IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION

SPORTS INVEST US, LLC	:	
	:	
Plaintiff	:	**No.: CV-2021-005638**
	:	
v.	:	
	:	
WASSERMAN	:	
	:	
Defendant	:	

ORDER GRANTING PETITION TO OPEN DEFAULT JUDGMENT

AND NOW, this 18th day of August, 2022, upon consideration of the Petition to Open and/or Vacate Default Judgment (the "Petition") filed by Defendant Wasserman ("Wasserman" or "Defendant"), the Response with New Matter filed thereto by Plaintiff Sports Invest US, LLC ("Sports Invest" or "Plaintiff"), and the Response to New Matter filed by Wasserman; a hearing having been held thereon on May 24, 2022 (the "May 24 Hearing") at which all parties appeared and had the opportunity to present evidence; and having received and considered submissions from Wasserman and Sports Invest after the May 24 Hearing; it is hereby **ORDERED** and **DECREED** that the Petition is **GRANTED IN PART** and **DENIED IN PART** as set forth below.

On June 25, 2021, Sports Invest filed a Complaint against Wasserman alleging intentional interference with contractual relations regarding two Major League Soccer players represented (or formerly represented) by Sports Invest. Wasserman did not respond to the Complaint; as such, a default judgment was entered against Wasserman on August 4, 2021. On January 27, 2022, Wasserman filed the instant Petition, requesting that the Court open and/or vacate the default judgment entered against it. Wasserman asserts that it was never served with the original Complaint and did not learn of the lawsuit until it received a Notice of

Entry of Order for Admission of Counsel *pro hac vice* on December 30, 2021. Accordingly, Wasserman asserts that it satisfies the three elements necessary to open a default judgment under Schultz v. Erie Insurance Exchange, 477 A.2d 471 (Pa. 1984). See infra. Wasserman also argues that the judgment should be vacated because the illegible markings on the return receipt are insufficient to establish that Wasserman or its authorized agent accepted service of the Complaint.

In response, Plaintiff argues that Defendant cannot satisfy two of the Schultz elements necessary to open a default judgment. Plaintiff also contends that Defendant had actual notice prior to December 30, 2021 because Wasserman received no fewer than 12 separate communications (either about the dispute or about the case) from Sports Invest or from the Court between December 2020 and December 2021, but did not do anything until early January 2022, when Wasserman filed the instant Petition.

At the May 24 Hearing, Wasserman modified the argument set forth in the Petition, arguing that the Court must first determine whether service of process was properly effectuated before addressing the three elements under Schultz to open a default judgment. In its supplemental brief, Defendant asserts that there is no difference between a petition to open and a petition strike when it comes to service of process. Plaintiff, in turn, argues that Wasserman only filed a petition to open and not a petition to strike. In its supplemental brief, Sports Invest further explains that any alleged failure in service of process that arises from a defect in the record must be addressed through a petition to strike, not a petition to open.

A petition to strike a default judgment and a petition to open a default judgment are two distinct remedies and are generally not interchangeable. U.K. LaSalle, Inc. v. Lawless, 618 A.2d 447, 449 (Pa. Super. Ct. 1992). A petition to strike a judgment acts as a demurrer to the

record. Id. As such, it is not a matter of judicial discretion. Id. A petition to strike a judgment may be granted only where a fatal defect in the judgment appears on the face of the record. Id. Conversely, a petition to open default judgment *is* matter of judicial discretion. Schultz, 477 A.2d at 472 (emphasis added). The court will exercise this discretion when: (1) the petition has been promptly filed; (2) a meritorious defense can be shown; *and* (3) the failure to appear can be reasonably excused. Id.; see also Pa. R. Civ. P. 237.3 (supplying two of the three requisites for opening default judgments). The court need not engage in this analysis if the party seeking to open the judgment has not received valid service or notice of the proceedings. Deer Park Lumber, Inc. v. Major, 559 A.2d 941, 943 (Pa. Super. Ct. 1989). In those events, the Court has no jurisdiction over the party and is powerless to enter judgment. Id. A court must have personal jurisdiction over a party to enter a judgment against it. Dubrey v. Izaguirre, 685 A.2d 1391, 1393 (Pa. Super. Ct. 1996).

