

Franklin County Legal Journal
Volume 29, No. 40, pp. 153-161
Myers v. Kazi Foods

JUNE C. MYERS, Plaintiff, v. KAZI FOODS OF NEW JERSEY, INC., Defendant Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch Civil Action - Law, No. 2009-3272

Judgment by Default: Opening or Setting Aside Default

1. A petition to open a default judgment is an appeal to the equitable powers of the court, and the decision to grant or deny is in the sound discretion of the trial court.
2. The three-factor test is the framework within which the trial court is to conduct its equitable analysis.
3. The court considers whether the moving party (1) promptly filed a petition to open the default judgment, (2) has shown a meritorious defense, and (3) has provided a reasonable excuse or explanation for its failure to file a responsive pleading.
4. Courts do not apply a bright line test. Rather, courts focus on two factors: (1) the length of the delay between discovery of the entry of a default judgment and filing the petition to open judgment, and (2) the reason for the delay.
5. Courts generally find that a filing was prompt where the delay was less than 30 days.
6. The court starts counting upon the party's discovery of the entry of the default judgment, not upon the party's counsel's discovery.
7. The fact that a party cannot defend on liability due to the entry of a default judgment is not prejudice the court considers when balancing the equities.

Appearances:

Bradley J. Reed, Esq., *Attorney for Plaintiff*
Carl J. Greco, Esq., *Attorney for Defendant*

OPINION

Krom, J., March 6, 2012

Before the Court is the Petition to Open Default Judgment filed by the Defendant, Kazi Foods of New Jersey, Inc. (hereinafter "Kazi Foods"). Upon consideration of said Petition, the Plaintiff's response thereto, and the arguments of the parties, the Court denies the Petition for the reasons that follow.

Procedural History

This action was commenced upon a Praecipe for the Issuance of a Writ of Summons and a Complaint filed by Plaintiff, June C. Myers, on July 28, 2009. The Complaint alleges negligence on the part of Kazi Foods in the nature of premise liability for injuries sustained in a slip and fall. The Plaintiff's wherefore clause demands judgment "in an amount in excess of [\$50,000] but less than [\$75,000], and other and such further relief as the nature of this cause may require." Pltf's Complaint. Kazi Foods filed an Answer with New Matter on May 3, 2010 through its counsel, Post & Schell, P.C. (hereinafter "Post & Schell"). The "New Matter" section raised the defenses of comparative/contributory negligence, failure to mitigate damages, and failure to join a necessary party, and countered the facts alleged by Plaintiff supporting the elements of a negligence action.^[1] Plaintiff filed a Denial of New Matter on May 17, 2011. Discovery was undertaken by both parties.

The Court held a November 1, 2010 Pre-Trial Conference and imposed deadlines that were memorialized in a November 2, 2010 Order of Court. On March 7, 2011, Plaintiff's counsel filed a Praecipe for Pre-Trial Conference, stating that discovery was complete, the Court imposed deadline for filing dispositive motions, March 2, 2011, had passed without the filing of such motions, and both parties wished to forego mediation. However, on March 17, 2011, Post & Schell filed a

Petition for Leave to Withdraw together with a Brief in Support Thereof. Plaintiff filed an Answer to the Petition on March 24, 2011, agreeing to Post & Schell's withdraw from representation of Kazi Foods but opposing any delay in the case. The Court issued a Rule to Show Cause on March 30, 2011, to which Kazi Foods did not respond; therefore, the Court granted Post & Schell's Petition for Leave to Withdraw on June 8, 2011. Post & Schell filed its Withdraw on June 15, 2011.

June 15, 2011 was also the day of a previously scheduled Pre-Trial Conference. A pre-trial memorandum for Kazi Foods was not received by the Court prior to the Pre-Trial Conference as required by Local Rule,^[2] and Kazi Foods did not attend the Pre-Trial Conference. Because Kazi Foods failed to appear at the Pre-Trial Conference, Plaintiff filed a Motion for Sanctions. The Court's July 22, 2011 Order directed Kazi Foods to file an answer to Plaintiff's Motion for Sanctions; Kazi Foods did not file an answer. Although the Court had ample justification and authority to sanction Kazi Foods, the Court provided Kazi Foods a further opportunity to defend this case and its prior failures to comply with the Rules of Court and prior Court Orders. To wit, the Court scheduled a Hearing on the Motion for Sanctions on September 15, 2011. Kazi Foods did not file an answer, request a continuance, or appear at the scheduled hearing. After continually receiving no response from Kazi Foods despite giving it several bites at the apple, the Court entered the September 30, 2011 Order granting the Motion for Sanctions, entering default judgment against Kazi Foods, and scheduling a Hearing on December 15, 2011 to determine damages.

