

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION - LAW**

**HOUSING OPPORTUNITY
PARTNERS, REO LLC,**

Plaintiff,

vs.

**MARIANNE MEHALSHICK AND
MICHAEL A. MEHALSHICK,**

Defendant.

No.: C-48-CV-2006-6855

**PENNSYLVANIA RULE OF APPELLATE PROCEDURE
1925(a) STATEMENT**

AND NOW, this 20th day of May, 2014, the Court issues the following statement:

Following denial of the "Petition To Open/Strike Judgment" filed by Defendant Marianne Mehalshick ("Mehalshick" or "Marianne"), Mehalshick served upon this Court a timely Notice of Appeal to the Superior Court of Pennsylvania. On August 20, 2013, pursuant to our request under Pa.R.A.P. 1925(b), we received Mehalshick's Concise Statement of the Errors Complained of on Appeal. As more fully set forth below, Mehalshick's appeal was dismissed by the Superior Court on September 20, 2013 and reinstated on March 17, 2014. For the reasons that follow, we respectfully suggest that Mehalshick's appeal lacks merit and should be dismissed.

BACKGROUND

I. Mehalshick's Mortgage

On October 27, 1986, Mehalshick and her then husband Michael Mehalshick ("Michael Mehalshick" or "Michael") entered into a mortgage with Keystone Savings Association in the amount of \$72,000, secured by property located at 234 James Avenue, Northampton, Moore Township, Northampton County, Pennsylvania (the "Property"). See Brief in Support of Defendant's Petition to Open/Strike Judgment at 1, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 24, 2013) ("Def. Br."). On April 19, 1991, Marianne and Michael divorced, but Michael's name was not removed from the mortgage. See *id.* Thereafter, the mortgage was assigned to a succession of new owners. See *id.* at 2.

II. The Action in Mortgage Foreclosure

On August 30, 2006, Wachovia Bank, N.A. ("Wachovia"), holder of the mortgage at that time, filed this action in mortgage foreclosure against Michael and Marianne, alleging that the mortgage was in default because the monthly payments of principal and interest from July 4, 2004 through the date of the filing of the Complaint were due and unpaid. See Compl. ¶ 5, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Aug. 30, 2006) ("Compl."). The Complaint demanded judgment for the outstanding principal balance of the mortgage, \$63,996.22, interest from June 4, 2004 through September 16, 2006 in the amount of

\$14,244.43, late fees, and certain other charges, expenses, and costs. See *id.* ¶ 6.

The first page of the Complaint was preceded by a Notice that stated:

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after the Complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claim in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

Notice to Plead, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Aug. 30, 2006) ("Notice to Plead").

Attached to the Complaint were a "Notice of Intention to Foreclose" and "Notice of Homeowners' Emergency Mortgage Assistance" (collectively, the "Act 91 Notice"). See Compl., Ex. B. The Act 91 Notice stated that:

- 1) Defendants could cure their default on the mortgage within thirty days by paying the total amount past due, \$9,062.35, plus any payments and late charges that became due during the thirty-day period;
- 2) if the default were not cured within thirty days, the lender intended to exercise its right to foreclose on the Property and accelerate the mortgage debt, meaning that the entire outstanding balance of the debt would be immediately due and payable;

- 3) if the lender proceeded with foreclosure, the Property would be sold at a Sheriff's Sale to pay the mortgage debt;
- 4) Defendants would have the right to cure their default on the mortgage at any time up to one hour before the Sheriff's Sale by paying the total amount then past due plus late fees and certain other charges and costs;
- 5) curing the default as set forth in the Act 91 Notice would restore the mortgage to the same position it had occupied before the default.

See id. at 4.

The Complaint averred that the Act 91 Notice had been sent to the Defendants by certified and regular mail. *See* Compl. ¶ 9. On September 27, 2006, a Northampton County Deputy Sheriff served the Complaint, together with its attachments and the Notice to Plead, on an adult in charge of Mehalshick's residence. *See* Sheriff's Return of Service, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Sept. 27, 2006).

III. Mehalshick's First Petition in Bankruptcy

Mehalshick did not answer the Complaint. On November 21, 2006, she filed a petition in bankruptcy in the United States Bankruptcy Court for the Eastern District of Pennsylvania (the "Bankruptcy Court"). *See* Plaintiff's Pet. To Amend Judgment ¶ 4, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No.

C-48-CV-2006-6855 (C.P. Northampton Co. Jul. 3, 2007) ("Pet. to Amend Judgment"). Mehalshick's filing of the petition in bankruptcy operated as an automatic stay of further proceedings in the action for mortgage foreclosure. *See id.*

On December 15, 2006, Wachovia's counsel, apparently unaware of Mehalshick's filing for bankruptcy, obtained a default judgment in the action for mortgage foreclosure in the amount of \$87,624.89. *See id.* ¶¶ 1-2; Judgment, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Dec. 15, 2006). A Sheriff's Sale of the Property was scheduled for April 5, 2007. *See* Notice of Sheriff's Sale of Real Property, Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Feb. 25, 2009).

On December 19, 2006, apparently having belatedly learned of Mehalshick's bankruptcy filing, Wachovia's counsel reported the bankruptcy filing to the Sheriff of Northampton County and requested a stay of the April 5, 2007 Sheriff's Sale. *See* Letter of Joseph A. Goldbeck, Jr. to Sheriff of Northampton Co., Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Feb. 25, 2009).

On January 8, 2007, the Bankruptcy Court granted Wachovia relief from the automatic stay. *See* Attach. to Pet. to Amend Judgment ¶ 5. On

January 23, 2007, the bankruptcy action was closed. See Docket Entries in Bankruptcy Action, Attach. to Pet. To Amend Judgment.

IV. Entry of Default Judgment in the Foreclosure Action

On February 7, 2007, Wachovia filed a Praecipe to Vacate Judgment in the action for mortgage foreclosure, asserting that the December 15, 2006 default judgment had been entered in error following Mehalshick's filing of her bankruptcy petition. See Praecipe to Vacate Judgment, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Feb. 7, 2007). On February 26, 2007, the default judgment was re-entered. See Pet. to Amend Judgment ¶ 2. A Sheriff's Sale of the Property was scheduled and postponed several times. See Sheriff's Return Pursuant to Pa.R.C.P. 3139 and Attachments, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Apr. 1, 2009).

