of mortgage filed by CNB against John B. and Nancy G. Dymond as individuals. Engay claims that the action against John B. and Nancy G. Dymond filed as individuals arose from the same set of

circumstances as the present case and is therefore subject to consolidation. Assume for purposes of argument that we agree with Engay that in fact it would be appropriate to consolidate the two causes of action under Pa.R.C.P.213, the fact is that was never done. The fact that two separate and distinct causes of action could have been consolidated does not give rise to a procedural irregularity if the opposing party has complied with all other procedural requirements. Further, we believe that Pa.R.C.P. 1141 specifically provides that the action against Engay and John B. and Nancy G. Dymond as individuals are correctly initiated as separate causes of actions. There are separate and distinct tracts of real estate that secure the obligations in each case. Further, the position of the Dymonds as officers of Engay, Inc. is separate and distinct from their position as individuals in the other action. We will therefore deny the petitioner/defendant's petition to strike on grounds that the plaintiff/respondent should have filed two separate and distinct actions for mortgage foreclosure.

DISCUSSION - PETITION TO OPEN JUDGMENT

Under Pennsylvania law the Court will only exercise its discretion to open judgment if the petitioner acts promptly in making a request for relief from judgment; and there was a reasonable explanation as to why the petitioner failed to file the appropriate pleading; and finally, the petitioner is able to demonstrate sufficient evidence of a meritorious defense. *Shultz v. Erie Insurance Exchange*, 505 Pa. 90, 477 A.2d 471 (1984). CNB concedes that Engay has satisfied the first requirement of showing a reasonable explanation for failing to file an answer pursuant to Pa.R.C.P. 237.3(a). We agree with CNB that Engay is not automatically excused and will therefore review the reasons given for its failure to file an answer. At the hearing on June 24, 1996 the president of Engay, Inc., John B. Dymond, testified that he did not receive the complaint filed pursuant to this action and it was served on his wife. However, the Sheriff's return of service which is part of the record shows that service was made on him at the corporate address of Engay, Inc. He testified further that he did in fact receive the notice of intention to take default judgment, but disregarded this, as well as the complaint, under the belief that these documents related to the other cause of action filed against

him and his wife as individuals. Mr. Dymond testified that he was aware that his attorney had already answered that complaint and felt that all of the matters had been taken care of. Through oral arguments of counsel at the hearing and the written briefs, it is clear that counsel for Engay suffered from the same confusion. Present counsel for Engay, David C. Cleaver, represented John B. Dymond in the action of foreclosure of mortgage against Mr. and Mrs. Dymond at the time CNB mailed the notice of intention to take default judgment to Engay Inc. in this case. CNB also sent a copy of this "10 day notice" to Mr. Cleaver. Obviously confusion and neglect existed on the part of Mr. Dymond as president of Engay, Inc. and counsel for Engay, Inc. However, in view of the fact that an answer was promptly filed by Mr. Cleaver in the separate matter involving Mr. and Mrs. Dymond as individuals, we find there was no intent to confound or delay the proceedings in the present action. It is apparent that had either Mr. Dymond as president of Engay, Inc. or counsel realized this case was a separate cause of action an answer would have been promptly filed. Therefore we find that although the explanation for failure to file an answer to CNB's complaint evidences serious neglect it is genuine and not intended to impede the proceedings. The Court will go on to consider whether or not Engay has demonstrated sufficient evidence of a meritorious defense.

In order for defendant to obtain relief from judgment on the issue of a meritorious defense it is not necessary that the petitioner/defendant demonstrate that the defense will prevail. It is only necessary to show there are issues of fact sufficient to go to the jury, that is, credible evidence that would withstand entry of a directed verdict. *Ironworkers Savings and Loan Association v. IWS, Inc.*, 424 Pa.Super.255, 622 A.2d 367 (1993). Engay asserts in its written argument it would present evidence it has made payments on the demand notes that were signed by CNB and Engay. Exhibit A attached to the petition specifically states that the petitioner/defendant is current and no payments are due. This is at best a general denial of the allegations of default contained in CNB's answer and is not sufficient to raise a meritorious defense. Engay does not deny or challenge the evidence presented in CNB's answer to its petition alleging Engay had not paid the principal and interest payments due for the months of November, 1995, December, 1995 and January, 1996.

Further correspondence from counsel for CNB to Engay indicate that subsequent payments were made, however, CNB was not retreating from its election to recover the full amount due on the loan as a result of Engay's default. A review of the record reveals CNB specifically reserves the right to elect such a remedy under the terms and conditions of the demand note and security agreement. CNB correctly points out the note and security agreement do not contain provisions whereby Engay can cure default by subsequent payment should CNB decide to avail itself of its right to collect the full amount of the loan. We therefore find that Engay's petition has not demonstrated a question of fact on the issue of default sufficient to go to a jury, and therefore it has failed to demonstrate a meritorious defense.

For the reasons stated herein an appropriate Order of Court will be entered a part of this Opinion.

ORDER OF COURT

NOW this 23 rd day of July, 1996, the defendant/petitioner's petition to open and/or strike judgment is DENIED.