The Law Offices of Carl J. Greco, P.C. filed an Entry of Appearance on behalf of Kazi Foods on October 18, 2011. In light of this filing, the Court conducted a Telephone Conference with both counsel on October 25, 2011. Kazi Foods filed the instant Petition to Open Default Judgment on November 15, 2011. Plaintiff filed an Answer to the Petition to Open Default Judgment on November 21, 2011. On February 9, 2012, the Court held a Hearing on the Petition at which the Court heard argument from both parties and the testimony of the sole witness - Kazi Foods' CFO, Steve Poludniak, Esq.^[3] In a strange yet unfortunate twist, Plaintiff's counsel filed a February 17, 2012 Supplemental Reply to inform Kazi Foods and the Court that while the Court was considering the Petition to Open the Default Judgment, the Plaintiff had died. The same day, Kazi Foods filed a Response to the Supplemental Reply, arguing how and to what extent the Court should consider the death of the Plaintiff.

Statement of the Case

Kazi Foods was in default for its failure to comply with Rules of Court and Court Orders and a Hearing on the issue of damages was scheduled when Kazi Foods' new counsel entered the case and filed a Petition to Open the Default Judgment. To provide the parties an opportunity to present evidence and make argument on their respective positions on the Petition, a Hearing was scheduled for February 9, 2012. At this Hearing, Mr. Poludniak testified that he has control and management over accounting, payroll, construction and remodeling, and legal matters. With respect to legal matters, Paracorp was designated as Kazi Foods' registered agent to accept service in Pennsylvania. Paracorp would forward all legal documents to Kazi Foods' California office. At the time the instant suit was initiated, Kazi Foods employed a legal administrator to manage the legal correspondence and report to Mr. Poludniak on pressing legal concerns. Upon the initiation of a lawsuit, Kazi Foods would either forward the information to their general liability insurance carrier or seek local counsel.

In this case, Kazi Foods determined that the nature of the suit dictated that it be forwarded to the insurance company, who at that time was Chubb. In turn, Chubb directed the matter to a third party administrator (hereinafter "TPA") to manage the litigation. The TPA arranged for the law firm of Post & Schell to represent Kazi Foods. While the Court is unsure of the details, it appears that Kazi Foods had some sort of dispute with Chubb's TPA about how it was managing litigation. Whether or not there was a casual connection the Court is unsure, but the TPA ceased paying Post & Schell's bills. Mr. Poludniak testified that Post & Schell had a discussion with Kazi Foods about Kazi Foods paying Post & Schell's bills; Kazi Foods refused to pay Post & Schell because the TPA had an obligation to pay the law firm. As a result, Post & Schell filed a Petition on March 17, 2011 requesting leave to withdraw as counsel.

The Court has reviewed the Petition for Leave to Withdraw as Counsel for Defendant filed March 17, 2011 and the Brief in Support of Petition for Leave to Withdraw as Counsel for Defendant filed March 17, 2011. The "Facts" section of the Brief^[4] states the following, in pertinent part: "On or about November 30, 2010 and December 9, 2010, counsel advised that [Kazi Foods] had multiple outstanding chronically overdue invoices unpaid in the above matter as well as in other unrelated matters involving the representation of [Kazi Foods] and/or related companies. Counsel has repeatedly requested full payment of all outstanding invoices in this and all other matters where Petitioner is representing [Kazi Foods] and its affiliated companies." The "Discussion" section of the Brief states that "[Kazi Foods] and its affiliated companies have been on notice for four months of Petitioner's intention to withdraw as counsel for [Kazi Foods] and its affiliated companies if payment was not promptly made in full."