On May 1, 2007, the Court issued an Order permitting substituted service of the Notice of Sheriff's Sale and any future Court filings on Michael Mehalshick by posting the Notice at the Property and sending the Notice by certified and regular mail to his last known address. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 1, 2007).

On July 3, 2007, Wachovia presented a petition to amend the February 26, 2007 default judgment to \$110,111.68 to reflect interest from June 4, 2004 through June 8, 2007 and the additional late fees, advances for

payment of taxes and insurance, and other charges, expenses, and costs that had accumulated during the pendency of the bankruptcy proceedings. See Pl. Pet. to Amend Judgment ¶¶ 1-7. The Petition to Amend Judgment set forth a detailed breakdown of the amounts that had accrued for each item. See *id.* ¶ 8.

On July 3, 2007, Mehalshick presented, through counsel, a motion to postpone the pending Sheriff's Sale, asserting that she was in the process of securing financing to avert a forced sale of the Property and that "Respondent would not be unfairly prejudiced by a short delay in the sale in order to permit a hearing to be held on the Plaintiff's Petition to Amend Judgment and also to permit Petitioner's lender an opportunity to complete the loan process (especially if the same can be done within perhaps two weeks)." Motion to Postpone Sheriff's Sale ¶ 10, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. July 3, 2007).

On July 3, 2007, following a hearing at which Mehalshick was represented by counsel, the Court issued an Order amending Wachovia's default judgment to "\$110,111.68, plus interest at the rate set forth in the note and mortgage, and costs of this action through and including the Sheriff's Sale of the Property or payment of the mortgage loan in full." *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. July 3, 2007). On July 3, 2007, the Court issued a second

Order postponing the pending Sheriff's Sale of the Property to August 10, 2007. *See Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. July 3, 2007).

V. Mehalshick's Second Petition in Bankruptcy

On August 10, 2007, the date of the rescheduled Sheriff's Sale, Mehalshick filed a second bankruptcy petition. *See* Letter of Joseph A. Goldbeck, Jr. to Sheriff of Northampton Co., Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Apr. 1, 2009). In light of the new bankruptcy filing, Wachovia's counsel asked the Sheriff to stay the August 10, 2007 Sheriff's Sale. *See id.*

On September 26, 2007, Mehalshick's bankruptcy action was dismissed on the ground that she had failed to timely file required documents in that action. *See In re Marianne Mehalshick*, Bky. No. 07-21329 (Bankr. E.D. Pa. Sept. 26, 2007), Attach. to Praecipe for Writ of Execution, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Nov 9, 2007). On November 9, 2007, Wachovia filed a Praecipe for Writ of Execution in Mortgage Foreclosure, alleging that \$110,111.68 was due as of that date. *See id.* A Sheriff's Sale of the Property was scheduled for February 8, 2008. *See* Notice of Sheriff's Sale of Real Property, Attach. to Sheriff's Return of Service Pursuant to

Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Aug. 3, 2009).

VI. Mehalshick's Payment to Forestall Sheriff's Sale

On January 31, 2008, Wachovia accepted \$2,500 from Mehalshick; agreed to postpone the February 8, 2008 Sheriff's Sale; and advised Mehalshick that she could resume making monthly payments on the mortgage. See Plaintiff's Response to Defendant Marianne Mehalshick's Petition to Open/Strike Judgment ¶ 11, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Apr. 11, 2013) ("Pl. Resp. to Pet. To Open/Strike Judgment"). On February 7, 2008, Wachovia's counsel asked the Sheriff to postpone the February 8, 2008 Sheriff's Sale to May 9, 2008. See Letter of Joseph A. Goldbeck, Jr. to Sheriff of Northampton Co., Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Aug. 3, 2009). On April 23, 2008, Wachovia's counsel advised the Sheriff that Mehalshick had paid \$2,500 toward the mortgage debt and asked the Sheriff to stay the May 9, 2008 Sheriff's Sale. See Letter of Michael T. McKeever to Sheriff of Northampton Co., Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Aug. 3, 2009).

VII. Mehalshick's Negotiations for a Modification of the Mortgage

On December 3, 2009, Wachovia filed a Praecipe for Writ of Execution on the default judgment for \$110,111.68 plus interest from July 7, 2007 of \$16,594.39. See Praecipe for Writ of Execution, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Dec. 3, 2009). On December 11, 2009, Wachovia served Mehalshick with a Notice of Sheriff's Sale of the Property for March 5, 2010. See Certificate of Service Pursuant to Pa.R.C.P. 3139.2(c)(2), *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Feb. 26, 2010). The Notice of the Sheriff's Sale stated that the Property was to be sold "to enforce the court judgment of \$110,111.68 obtained by [Wachovia] against you." Notice of Sheriff's Sale of Real Property for March 5, 2010, Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 27, 2011). The Notice further stated: "You may be able to stop the sale by filing a petition asking the Court to strike or open judgment, if the judgment was improperly entered. You may also ask the Court to postpone the sale for good cause." *Id.* ¶ 2.

Mehalshick did not file a petition to strike or open the default judgment. On March 4, 2010, she filed a motion to continue the Sheriff's Sale. See Motion to Continue Sheriff's Sale, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Mar. 4, 2010).

In her motion, she stated: "Following entry of judgment in favor of Plaintiffs and against Defendants in this action, Defendant Marianne Mehalshick entered into an agreement with SN Servicing Corporation, on behalf of Plaintiff, to avoid a sheriff's sale of the subject real property in February 2008." *Id.* ¶ 3. She further stated: "Defendant Marianne Mehalshick made all required payments under the terms of that agreement until June 2009." *Id.* ¶ 4. Mehalshick did not assert that her January 31, 2008 payment of \$2,500 had cured her default on the mortgage; that Wachovia had agreed to vacate the February 26, 2007 default judgment; that the default judgment was no longer valid or enforceable; or that there was any basis for striking or opening the default judgment. Rather, Mehalshick asserted that she had sufficient resources and equity in the Property to secure a modification of the mortgage and that Wachovia would not be prejudiced by a continuance of ninety days to permit her to participate in the Northampton County Mortgage Foreclosure Conference program. *See id.* ¶¶ 6-9.