Jurisdiction over a person is dependent on proper service; as such, the rules relating to proper service must be strictly followed. Id. If there is no valid service of initial process, a subsequent judgment by default must be deemed defective. Lawless, 618 A.2d at 450. However, regardless of whether Defendant had actual notice or not, the Superior Court has held that "where a defendant has actual notice, but lacks proper service, a petition to open should be granted." Mischenko v. Gowton, 453 A.2d 658, 661 (Pa. Super. Ct. 1982). The court's discretion will not be disturbed absent abuse. Lawless, 618 A.2d at 450. It is well within a court's equitable powers to prevent an advantage to the plaintiff. Default judgments are not a procedure "to furnish an advantage to the plaintiff so that a defense may be defeated or "a judgment reached without the difficulty that arises from a contest by the defendant." Kraynick v. Hertz, 277 A.2d 144, 147 (Pa. 1971). Further, Pennsylvania courts generally disfavor snap

judgments. Queen City Electrical Supply Co. v. Soltis Electric Co., 421 A.2d 174, 178 (Pa. 1980). Therefore, courts may open a judgment in an appeal to its equitable powers. Cintas Corp. v. Lee's Cleaning Servs., 700 A.2d 915, 919 (Pa. 1997).

Since courts may open a judgment, this Court must determine whether a petition to open can address defective service of process apparent on the face of the record. The Superior Court has not hesitated to open judgments and give defendants an opportunity to file answers in cases where process was not properly served. U.S. Dept. of Hous. & Urb. Dev. v. Dickerson, 516 A.2d 749, 751 (Pa. Super. Ct. 1986); Mischenko, 453 A.2d at 660; Liquid Carbonic Corp. v. Cooper & Reese, Inc., 416 A.2d 549 (Pa. Super. Ct. 1979). In this case, Plaintiff asserts that defective service of process apparent on the face of the record must be addressed exclusively by a petition to strike. See Pl.'s Supplemental Br. at 2, 4-5. The Court disagrees.

In Deer Park, defendants filed a petition to open default judgment—*not a petition to strike*—that was denied by the trial court. Deer Park, 559 A.2d at 942. On appeal, defendants claimed that the affidavit in support of service was defective on its face. Id. at 943. Since the defendants' claim went to the facial validity of the judgment, the court noted that:

> Ordinarily, in order to attack a judgment on the basis that it is facially invalid, the proper procedure is to file a petition to strike, not open, judgment. In its brief, appellee stresses this point and argues that appellants are precluded from challenging the validity of the affidavit of service. We disagree. While it is true that appellants' petition directed the court to *open* rather than *strike* the judgment, it is one of appellants' contentions that this defective service resulted in a lack of actual or constructive notice of the instant action. We are also aware that if appellants' allegations are correct, the trial court was without power to enter judgment. Both circumstances form a proper basis for a petition to open judgment.

Id. at 943 n.1 (citations omitted). The Deer Park Court found that, since defendants were not properly served with notice of the action, "the trial court had not obtained the requisite personal

jurisdiction needed for entry of judgment." Id. at 947 (citation omitted). In reversing the trial court's decision, the Deer Park Court held "that the trial court's action in refusing to open the default judgment and allow the [defendants] to file an answer to the complaint constituted an abuse of discretion." Id. In light of Deer Park, and contrary to Plaintiff's assertion that defective service of process must be addressed exclusively by a petition to strike, the Court concludes that it can entertain and resolve an argument about effective service of process in the context of a petition to open.