At all times when Kazi Foods was not represented, service was being made to Kazi Foods' California office^[5]; however, the legal administrator, Kazi Foods' employee who had the responsibility of processing and managing legal correspondence, left for other employment in June of 2011. No one else fulfilled the responsibilities of that position. As a result, all legal correspondence was left in unopened piles. Mr. Poludniak was the last line of defense for Kazi Foods because he was the executive charged with oversight of legal matters, among other responsibilities. Mr. Poludniak came into the California office only a few times during the time period at issue because he was primarily in Florida and St. Croix dealing with Kazi Foods' bankruptcy. The only legal correspondence from this case that he recalls seeing over the relevant time period is the June 15, 2011 Withdraw of Post & Schell. When questioned by Plaintiff's counsel about receiving information about this case via email, Mr. Poludniak admitted that he has "probably 5,000 unopened emails sitting in my inbox right now."

Despite denying knowledge of what was occurring in the case and testifying that he "didn't think anything was going on in the case," Mr. Poludniak wanted to "get the case back on track." To that end, Mr. Poludniak testified that he made efforts, in conjunction with his California counsel, to obtain local counsel. Despite much testimony and questioning on this point, the Court is still unsure of exactly what was done to obtain local counsel. Mr. Poludniak represented that he did some internet searches and spoke to a few attorneys in the Harrisburg area. He relayed that the California attorney identified Attorney Carl J. Greco as a Pennsylvania lawyer who was able to handle Kazi Foods' legal matters in the Commonwealth, including this case. Mr. Poludniak had a telephone conversation with Attorney Greco and agreed with the California attorney that Attorney Greco should be retained.

Mr. Poludniak further testified that he did not have any knowledge of what was occurring in this case from the time Post & Schell came to Kazi Foods requesting payment until new counsel, Attorney Greco, participated in a Telephone Conference with this Court and Plaintiff's counsel on October 25, 2011. On this conference call, Attorney Greco learned that a default judgment had been entered against Kazi Foods. Kazi Foods asserted that this is the first it knew that it was in default; Mr. Poludniak testified that he was "surprised" by this news.

Finally, the Court notes that Kazi Foods directly employed Attorney Greco and is responsible for his payment. Kazi Foods has since hired a new legal administrator and abandoned its relationship with Chubb. Its new insurer does not use a TPA to manage litigation.

Discussion

"In general, a default judgment may be opened when three elements are established: the moving party must (1) promptly file a petition to open the default judgment, (2) show a meritorious defense, and (3) provide a reasonable excuse or explanation for its failure to file a responsive pleading." Allegheny Hydro No. 1 v. American Line Builders, Inc., 722 A.2d 189, 191 (Pa.Super. 1998) (citing Alba v. Urology Assocs. of Kingston, 598 A.2d 57, 58 (Pa.Super. 1991). "A petition to open a default judgment is an appeal to the equitable powers of the court." Alba, 598 A.2d at 58 (internal citation omitted). Moreover, "the three-factor test is a framework within which the trial court is to conduct its equitable analysis." Allegheny Hydro No. 1, 722 A.2d at 192. "The decision to grant or deny a petition to open a default judgment is in the sound discretion of the trial court...." Alba, 598 A.2d at 58.

In this case, the Court finds Kazi Foods (1) did not promptly file the Petition to Open the Default Judgment, (2) did plead a meritorious defense, and (3) did not provide a reasonable excuse or explanation for its failure to file a responsive pleading. Accordingly, like the petitioner in Allegheny Hydro No. 1, Kazi Foods failed to make an adequate showing on two of the three factors. For this reason, the Court denies Kazi Foods' Petition to Open the Default Judgment.

When examining whether a petition to open default judgment was timely filed, courts do not "employ a bright line test.... [The Court focuses] on two factors: (1) the length of the delay between discovery of the entry of a default judgment and filing the petition to open judgment, and (2) the reason for the delay." Quatrochi v. Gaiters, 380 A.2d 404, 407 (Pa.Super. 1977). Courts generally find that a filing was prompt where the delay was less than 30 days.^[6] Allegheny Hydro No. 1, 722 A.2d at 193. Kazi Foods filed its Petition to Open Default Judgment on November 15, 2011, which was 46 days after the default judgment was entered on September 30, 2011. However, counsel for Kazi argued that the Petition to Open Default Judgment was promptly filed because the filing was within 20 days of Kazi Foods learning of the entry of default judgment through Attorney Greco's participation in the Telephone Conference on October 25, 2011.