On March 4, 2010, the Court continued the March 5, 2010 Sheriff's Sale to June 11, 2010 and referred the action to the Northampton County Mortgage Foreclosure Conference program. *See Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Mar. 4, 2010). On May 28, 2010, the Court removed the action from the Mortgage Foreclosure Conference program and extended the stay of the June 11, 2010

Sheriff's Sale to July 9, 2010. *See Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 28, 2010).

On July 8, 2010, Mehalshick filed a Motion to Continue Sheriff's Sale, asserting that (1) she had been unable to participate in the Mortgage Foreclosure Conference program, because Michael Mehalshick's name was still on the mortgage, and she was attempting to have his name removed; (2) she continued believe that she had sufficient assets and home equity to obtain a modification of the mortgage; and (3) Wachovia would not be prejudiced if the July 9, 2010 Sheriff's Sale were continued for a period of ninety days. *See Mot. To Continue Sheriff's Sale ¶¶ 5-8, Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. July 8, 2010). On July 8, 2010, the Court granted Mehalshick's motion and continued the July 9, 2010 Sheriff's Sale to October 8, 2010. *See Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. July 8, 2010).

On October 7, 2010, Mehalshick filed another Motion to Continue Sheriff's Sale, asserting that she was continuing her efforts to locate Michael Mehalshick, that she continued to believe she might obtain a modification of the mortgage, and that there would be no prejudice to Wachovia if the October 8, 2010 Sheriff's Sale were continued for another ninety days. *See Mot. To Continue Sheriff's Sale, Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Oct. 7, 2010). On October

7, 2010, the Court granted Mehalshick's Motion and continued the October 8, 2010 Sheriff's Sale to December 10, 2010, but stated that no further continuances would be allowed. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Oct. 7, 2010).

VIII. Mehalshick's Third Petition in Bankruptcy

On December 8, 2010, two days before the December 10, 2010 Sheriff's Sale, Mehalshick filed a third petition in bankruptcy. See Letter of Goldbeck, McCafferty & McKeever to Sheriff of Northampton Co. dated Dec. 9, 2010, Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 27, 2011). Accordingly, on December 9, 2010, Wachovia's counsel asked the Sheriff to stay the December 10, 2010 Sheriff's Sale. See *id.* On November 1, 2012, the Bankruptcy Court issued an Order dismissing Mehalshick's bankruptcy action and barring her from filing another bankruptcy petition for one year without prior leave of court. See *In re Marianne Mehalshick*, Bankr. No. 12-12268 REF (Bankr. E.D. Pa. Nov. 1, 2012), Attach. to Sheriff's Return Pursuant to Pa.R.C.P. 3139, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Feb. 25, 2014).

IX. Succession of Housing Opportunity Partners as Plaintiff

On November 21, 2011, during the pendency of Mehalshick's third bankruptcy proceeding, Wachovia assigned the mortgage to U.S. Bank

National Association, as Trustee of the Security National Mortgage Loan Trust ("U.S. Bank"). See Def. Br. at 2. On November 29, 2011, U.S. Bank moved to substitute itself as Plaintiff in the action for mortgage foreclosure. See Praecipe for Voluntary Substitution of Plaintiff Under Pa.R.C.P. 2352, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Nov. 29, 2011). On November 29, 2011, U.S. Bank filed a new Praecipe for Writ of Execution for \$110,111.68 plus interest from February 22, 2007 of \$37,871.44. See Praecipe for Writ of Execution, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Nov. 29, 2011).

On May 1, 2012, U.S Bank assigned the mortgage to Housing Opportunity Partners, LLC ("Housing Opportunity Partners"). See Def. Br. at 2. Housing Opportunity Partners did not immediately move to substitute itself as Plaintiff in the action.

Mehalshick had made sporadic mortgage payments after January 31, 2008, but payments stopped on October 15, 2012. See Pl. Resp. to Pet. to Open/Strike Judgment ¶ 11; Mehalshick's Loan History, *id.*, Ex. A. On November 21, 2012, Housing Opportunity Partners filed a Praecipe for Writ of Execution for \$110,111.68 plus interest from February 22, 2007 of \$37,871.44. See Praecipe for Writ of Execution, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Nov. 21, 2012). On December 12, 2012, Housing Opportunity Partners served

Mehalshick with a Notice of Sheriff's Sale of the Property for March 8, 2013. See Certificate of Service, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Mar. 7, 2013). On March 7, 2013, the Court continued the March 8, 2013 Sheriff's Sale to May 10, 2013. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Mar. 7, 2013).

X. Mehalshick's Petition to Open/Strike the Default Judgment

On March 14, 2013, Mehalshick filed the instant Petition to Open/Strike Judgment. See Petition to Open/Strike Judgment, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Mar. 14, 2013). Also on March 14, 2013, Mehalshick filed a proposed Answer to the Complaint. See Proposed Answer to Complaint & New Matter, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Mar. 14, 2013) ("Proposed Answer"). The Proposed Answer contained no responses to paragraphs 2-11 of the Complaint. See *id.*

On May 9, 2013, Mehalshick filed a motion to continue the May 10, 2013 Sheriff's Sale until after the Court had decided her Petition to Open/Strike Judgment. See Motion for Stay of Execution, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 9, 2013). On May 9, 2013, the Court granted Mehalshick's Motion for Stay of Execution; continued the May 10, 2013 Sheriff's Sale to June 7,

2013; and placed Mehalshick's Petition to Open/Strike on the May 28, 2013 Argument List. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. May 9, 2013). On June 6, 2013, the Court postponed the June 7, 2013 Sheriff's Sale to July 5, 2013. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. June 6, 2013). On June 26, 2013, the Court denied Mehalshick's Petition to Open/Strike Judgment. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. June 26, 2013).

XI. Mehalshick's Appeal

On July 24, 2013, Mehalshick filed a Notice of Appeal to the Superior Court of Pennsylvania. See Notice of Appeal, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. July 24, 2013).