In determining whether service of the Complaint was defective in this case, the Court considers Wasserman's argument that the signature on the return receipt did not contain Defendant's or its agent's signature, and therefore service was defective and the default judgment should be opened. See Def. Supp. Brief at 1. In a recent case discussing service of process during the coronavirus pandemic, the Superior Court considered a petition to strike where the signature on U.S. Postal Form 3811 was illegible, the phrase "Covid-19" was written next to the signature, and the box "agent" was marked on the form. Penn Natl. Mut. Cas. Ins. Co. v. Phillips, 276 A.3d 268, 271 (Pa. Super. Ct. 2022). Regarding the difference between a petition to strike and a petition to open, the court noted as follows:

> To the extent Mr. Phillips contends the person who signed for the certified mail was not his agent, despite marking the box indicating he or she was his agent, we note the trial court was unable to consider the argument in the context of a motion to strike the default judgment. ***See Digital Communications Warehouse, Inc. v. Allen Investments, LLC***, 2019 PA Super 341, 223 A.3d 278 (Pa. Super. Ct. 2019) (holding trial court was unable to consider the appellant's argument that the person upon whom the complaint was served was not an authorized agent in the context of a motion to strike as such evidence was outside the record). ***See also Pincus v. Mutual Assur. Co.***, 457 Pa. 94, 321 A.2d 906, 910 (Pa. 1974) (indicating that even where a return of service fails to specifically identify by name the person served, that failure alone does not necessarily invalidate the service).

Id. at 275 n.8. The court rejected the argument that there was a fatal defect in the record,

explaining that:

> [T]o the extent Mr. Phillips suggests the trial court should have looked beyond the record to determine why his agent wrote "Covid-19" next to his or her signature, we note the trial court was unable to consider the argument in the context of a motion to strike the default judgment.

Id. at 275 n.8 (citation omitted). In other words, courts are limited in what they may consider in a petition to strike the default the judgment.

Unlike Phillips, the present case is a petition to open. Since a petition to open default judgment is a matter of judicial discretion, the Court may look beyond the record and may consider arguments regarding the signature on the return receipt. Phillips is further distinguishable because the box "agent" was marked on the return receipt; in our case, that box was not marked. The seemingly dispositive factor in Phillips was that the box "agent" was marked. In this case, there is no evidence that Defendant or its agent received the Complaint. See Def. Pet. to Open Ex. B ("Affirmation of Richard Motzkin") ¶ 4. It is not apparent, looking at the return receipt, whether the Defendant or its agent received service of process. For these reasons, the Court concludes that service on Defendant was defective. Because proper service did not occur, the Court did not have personal jurisdiction over the Defendant to enter a default judgment against it. And as discussed above, under such circumstance, the Court need not analyze the factors outlined in Schultz. See supra.

Finally, the Court considers whether, if the Defendant had actual notice of the proceedings, a petition to open should be denied. The Court acknowledges that Plaintiff claims to have made at least twelve attempts to communicate about the case with Defendant, and finds it difficult to believe that Defendant did not have actual notice of the pending litigation. However, Defendant's employee, the Executive Vice President & Managing Executive, represented in his verified Affirmation, subject to penalty of perjury and 18 Pa. Cons. Statt. §

4904, that he never received notice of the pending litigation. See Def.'s Pet. to Open Ex. B ("Affirmation of Richard Motzin") ¶ 4.[1] Further, each of Plaintiff's attempted communications with Defendant occurred during the coronavirus pandemic, while many offices across the nation remained closed. Defendant's agent's Affirmation that its office was closed on Tuesday June 29, 2021, when the Complaint was delivered. See Def.'s Pet. to Open Ex. B ¶ 4. Regarding the notice of intent to file default that was delivered on Saturday, July 24, 2021, Defendant's Affirmation states that Wasserman's headquarters is closed on Saturdays and that there would not have been any Wasserman staff members available to sign for the notice. See Def. Pet. to Open Ex. B ("Affirmation of Richard Motzkin") ¶¶ 10-12. The Court need not determine whose written words to believe because, as determined hereinabove, service of original process was defective. As such the petition to open should be granted. See Mischenko, 453 A.2d at 661.

For the foregoing reasons, it is HEREBY **ORDERED** and **DECREED** as follows:

1. Defendant's Petition to Open the Default Judgment is **GRANTED**.
2. Defendant's Petition to Vacate Default Judgment is **DENIED.**

BY THE COURT:

KELLY D. ECKEL, J.

[1] At the May 24 Hearing, neither party called any witness in connection with the Petition, and instead elected to proceed "on the papers" with respect to their respective arguments.