While the Court believes that October 25, 2011 is the date Attorney Greco discovered the default judgment, the Court finds that the clock started sooner. Although Kazi Foods, in the form of Mr. Poludniak, may have also discovered the default judgment on October 25, 2011, the only reason for the delayed discovery was neglect for the pile of mail. The Court notes that entry of the default judgment was served on Kazi Foods^[7] and was a matter of record.^[8] The Court

does not start counting from the date when new counsel gets up to speed and discovers that a default judgment has been entered against his or her client; the Court counts from the date the party discovered the default.^[9] In this case, even if this Court's September 30, 2011 Order took ten days to reach California, Kazi Foods was still served with notice of the default judgment more than 30 days before the filing of the Petition to Open the Default Judgment. Attorney Greco's delay may have been reasonable, but Kazi Foods' delay was not. Accordingly, the Court finds that Kazi Foods' Petition to Open Default Judgment was not timely filed.

The second part of the inquiry, whether the petitioner has shown a meritorious defense, is easily satisfied and was satisfied here. Plaintiff's action against Kazi Foods sounds in negligence and relates to a slip and fall. In Kazi Foods' Answer and New Matter, Kazi Foods pled comparative/contributory negligence, failure to mitigate damages, and failure to join a necessary party. Moreover, in the same filing, Kazi Foods asserted facts which, if proven at trial, would support the affirmative defenses pled and negate the Plaintiff's contention that Kazi Foods owed the Plaintiff a duty and that the acts or omissions of Kazi Foods were the cause of Plaintiff's injuries. Therefore, the Court finds that Kazi Foods has shown a meritorious defense.

As to whether Kazi Foods provided a reasonable excuse or explanation for its failure to file a responsive pleading, the Court finds that it did not. The Court is aware that during the nearly seven months that Kazi was not active in this case^[10] it did not have representation. After considering all that occurred from the time that Kazi Foods' original counsel filed a Petition for Leave to Withdraw until Attorney Greco filed the instant Petition to Open Default Judgment, the term "neglect" is what comes to the Court's mind and not "reasonable excuse."

Kazi Foods has not argued that it did not receive correspondence, either regular mail or email, about this case. All mail, whether an email from Plaintiff's counsel or an Order issued by this Court, was left unread, with the exception of the June 15, 2011 Order permitting Post & Schell's withdraw. In Allegheny Hydro, the Superior Court agreed with the trial court's holding that a party's in-house counsel's belief that action was unnecessary based on a mistaken understanding as to the meaning and effect of certain filings and correspondences was not reasonable. Allegheny Hydro No. 1, 722 A.2d at 194. In this case, neither Kazi Foods nor its counsel made a mistaken judgment about the necessity to take action based on a filing or piece of correspondence; rather, Kazi Foods did not even bother to read the documents to discover what they might say. If a mistaken belief about the import of a document or filing is not reasonable, the Court fails to see how a complete avoidance of the same would be.

Kazi Foods has also argued that its neglect was justified because it was making a good faith attempt to seek new local counsel. The Court does not find this excuse to be reasonable for several reasons. First, had Kazi Foods simply notified the Court that it was seeking new counsel, the Court could have managed this ongoing litigation appropriately, such as by allowing Kazi Foods a reasonable amount of time to obtain new counsel. Second, Kazi Foods had local counsel; Post & Schell had been representing Kazi Foods through the initial pleadings and discovery. Mr. Poludniak testified to only one reason that Kazi Foods did not retain Post & Schell's services: a belief that Kazi Foods should not be financially responsible for Post & Schell's representation. Yet, after months of unwarranted delay caused by complete disregard of the Rules of Civil Procedure, Local Rules, and this Court's Orders, Kazi Foods has asserted that it is prepared to defend this lawsuit in a trial now that it has been able to locate and retain local counsel - counsel that Kazi Foods is paying for out of its own pocket. Kazi Foods could have paid Post & Schell a year ago and it would never have been without counsel. Third, the amount of time it took for Kazi Foods to find and/or hire new counsel was not reasonable. At the Hearing, Mr. Poludniak was careful to identify the amount of time that it took him and California counsel to locate and hire a new attorney as three months and less than four. However, the March 17, 2011 Petition for Leave to Withdraw indicates that Post & Schell had been threatening to withdraw at least as early as the middle of November, 2010.