On appeal, Mehalshick contends that:

- 1) the February 26, 2007 default judgment should have been stricken, because there were four fatal defects on the face of the judgment:
 - (a) the default judgment has expired and was never revived and is therefore unenforceable, and the Court failed to consider Pa.R.C.P. 3180, which states that "[w]here a judgment is entered on the obligation secured by a mortgage, execution shall be in accordance with the rules governing the enforcement of judgments for the payment of money";
 - (b) the default on the mortgage was cured on

January 31, 2008 when Mehalshick began making payments on the mortgage debt and the lenders accepted those payments, and the default judgment therefore should have been vacated at that time; (c) the calculation of the amount due on the mortgage debt is inaccurate and inconsistent with the loan history submitted by Housing Opportunity Partners; and (d) Housing Opportunity Partners was not listed as the plaintiff in the caption of the action at the time it filed its November 21, 2012 Praecipe for Writ of Execution and therefore lacked standing to enforce the default judgment.

- 2) The February 26, 2007 default judgment should have been opened, because (a) although Mehalshick waited six years to file her Petition to Open/Strike Judgment, she acted promptly under the circumstances, because she was taking steps to resolve the matter, and due to her lack of sophistication and poor legal advice, she mistakenly believed that when she resumed payments on January 31, 2008, the default judgment had been vacated and had become unenforceable; (b) Mehalshick has presented a meritorious defense to the Complaint in that the amount allegedly due is inaccurate; and (c) the errors, irregularities, and "extreme inequities" in this case were "so severe" that she was deprived of her constitutional right to due process before being deprived of her property.

See Concise Statement of Matters Complained of on Appeal, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. C-48-CV-2006-6855 (C.P. Northampton Co. Aug. 20, 2013).

On September 3, 2013, the Superior Court issued an Order noting that Mehalshick had not filed the docketing statement required by Pa.R.A.P. 3517; directing her to file the docketing statement by September 13, 2013; and stating that failure to comply with the Order would result in dismissal of the appeal. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. 2106 EDA 2013 (Pa Super. Sept. 3, 2013). On September 20, 2013, the Superior Court dismissed Mehalshick's appeal for failure to comply with Pa.R.A.P. 3517. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. 2106 EDA 2013 (Pa Super. Sept. 20, 2014). On March 17, 2014, the Superior Court granted Mehalshick's motion for reinstatement of the appeal. See *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. 2106 EDA 2013 (Pa Super. Mar. 17, 2014).

DISCUSSION

I. Petition to Strike

A petition to strike or open a default judgment is governed by Pa.R.C.P. 206.1.

Rule 206.1 Petition. Definition. Content. Form

(a) As used in this chapter, "petition" means

(1) an application to strike and/or open a default judgment or a judgment of non pros

(b) A petition shall specify the relief sought and state the material facts which constitute the grounds therefore. All grounds for relief, whether to strike or open a default judgment, shall be asserted in a single petition.

Pa.R.C.P. 206.1; *accord Aquilino v. Philadelphia Catholic Archdiocese*, 884 A.2d 1269, 1280 (Pa. Super. 2005).

With regard to a motion to strike a default judgment, "[a] court may only look at the facts of record at the time judgment was entered to decide if the record supports the judgment. A petition to strike does not involve the discretion of the court." *Erie Ins. Co. [v. Bullard]*, 839 A.2d 383, 386 (Pa. Super. 2003)] (quoting *Triangle Printing Co. v. Image Quest*, 730 A.2d 998, 999 (Pa. Super. 1999)). "A petition to strike a judgment will not be granted unless a fatal defect in the judgment appears on the face of the record. Matters outside of the record will not be considered, and if the record is self-sustaining, the judgment will not be stricken." *Cargitlada v. Binks Mfg. Co.*, 837 A.2d 547, 549-50 (Pa. Super. 2003) (citation omitted).

Aquilino, 884 A.2d at 1280; *Wells Fargo Bank, N.A. v. Vanmeter*, 67 A.3d 14, 17 (Pa. Super. 2013).

A. Alleged Failure to Revive the Judgment

1. Requirement of Revival

Mehalshick asserts that the February 26, 2007 default judgment has "expired" and that Plaintiff's failure to "revive" it constitutes a fatal defect. See Def. Br. at 4-5. We disagree.

When a plaintiff secures a judgment for money damages, the judgment creates a "judgment lien" against the defendant's real property. See Pa.R.C.P. 3023(a) ("[A] judgment when entered in the judgment index shall create a lien on real property located in the county, title to which at the

time of entry is recorded in the name of the person against whom the judgment is entered."); Pa.R.C.P. 3020 ("As used in this chapter, 'judgment' means a judgment, order or decree requiring the payment of money").

A judgment lien expires after five years unless it is revived. See Pa.R.C.P. 3023(b) ("The lien shall continue for five years from the date the judgment was entered in the judgment index unless the judgment is sooner discharged or the lien is sooner revived."). The procedures for revival are set out in Rules 3025 through 3051. See Pa.R.C.P. 3023(c), Note ("A judgment lien may be revived in the manner provided by Rule 3025 *et seq.*"). Revival is not required for the judgment but only for the lien, to preserve its priority against other liens. See *Shearer v. Naftzinger*, 747 A.2d 859, 861 (Pa. 2000).

A money judgment acts as a lien against real property, but only for five years. The lien must be continued (or revived) to maintain (or obtain a new) place of priority. However, properly speaking, *it is the lien that is revived, not the judgment*. There is no outer time limit to executing against real property to satisfy a judgment, but the proceeds of such a sale must be distributed according to the priority of liens.

Id. (Zappala, J., concurring) (emphasis in original) (quoted in Explanatory Comment preceding Pa.R.C.P. 3020). Thus, contrary to Mehalshick's assertion, a judgment does not expire or become "unenforceable." It is only the lien, not the judgment, that "expires" and must be "revived."

