

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL DIVISION - LAW**

MAERSK AGENCY U.S.A., INC.,  
As agent for carrier MAERSK  
LINE A/S D/B/A MAERSK LINE,

Plaintiff/Appellee

v.

GABRIEL RUBBER, LLC,

Defendant/Appellant

No. 22-1948

Daniel W. Wechsler, Esq.

Counsel for Plaintiff/Appellee

Douglas C. Lovelace, Esq.

Counsel for Defendant/Appellant

**MEMORANDUM OPINION**

Serfass, J. - November 1, 2024

Defendant, Gabriel Rubber, LLC, has appealed from this Court's Order dated August 6, 2024, pursuant to which we denied "Defendant's Petition to Open Default Judgment". We file the following Memorandum Opinion in accordance with Pennsylvania Rule of Appellate Procedure 1925(a), respectfully recommending that our Order of August 6, 2024, be affirmed for the reasons set forth hereinafter.

**FACTUAL AND PROCEDURAL BACKGROUND**

On October 18, 2022, Plaintiff filed a Complaint against Defendant averring breach of contract and unjust enrichment. Having failed to effectuate service of the Complaint, Plaintiff filed a "Motion for Alternative Service" on August 25, 2023. By Order dated August 29, 2023, we granted Plaintiff's alternative service motion

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directing service of the Complaint by posting at two separate locations, postal delivery via regular and certified mail, and by newspaper publication.

On November 20, 2023, Plaintiff's counsel filed an "Affidavit of Service" indicating that an authorized agent of Defendant had been personally served, on October 4, 2023, with a copy of the Complaint at 148 Shaw Avenue, Irvington, New Jersey, a property owned by the principal of Gabriel Rubber, LLC. Also on November 20 2023, a "Praecipe for Default Judgment" was filed with the Prothonotary of Carbon County and, on that date, Default Judgment was entered in favor of Plaintiff and against Defendant in the amount of one hundred twenty-three thousand three hundred eighty-seven dollars and thirty-one cents (\$123,387.31).

"Defendant's Petition to Open Default Judgment" was filed on January 31, 2024. In the petition, Defendant claims that the individual identified in Plaintiff's "Affidavit of Service" is not employed by Defendant and, therefore, not able to accept service of the Complaint on its behalf. On February 20, 2024, Plaintiff filed a response to Defendant's petition claiming that Defendant has listed two business addresses, both of which Defendant later denied as being locations where service may be effectuated. Oral argument on "Defendant's Petition to Open Default Judgment" was held before the undersigned and, on August 6, 2024, we issued an Order denying that petition.

On September 3, 2024, Defendant filed an Appeal to the Superior Court of Pennsylvania seeking review and reversal of this Court's Order of August 6, 2024. On that same date, we entered an Order directing Defendant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In compliance with our Order, Defendant filed its concise statement on September 25, 2024.

### ISSUES

Upon review of Defendant's 1925(b) Statement, this Court will address the following issues:

- (1) Whether Defendant's claim of improper service is meritorious; and
- (2) Whether a petition to open judgment has been promptly filed in this matter.

### DISCUSSION

#### Issue One:

This matter was scheduled for an evidentiary hearing on "Defendant's Petition to Open Default Judgment". However, no officers or designees nor any other witnesses appeared on behalf of either party. As a result, no testimony was presented for the Court's consideration and we heard only the oral argument of counsel.

It is well settled that the decision concerning whether to open a default judgment lies within the sound discretion of the trial court. Bittenbender v. SEPTA, 523 A.2d 1173, 1176 (Pa.Super. 1987). 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. Alba v. Urology Assocs. of Kingston, 598 A.2d 57, 58 (Pa.Super. 1991). However, when the party seeking to open a judgment asserts that service was improper, a court must address this issue first before considering any other factors. United States Dept. of Housing and Urban Dev. v. Dickinson, 516 A.2d 749 (Pa.Super. 1986). If valid service has not been made, then the judgment should be opened because the court has no jurisdiction over the defendant and is without power to enter a judgment against him or her. Cintas Corp. v. Lee's Cleaning Services, 700 A.2d 915, 919 (Pa. 1997).

Here, Defendant seeks to challenge the truth of the factual averments set forth in the record at the time judgment was entered. Specifically, Defendant contends that its offices are not located at nor does it have any connection with 148 Shaw Avenue, Irvington, New Jersey, the building at which the complaint was served; that no one at that location was authorized to accept service of original process on behalf of Defendant as required by Pa.R.C.P. 402(2)(iii) and Pa.R.C.P. 424; and that neither the ten-day notice of default nor the notice of judgment was properly served on Defendant. However, Defendant presented no evidence by way of testimony, affidavits, depositions or otherwise in support of its claims. Notably,

Defendant does not contend that there was a fatal defect on the face of the record at the time judgment was entered. The appropriate mechanism to bring such a challenge would be a petition to strike the judgment and Defendant filed no such petition for the Court's consideration. Therefore, Defendant's claim of improper service is without merit, and we return to our evaluation of the promptness of the instant petition.

**Issue Two:**

In evaluating whether a petition to open judgment has been promptly filed, "[the] Court does not employ a bright line test...[The Court focuses] on two factors: (1) the length of delay between discovery of the entry of a default judgment and filing the petition to open judgment, and (2) the reason for the delay: Allegheny Hydro No. 1 v. American Line Builders, Inc., 722 A.2d 189 (Pa.Super. 1988). Here, Defendant did not file its petition to open judgment until fifty (50) days have been untimely. See Allegheny Hydro No. 1 v supra (forty-one (41) day delay is not prompt); B.C.Y., Inc. Equipment Leasing Assocs. v. Bukovich, 390 A.2d 276, 278 (Pa.Super. 1978) (twenty-one (21) day delay is not prompt); Hatgimisios v. Dave's N.E. Mint, Inc., 380 A.2d 485, 495 (Pa. Super. 1977) (thirty-seven (37) day delay is not prompt). In cases where our appellate courts have found there to be a prompt filing of the petition to open, the period of delay was generally less than one month. Allegheny Hydro No. 1 v. American Line Builders, Inc., *supra*,

at 193. However, in McCoy v. Public Assistance Corp., et al., 305 A.2d 698 (Pa. 1973), we note that a seventeen (17) day delay from the time an appellant learned of the default judgment to when it filed a petition to open was not prompt. Moreover, Defendant's attempts to informally resolve this matter by asking Plaintiff's counsel to voluntarily vacate the default judgment is not a reasonable excuse for the fifty (50) day delay. Clearly, a delay of fifty (50) days between the time Defendant learned of the default judgment and its filing of the petition to open cannot be considered prompt.

Having concluded that Defendant has not established the first element required for the opening of a default judgment, there is no need to address the remaining elements as no relief is warranted.

#### CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be denied and that our Order of August 7, 2024, be affirmed accordingly.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'S.R. Serfass', written over a horizontal line.

Steven R. Serfass, J.