Finally, while not a requirement, the Court will address the equities. At the February 9, 2012 Hearing, Plaintiff's counsel argued that the Plaintiff's case would be prejudiced if the Court opened the default judgment because the Plaintiff would have the burden of proving both liability and damages. The Court noted then, as it does now, that every respondent to a petition to open default judgment could argue that their client would be prejudiced by having the easy win pulled out from under their feet. Plaintiff's counsel conceded that his client would not suffer any prejudice in the delay of the trial, other than having to litigate liability, as all the evidence and witnesses previously available remained available. Unfortunately, between the Hearing and the date of this Opinion, the Plaintiff has died. The Court is left to speculate on the effect the Plaintiff's death will have on the trial. More specifically, the Court must consider the fact that Plaintiff's testimony will likely be presented in the form of her prior deposition testimony. On the one hand, Plaintiff's testimony would be presented in a cold reading; on the other hand, Plaintiff's cause could be met with sympathy for her passing. The Court does not believe that the scale of equity would tip significantly to one side or the other in such a situation, particularly when the Court would appropriately instruct the jury on how to consider deposition testimony and the Plaintiff's absence from the courtroom.

The prejudice to Kazi Foods in not opening the default judgment is simply that it will not have the opportunity to defend on the issue of liability. The Court is not persuaded that Kazi Foods' current position is prejudice that the Court should consider because "[t]he nature of a default judgment is to impose responsibility upon a defendant who had the opportunity to defend the claim on the merits but has failed to do so." Allegheny Hydro No. 1, 722 A.2d at 195 (citing Kraynick v. Hertz, 277 A.2d 144, 147 (Pa. 1971)).

In sum, the Plaintiff's death is the only prejudice for the Court's consideration, and there, unfortunately, the damage has already been done. With respect to the tripartite test that is the framework for considering the equities, Kazi Foods has not satisfied this Court in two of the three factors - with the reasonableness of the excuse missing by a wide margin.

Conclusion

Kazi Foods has failed to prove two elements of the tripartite test. As a result and based on an examination of the equities, the default judgment will not be opened. The Court certainly understands that it was a sound business decision to not hire a replacement legal administrator, to not pay out of pocket for legal representation, and to ignore pending lawsuits, including this one, while the company dealt with a bankruptcy. The Court acknowledges that it makes financial sense for the CFO to be focused on handling the bankruptcy and not sifting through large numbers of emails and paper correspondence regarding lawsuits, which if ignored may result in liability that a bankrupt company does not have to or cannot pay anyway - a point the Court does not believe was lost on Mr. Poludniak given his experience as an attorney and executive. However, the price Kazi Foods paid for shifting its resources from litigation management to bankruptcy management was at least one default judgment. Fortunately for Kazi Foods, it has returned to his case in time to defend on the damages.

ORDER OF COURT

March 6, 2012, upon review and consideration of Defendant's Petition to Open the Default Judgment, Plaintiff's Reply, Plaintiff's Supplemental Reply, Defendant's Answer to Plaintiff's Supplemental Reply, the February 9, 2011 Hearing, the record, and the applicable law, the Court hereby orders that Defendant's Petition to Open the Default Judgment is denied for the reasons discussed in the attached Opinion.

[1]"A cause of action in negligence requires a showing of four elements: (1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage." Pyeritz v. Commonwealth, 32 A.3d 687, 692 (Pa. 2011). Here, Kazi Foods alleged that it did not owe Plaintiff a duty and that its actions were not the cause of Plaintiff's harm.

[2]39th Jud. Dist. R.C.P. 39-212.3.

[3]Mr. Poludniak was a practicing tax attorney for five years and has since worked in the business world.

[4]While the Court cites from the Brief, the same or substantially similar representations were made in the Petition.

[5]Mr. Poludniak testified that this address has not changed during the times relevant to this case and that Kazi Foods maintains the same California office.

[6]Kazi Foods concedes that a prompt filing is generally found when the delay was a month or less. Def.'s Pet. to Open Default Judgment, ¶ 16.

[7]Kazi Foods does not argue that it was not properly served during the time in question.

[8]Kazi Foods actively defended this case through discovery; therefore, the Court is not faced with a situation where the defendant is unaware of the pending litigation.

[9]The court considered the conduct of Allegheny Hydro's in-house counsel prior to the party's hiring of a law firm when analyzing the delay in filing a petition to open default judgment. Allegheny Hydro No. 1, 722 A.2d at 194.

[10] From the time it failed to answer the Rule to Show Cause why Post & Schell should not be permitted to withdraw until Attorney Greco participated in the Telephone Conference on Kazi Foods' behalf.