2. Revival Not Required for Judgments of Foreclosure

Although a judgment of mortgage foreclosure is for a sum certain, it is not a judgment for money damages but a judgment *in rem* against the property. See *Reed v. S & T Bank*, 274 B.R. 155, 158 (Bankr. W.D. Pa. 2002) ("The sole purpose of a judgment in mortgage foreclosure is to effectuate a judicial sale of the property subject to the mortgage lien."). Thus, the rules requiring revival of judgment liens are inapplicable to a mortgage lien. See *U.S. Bank Nat'l Ass'n v. Walnut Park Plaza Assocs.*, 2009 WL 5467975 (C.P. Philadelphia Co. Dec. 29, 2009)

[Petitioner] contended that the Sheriff's Sale was scheduled to occur more than five years after the date of the judgment and that as the foreclosing creditor failed to revive its lien securing the judgment, the lien was no longer valid. This court found this claim was without merit as there is no requirement to revive a judgment in mortgage foreclosure"

Id. Thus, a mortgage lien need not be revived in order to maintain its priority against other liens.

Mehalshick asserts that the Court failed to consider Rule 3180, which states that "[w]here judgment is entered on the obligation secured by the mortgage, execution shall be in accordance with the rules governing the enforcement of judgments for the payment of money." Pa.R.C.P. 3180. However, Rule 3181 lists the specific rules governing money judgments that are applicable to an action for mortgage foreclosure, and the rules on revival of liens are not included. See *U.S. Bank v. Walnut Park Plaza Assocs.*, 2009 WL 5467975 ("[T]he Pennsylvania Rules of Civil Procedure governing

mortgage foreclosure actions, which specify the rules that apply to a judgment for mortgage foreclosure, do not include the rules regarding revival."). Moreover, as noted above, even if revival were applicable, revival would be required only for the lien, to preserve its priority as against other liens, and not for the judgment. Thus, the February 26, 2007 default judgment has not "expired" and the Plaintiff's alleged failure to "revive" it does not constitute a fatal defect on the face of the judgment.

B. Mehalshick's Alleged Cure of Her Default on the Mortgage

Mehalshick argues that the February 26, 2007 default judgment is defective on its face, because on January 31, 2008, she cured her default on the mortgage and resumed making payments, which, she asserts, required the default judgment to be vacated at that time. See Mot. to Open/Strike Judgment ¶ 11. We disagree.

In order to cure a default on a mortgage, the debtor must pay the full amount necessary to bring the mortgage current at the time of the payment, including interest, late fees, and the creditor's costs of seeking foreclosure, before the property is sold at a Sheriff's Sale. See 41 P.S. § 404.

§ 404. Right to cure a default

(a) Notwithstanding the provisions of any other law, after a notice of intention to foreclose has been given pursuant to section 403 of this act, at any time at least one hour prior to the commencement of bidding at a sheriff sale or other judicial sale on a residential mortgage obligation, the residential mortgage debtor or anyone in his behalf, not more than three times in any calendar year, may cure his default and prevent sale or other disposition of the real estate and avoid acceleration, if any, by

tendering the amount or performance specified in subsection (b) of this section.

(b) To cure a default under this section, a residential mortgage debtor shall:

(1) Pay or tender in the form of cash, cashier's check or certified check, all sums which would have been due at the time of payment or tender in the absence of default and the exercise of an acceleration clause, if any;

(2) Perform any other obligation which he would have been bound to perform in the absence of default or the exercise of an acceleration clause, if any;

(3) Pay or tender any reasonable fees allowed under section 406 and the reasonable costs of proceeding to foreclosure as specified in writing by the residential mortgage lender actually incurred to the date of payment.

(4) Pay any reasonable late penalty, if provided for in the security document.

(c) Cure of a default pursuant to this section restores the residential mortgage debtor to the same position as if the default had not occurred.

Id.

If a debtor pays less than the full amount required by section 404 and the creditor agrees to temporarily refrain from executing on the judgment, the default on the mortgage is not cured, and the judgment remains valid and enforceable. *See In re Jones*, 91 B.R. 725, 728 (Bankr. W.D. Pa. 1988), *rev'd on other grounds*, 122 B.R. 246 (W.D. Pa. 1990).

Debtor contends that . . . a cure was accomplished . . . when payment of \$600.00 was tendered to Defendant and Defendant stayed the execution sale. It is patently clear that no "cure" took place . . . , as \$600.00 was not sufficient to bring the mortgage current, let alone pay any court costs and/or fees

incurred. If Debtor did not cure the default, then the mortgage was not returned to current status. As the loan remained in default, it was not necessary for Defendant to initiate new foreclosure proceedings. Debtor offered no proof of accord and satisfaction; this was merely a sum paid to forestall mortgage foreclosure.

Id.

Here, Mehalshick has not denied that at the time the Complaint was filed, she was in default on her mortgage. The amount necessary to bring the mortgage current was \$9,062.35. See Act 91 Notice at 4. The default judgment was entered on February 26, 2007. See Mot. to Open/Strike Judgment ¶¶ 9, 11; Resp. to Mot. to Open/Strike Judgment ¶¶ 9, 11. On January 31, 2008, prior to the scheduled Sheriff's Sale on that day, Mehalshick made a payment of \$2,500, and in return, Wachovia agreed to refrain from proceeding with the Sheriff's Sale. See Mot. to Open/Strike Judgment ¶¶ 9, 11; Resp. to Mot. to Open/Strike Judgment ¶¶ 9, 11. The \$2,500 payment was less than the \$9,062.35 required to bring the mortgage current plus the additional fees required to cure the default under Pa.R.C.P. 404. Thus, the \$2,500 payment did not cure Mehalshick's default on the mortgage. As in *Jones*, the payment simply secured Wachovia's agreement not to proceed with the Sheriff's Sale on that day and allowed additional time in which to bring the mortgage current.

Mehalshick has not alleged that Wachovia agreed to forgive her past-due obligation in return for the \$2,500 payment. As noted above, Mehalshick described her agreement to make this payment not as a

settlement of Wachovia's claims but as "an agreement . . . to avoid a Sheriff's Sale." Mot. to Continue Sheriff's Sale ¶ 3, *Wachovia Bank Nat'l Ass'n v. Mehalshick*, No. 2106 EDA 2013 (Pa Super. Mar. 4, 2010). As in *Jones*, "Debtor offered no proof of accord and satisfaction; this was merely a sum paid to forestall mortgage foreclosure." 91 B.R. at 728. Thus, the \$2,500 payment did not cure Mehalshick's default on the mortgage.

