

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

CLARAMARIA KOCHMANN,	:	
	:	
Plaintiff	:	
	:	
Vs.	:	No. 13-1004
	:	
BLUE MOUNTAIN HEALTH SYSTEMS,	:	
INC., GNADEN HUETTEN MEMORIAL	:	
HOSPITAL, PALMERTON HOSPITAL,	:	
THOMAS E. MUNSHOWER, D.O.,	:	
MARIA T. BRASKIE, P.A.,	:	
	:	
Defendants	:	

Anthony J. Voci, Jr., Esquire	Counsel for Plaintiff
Frederick J. Stellato, Esquire	Counsel for Defendants Blue Mountain Health System, Inc. & Gnadon Huetten Memorial Hospital
John R. Hill, Esquire	Counsel for Defendant Munshower, D.O.
Michael Perry, Esquire	Counsel for Defendant Braski, P.A.
Paul C. Troy, Esquire	Counsel for Defendant Palmerton Hospital

MEMORANDUM OPINION

Matika, J. - January , 2014

Before the Court is Plaintiff's "Motion to Lift Defendant, Palmerton Hospital's Judgment Non Pros." This judgment non pros was filed by Defendant, Palmerton Hospital on September 13, 2013, due to Plaintiff's failure to file a certificate of merit pursuant to Pennsylvania Rule of Civil Procedure 1042.3. This matter was called for hearing at which time both parties relied

upon their respective filings in this matter to form the factual basis for and against the motion. This matter is now ripe for disposition.

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2013, Plaintiff, Claramaria Kochmann, (hereinafter "Plaintiff"), filed a medical professional liability action against a number of health care providers including Palmerton Hospital, (hereinafter "Defendant"). Thereafter, on July 25, 2013, Defendant filed preliminary objections to the original complaint. On August 12, 2013, Plaintiff, in response, filed her first amended complaint. Subsequently, Defendant, on August 9, 2013, mailed to the Carbon County Prothonotary's Office a notice of intent to enter judgment non pros against the Plaintiff in the event that Plaintiff does not file a certificate of merit as required by Pennsylvania Rule of Civil Procedure 1042.3.¹ Attached to this notice was a certificate of service indicating that Defendant's Counsel mailed a copy of the notice by first class mail to, among others, Anthony J. Voci, Jr., Esquire, who is Plaintiff's counsel.

Also accompanying this notice and the attached certificate of service was a cover letter identifying the contents of the

¹ Exhibit "A" Defendant's response to Plaintiff's petition.

mailing referenced herein.² This letter references a "cc" to Plaintiff's Counsel as well as all other counsel of record. The notice of intent was filed on August 13, 2013.

On September 13, 2013, Counsel for Defendant filed with the Carbon County Prothonotary's Office a "PRAECIPE FOR ENTRY OF JUDGMENT NON PROS PURSUANT TO RULE 1042.6."³ Supplementary to this praecipe were documents to allow the Carbon County Prothonotary's Office to enter judgment non pros in favor of Defendant, Palmerton Hospital, and against Plaintiff in accordance with Pennsylvania Rule of Civil Procedure 1042.6. According to the docket entries in this matter, a copy of the judgment was sent, along with the praecipe to Plaintiff on September 13, 2013.⁴ Additionally, copies of these same documents were sent by Counsel for Defendant to Attorney Voci on September 13, 2013.⁵

Thereafter, on September 26, 2013, Plaintiff filed the instant "Motion to Lift Defendant, Palmerton Hospital's Judgment of Non Pros." In this motion, Plaintiff's Counsel claims that notice was not sent by Defendant and thus Counsel for Plaintiff never received such notice. Consequently, Plaintiff's Counsel

² Exhibit "B" of Defendant's Response to Plaintiff's Petition.

³ Exhibit "C" of Defendant's response to Plaintiff's petition.

⁴ Exhibit "D" of Defendant's response to Plaintiff's petition.

⁵ Exhibit "F" of Defendant's response to Plaintiff's petition.

asserts that it was not until after judgment was entered did he become aware of the fact that judgment was entered on September 13, 2013.

At the hearing held on Plaintiff's motion, Counsel for both parties agreed that no testimony would be proffered as each party would rely upon their respective representations set forth in the motion and response thereto, along with their respective supplementary briefs.