If, as Mehalshick asserts, she had believed that the \$2,500 payment was not simply to forestall the Sheriff's Sale but was to secure a settlement and release of her past-due obligation and thereby cure her default on the mortgage, she and her counsel would have required Wachovia to vacate the default judgment and execute a release of the claims asserted in the Complaint at the time Mehalshick made the payment. In addition, the next time Wachovia attempted to execute on the default judgment, Mehalshick would have asserted the defense of accord and satisfaction and/or moved to open the default judgment based on her purported cure of the default on the mortgage. Instead, when Wachovia served Mehalshick with a Notice of Sheriff's Sale on December 11, 2009, which stated that she could file a motion to open/strike the judgment if she believed the judgment had been improperly entered, Mehalshick did not file a petition to open/strike the judgment but responded by seeking to postpone the scheduled Sheriff's Sale; attempting to obtain a modification of the mortgage; and ultimately filing her third petition for bankruptcy. These actions constitute an

admission by Mehalshick that there was no cure of her default on the mortgage. Because there was no cure of the default on the mortgage, the February 26, 2007 default judgment was not defective on its face, and there was no basis for striking the judgment.

C. Alleged Inaccuracy of Amount Due

Mehalshick argues that the default judgment is defective on its face because the amounts due, \$110,111.68 plus \$37,871.44 in interest from February 28, 2007 through November 21, 2012, are inconsistent with the loan history submitted by Housing Opportunity Partners and do not reflect all of the payments she made during the bankruptcy proceedings. See Def. Br. at 5. We disagree.

Mehalshick has not denied that she was in default on the mortgage at the time the default judgment was entered. Thus, even if the loan history does not reflect all of her payments, the default judgment was properly entered and is not defective. See *First Wisconsin Trust Co. v. Strausser*, 653 A.2 688, 694 (Pa. Super. 1995) ("Summary judgment is properly granted in mortgage foreclosure actions where the mortgagor admits that he is delinquent in mortgage payments.").

In addition, Mehalshick has failed to explain how the loan history is inaccurate or identify any specific payments that she asserts are not reflected in the loan history. Thus, she has failed to allege the basis for her

relief in specific concise terms as required by Pa.R.C.P. 206.1(b). See *Wells Fargo Bank, N.A. v. Vanmeter*, 67 A.3d 14, 18-19 (Pa. Super. 2013).

Pennsylvania Rule of Civil Procedures 206.1(b) states that an application to open a default judgment ". . . shall specify the relief sought and state the material facts which constitute the grounds therefor." See Pa.R.C.P. 206.1(b). Appellants acknowledge that "[t]he meritorious defense **must be set forth in specific concise terms.**" Appellants' Brief at 14 (internal citations omitted) (emphasis supplied). Despite this acknowledgment, Appellants did not comply with this requirement in their petition. In their brief, Appellants only provide minimally more information by contending that "discovery and/or evidentiary proceedings would have disclosed relevant evidence concerning payments and credits that [Appellants] were entitled to on the mortgage, and specific negotiations with representatives of [Bank] . . ." *Id.* However, even if true, this contention is insufficient to defeat Bank's entitlement to judgment at law.

Id. (emphasis in original).

We note that Mehalshick was served with notice of Wachovia's July 3, 2007 petition to amend the judgment to \$110,111.68, and she chose not to respond. As a result, Wachovia's allegations were deemed admitted. In addition, Wachovia claimed the \$37,871.44 in interest in its November 29, 2011 Praecipe for Writ of Execution. Mehalshick was represented by counsel and has aggressively asserted her interests in two courts throughout these proceedings. She could have challenged the interest calculation but did not do so. Thus, this allegation does not establish a defect on the face of the judgment.

D. Housing Opportunity Partners' Alleged Lack of Standing

Mehalshick asserts that Housing Opportunity Partners lacked standing to enforce the default judgment, because after Housing Opportunity Partners acquired the mortgage, it did not amend the caption of the action to substitute itself for U.S. Bank as Plaintiff in the action before filing its November 21, 2012 Praecipe for Writ of Execution scheduling a Sheriff's Sale of the Property. See Mot. to Open/Strike Judgment ¶¶ 14, 19(g), 19(k). This argument is without merit.

Pa.R.C.P. 2004 states:

If a plaintiff has commenced an action in his or her own name and thereafter transfers the interest therein, in whole or in part, the action may continue in the name of the original plaintiff, or upon petition of the original plaintiff or of the transferee or of any other party in interest in the action, the court may direct the transferee to be substituted as plaintiff or joined with the original plaintiff.

Pa.R.C.P. 2004. At the time Housing Opportunity Partners sought to execute on the default judgment, it owned the mortgage. Under Rule 2004, Housing Opportunity Partners had standing to enforce the default judgment and was entitled to prosecute the action in the name of U.S. Bank. Thus, the fact that Housing Opportunity Partners was not named as the Plaintiff in the caption does not constitute a fatal defect on the face of the default judgment.

Because there was no fatal defect apparent on the face of the default judgment, we respectfully suggest that Mehalshick's petition to strike was properly denied.

II. Petition to Open

The decision whether to open a default judgment is committed to the sound discretion of the trial court. *See U.S. Bank, N.A. v. Mallory*, 982 A.2d 986, 994 (Pa. Super. 2009) (quoting *ABG Promotions v. Parkway Publishing, Inc.*, 834 A.2d 613, 615-16 (Pa. Super. 2003) (en banc)).

It is well settled that a petition to open a default judgment is an appeal to the equitable powers of the court, and absent an error of law or a clear, manifest abuse of discretion, it will not be disturbed on appeal. An abuse of discretion occurs when a trial court, in reaching its conclusions, overrides or misapplies the law, or exercises judgment which is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will.

Id. (citations and quotation marks omitted).

A petition to open a default judgment may be granted if the petitioner establishes that (1) the petition to open has been promptly filed; (2) the petitioner has a meritorious defense to the underlying claim; and (3) the petitioner has provided a reasonable explanation for failing to answer the complaint. *See Wells Fargo Bank, N.A. v. Vanmeter*, 67 A.3d 14, 18 (Pa. Super. 2013). "[W]here certain facts necessary to justify opening a judgment have not been established and are denied in the answer, the burden of proof is upon the petitioner." *Continental Bank v. Schaler*, 525 A.2d 388, 391 (Pa. Super. 1987).

"[T]he trial court cannot open a default judgment based on the 'equities' of the case when the defendant has failed to establish all three of the required criteria." *U.S. Bank, N.A. v. Mallory*, 982 A.2d 986, 994 (Pa. Super. 2009) (trial court was not required to consider whether petitioner had presented a meritorious defense, because petitioner had failed to promptly file her petition to open and provided no reasonable excuse or explanation for failing to file a responsive pleading) (quoting *ABG Promotions v. Parkway Publishing, Inc.*, 834 A.2d 613, 615-16 (Pa. Super. 2003) (en banc)).

[E]ven assuming Appellant pleaded a meritorious defense, the trial court properly denied Appellant's petition to open the default judgment. *See McFarland [v. Whitman]*, 544 A.2d 929 (Pa. 1988)] (reversing on the sole basis the trial court erred in concluding the defendant provided a justifiable explanation for failing to respond to complaint in a timely manner); *McCoy v. Public Acceptance Corp.*, 451 Pa. 495, 305 A.2d 698 (1973) (indicating all three factors must be met before default judgment may be opened and having concluded the appellant did not adequately explain the failure to answer the complaint, the trial court was justified in refusing to open the judgment); *Seeger [v. First Union Nat'l Bank]*, 836 A.2d 163, 167 (Pa. Super. 2003)] (despite fact the trial court erred in concluding the appellant did not plead a meritorious defense, this Court affirmed the trial court's denial of the petition to open solely on the basis the appellant failed to provide a reasonable excuse or explanation for its decision not to defend).

Id. at 997. As more fully set forth below, Mehalshick has failed to establish any of the three elements required to open a default judgment.

A. Prompt Filing of Petition To Open

The timeliness of a petition to open judgment is measured from the date that notice of the entry of the default judgment is received. The law does not establish a specific time period within which a petition to open a judgment must be filed to qualify as timely. Instead, the court must consider the length of time between discovery of the entry of the default judgment and the reason for delay.

U.S. Bank v. Mallory, 982 A.2d at 995 (quoting *Castings Condominium Ass'n v. Klein*, 663 A.2d 220, 223 (1995) (citations omitted)).

In previous decisions, the appellate courts have held that delays of less than eighty-two days between notice of the entry of the judgment and filing a petition to open were not prompt. . . . Based on these previous decisions, we find support for the trial court's conclusion that the delay in this case [eight-two days] does not constitute a prompt filing, and therefore, we find no abuse of discretion on this basis.

Id. (citing cases).

Mehalshick waited more than six years after the default judgment was entered before she filed her petition to open. Filing the petition after a delay of six years is not prompt. *See Wells Fargo Bank*, 67 A.3d at 18 ("Here, the petition to open was not filed for twenty months after the default judgment was taken. This was not a prompt filing.") (quoting trial court opinion). Thus, Mehalshick has failed to establish the first element required to open a default judgment.

Mehalshick asserts that she delayed filing her petition to open because, due to her lack of sophistication and poor legal advice, she mistakenly believed that she had cured her default on the mortgage when

she made her \$2,500 payment on January 31, 2008 and that curing the default on the mortgage also satisfied the judgment and rendered it unenforceable. See Def. Br. at 6.

Defendant's unsophistication and less than stellar legal advice in the past led her to believe that the judgment had been satisfied, terminated, and no longer effective as she had cured the debt, proceeded to bankruptcy, had numerous judgments vacated in the past, the parties had changed, and the amount of time that had passed.

Id. As discussed above, we find this explanation incredible.

Mehalshick's repeated failures to seek reopening of the default judgment constitute an admission that there was no cure of her default on the mortgage. Because Mehalshick has offered no satisfactory explanation for her six-year delay in filing a petition to open the default judgment, she has failed to establish the first element required for opening the judgment.

B. Meritorious Defense

The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief. The defense does not have to prove every element of its defense[;] however, it must set forth the defense in precise, specific and clear terms.

Seeger v. First Union Nat'l Bank, 836 A.2d 163, 166 (Pa. Super. 2003) (quoting *Penn-Delco Sch. V. Bell Atlantic-PA*, 745 A.2d 14, 19 (Pa. Super. 1999) (citations omitted)).

Here, Mehalshick has failed to present a meritorious defense to the Complaint in mortgage foreclosure. As noted above, she does not deny that she was in default at the time the Complaint was filed, which entitled

Wachovia to judgment as a matter of law. *See First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688, 694 (Pa. Super. 1995) ("Summary judgment is properly granted in mortgage foreclosure actions where the mortgagor admits that he is delinquent in mortgage payments.").

Although Mehalshick asserted that the default judgment was cured when she made her \$2,500 payment on January 31, 2008, as discussed above, that payment did not cure her default on the mortgage and therefore did not require that the default judgment be vacated. Because Mehalshick has not demonstrated that she had a meritorious defense to the complaint, she has failed to establish the second element required for opening a default judgment.

C. Explanation for Failure to Answer the Complaint

Where a party has been properly served with a Complaint and failed to answer, the resulting default judgment is valid and will not be vacated unless the party provides a reasonable explanation for its failure to answer the Complaint. *See Wells Fargo Bank, N.A. v. Vanmeter*, 67 A.3d 14, 19 (Pa. Super. 2013).

Appellants' explanation for their failure to file a timely responsive pleading is deficient. Appellants do not deny that they were served with Bank's complaint seeking to foreclose on Appellants' mortgage, and which contained a notice to defend. The notice to defend admonished Appellants that "a judgment may be entered against you by the Court without further notice" and that "[y]ou may lose money or property or other rights important to you." Bank's Complaint in Mortgage Foreclosure, 5/28/10, at 2. Notwithstanding this warning, Appellants never answered the complaint, and their petition did not explain their lack of

response. Appellants expect us to disregard that default judgments are valid where a party, once served, fails to answer or defend a suit filed against them. We cannot do so.

Id.

Mehalshick asserts that she delayed filing her petition to open the default judgment due to lack of sophistication and poor legal advice. However, she has offered no explanation for her failure to answer the Complaint. Thus, she has failed to establish the third requirement for opening a default judgment. As more fully set forth below, even if the Court were to infer that Mehalshick intends to raise her lack of sophistication and poor legal advice as explanations for her failure to answer the Complaint, we would find her argument unpersuasive.

1. Client's Lack of Sophistication

A party's lack of sophistication with respect to legal matters is not a reasonable explanation for failing to file a responsive pleading. See *U.S. Bank v. Mallory*, 982 A.2d at 996-97 (in mortgage foreclosure action, mortgagor's lack of sophistication in legal and financial matters did not constitute a reasonable excuse for her failure to file a responsive pleading to mortgagee's complaint).

[T]his is a case where Appellant, despite numerous notices to secure counsel, simply did not do so until approximately three months after the complaint was filed and six weeks after the default judgment was entered against her. The fact Appellant may be unsophisticated in legal and financial matters is all the more reason she should have heeded the notices to secure legal counsel at once, and her deliberate decision not to defend does not provide a reasonable explanation or excuse necessary to

open the default judgment. *Seeger v. First Union Nat'l Bank*, 836 A.2d 163, 167 (Pa. Super. 2003) ("Excusable negligence must establish an oversight rather than a deliberate decision not to defend.").

Id.

Mehalshick asserts that she believed that her January 31, 2008 payment of \$2,500 cured her default on the mortgage and that the default judgment was vacated and thereafter became unenforceable. As discussed above, we do not find this assertion credible.

2. Mistake or Negligence of Attorney

Where the explanation for delay involves a mistake or negligence by the party's attorney, the Court focuses on the extent to which the attorney was aware of his responsibilities and understood the implications of failing to fulfill them. *See Davis v. Burton*, 529 A.2d 22, 23-24 (Pa. Super. 1987).

Our courts have held that the power to open a default judgment entered as the result of a mistake or oversight by counsel may be exercised when a reasonable excuse has been offered. In *Shainline v. Alberti Builders, Inc.*, 403 A.2d 577 (1979), this Court distinguished between mistakes by counsel that are excusable and those that are not. Relying on prior caselaw of this Commonwealth, we noted that an attorney's dilatoriness, failure to act with knowledge of the implications, or deliberate decision not to defend are inadequate reasons for his or her failure to answer a complaint. We also stated that a clerical oversight or the misplacement of papers through no fault of the attorney that results in a failure to file timely an answer are reasonable excuses. Here, the lower court held that appellants had satisfied two of the three requirements for opening a default judgment. The court held that the petition to open was timely and that a meritorious defense had been presented. The court also held, however, that appellants did not meet the third requirement because they had failed to advance a reasonable explanation for failing to file a timely answer to the complaint.

The only reason that appellants set forth in their petition to open the default judgment for their failure to file an answer to the complaint was that their attorney believed that an entry of appearance was sufficient to prevent the entry of a default judgment. They assert that under prior law, upon which their attorney mistakenly relied, a default judgment would not be entered in trespass cases unless a defendant neither pleaded to the complaint nor entered an appearance in the action. See Pa.R.Civ.P. 1047(a) (rescinded effective July 1, 1984).

We agree with the court below that this excuse was not reasonable. Rule 1047 had been rescinded for nearly one year when the complaint was served upon appellants. In addition, the complaint contained the required notice on the front page that a written answer was required within twenty days. Moreover, appellants' attorney admitted receiving a letter from appellee's attorney dated July 29, 1985, which stated the following:

Also, if you will be representing [appellants], I trust that you will proceed to file your Answer to our Complaint as soon as possible, as per the applicable Rules of Civil Procedure. If you require an extension of time, please advise.

Oral Deposition, April 7, 1986, exhibit D. From these factors, we conclude that appellants' attorney was aware that an answer was required and of the implications of a failure to answer. This is not a case of mistake or oversight, but rather, an inexcusable failure to act by one who knew the implications of such a failure.

Id.

In addition, the Court must be satisfied that the attorney did not make a strategic decision not to defend the case. See *Keystone Boiler Works, Inc. v. Combustion & Energy Corp.*, 439 A.2d 792, 794 (Pa. Super. 1982) (reversing trial court's decision to open default judgment where it appeared that attorney had made strategic decision to litigate matter in jurisdiction

where judgment would be executed rather than jurisdiction where complaint had been filed).

Under the circumstances of this case, we are unable to find an equitable consideration which would justify the opening of this default judgment. Appellee received notice prior to the filing of the complaint, appellee was served with the complaint, appellee was notified of the entry of the default judgment and appellee was advised that execution in New York was forthcoming. Appellee was apparently advised to wait to file a Petition to Open until it obtained the "home court advantage" in New York.

Id. at 794-95.

Here, Mehalshick does not argue that her counsel was unaware of the consequences of failing to answer the Complaint. Although she asserts that her counsel gave her "less than stellar legal advice," she provides no specific explanation for why the attorney failed to answer the Complaint. It is apparent that, as in *Keystone Boiler Works*, Mehalshick and her counsel made a strategic decision not to defend the mortgage foreclosure action but to (1) force a stay of the action by filing petitions in bankruptcy in federal court and (2) seek a modification of the mortgage to avert a forced sale of the Property. Mehalshick has failed to offer a satisfactory explanation for either her or her attorney's failure to answer the Complaint. Thus, she has failed to establish the third element for opening a default judgment.

Because Mehalshick has failed to establish any of the elements required for opening a default judgment, we respectfully suggest that this Court did not abuse its discretion in denying her petition to open.

CONCLUSION

Because Mehalshick has failed to establish a defect on the face of the February 26, 2007 default judgment and has failed to establish any of the three requirements for opening a default judgment, we respectfully suggest that her appeal lacks merit and should be dismissed.

BY THE COURT:

MICHAEL J. KOURY, JR., J.