LEGAL DISCUSSION

Under Pennsylvania law, a plaintiff in a professional liability action must comply with Pennsylvania Rule of Civil Procedure 1042.3(a) that reads as follows:

- (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either
 - (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
 - (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

Pa.R.C.P. 1042.3(a). This sixty (60) day time period can be extended upon good cause shown pursuant to subsection (d) of this rule.

If a plaintiff fails to attach the requisite certificate of merit to his or her complaint, a defendant in the same action can seek to enter judgment non pros, under Pennsylvania Rule of Civil Procedure 1042.6 and 1042.7. To obtain such judgment, a defendant, pursuant to Rule 1042.6, shall file a written notice of intent to file a praecipe for the entry of the judgment non pros thirty-one (31) days after plaintiff filed the complaint; such notice must be served upon the party's attorney of record. See, Pa.R.C.P. 1042.6. Thereafter, the defendant must wait thirty days, and if the plaintiff fails to file the certificate of merit within this thirty-day time period or any additional time is granted as of the result of a motion to extend such timeframe, the defendant can file the praecipe to enter judgment non pros. See, Pa.R.C.P. 1042.7.⁶ If a plaintiff does not file the required certificate of merit and the defendant complies with these timeframes, the result would be that the praecipe of judgment non pros would be entered sixty-one days after

⁶ There are two exceptions when a judgment non pros may be entered without the required notice; however, such exceptions are not applicable to the facts before the Court. See, Pa.R.C.P. 1042.6(b).

plaintiff filed the complaint but without also filing the certificate of merit in violation of Pennsylvania Rule of Civil Procedure 1042.3(a).

The relevant facts before the Court, as it relates to Plaintiff's motion, are as follows:

- (a) The complaint was filed on July 9, 2013, without the required certificate of merit;
- (b) On August 9, 2013, Defendant mailed to the Carbon County Prothonotary's office and Plaintiff's Consul, the notice of intent to enter judgment non pros; said notice was docketed by the Prothonotary's office on August 13, 2013;
- (c) The sixtieth (60th) day after filing the complaint was September 7, 2013;
- (d) Plaintiff did not file a certificate of merit pertaining to her claim against the Defendant on or before September 7, 2013;
- (e) Judgment non pros was entered by the Carbon County Prothonotary's office after receipt of the praecipe from Defendant on September 13, 2013; and
- (f) Plaintiff filed the instant motion to lift judgment non pros on September 26, 2013, two days

after learning from defense counsel that judgment non pros was entered.

Plaintiff, in the request to lift the judgment non pros, attests that despite Defendant's Counsel's claim that notice of intent to enter judgment non pros was mailed to Plaintiff's Counsel, such notice was never received.

Where judgment non pros has been entered, a party may, in accordance with Pennsylvania Rule of Civil Procedure 3051, seek relief from that judgment by filing a petition to strike or open that judgment. Pennsylvania Rule of Civil Procedure 3051(b) states that:

[e]xcept as provided in subdivision (c), if the relief sought includes the opening of the judgment, the petition shall allege facts showing that

- 1) the petition is timely filed
- 2) there is a reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment of non pros, and
- 3) there is a meritorious cause of action.

Pa.R.C.P. 3051(b); see also, *Bartolomeo v. Marshall*, 69 A.3d 610, 613 (Pa. Super. Ct. 2013).

The Court must now examine each of these requirements to determine whether Plaintiff is entitled to the relief requested.

The first prong in this three prong test requires a party to have timely filed the petition. In this case, Plaintiff's Counsel filed the instant motion thirteen (13) days after judgment non pros was entered, and, if the Court were to accept Plaintiff's Counsel's representation, two (2) days after he was

advised of the judgment being entered. Notwithstanding Plaintiff's claim, the Court considers the thirteen (13) day time lapse *de minimis*, and thus Plaintiff's petition timely. Therefore, prong one is satisfied.

The Court now turns to the second requirement of whether or not there is a reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment non pros. Defendant claims that on August 9, 2013, notice of intent to enter judgment non pros was sent to the Carbon County Prothonary's office with a copy of such notice being mailed to Plaintiff's Counsel. Attached to the notice of intent sent to the Prothonary's office was a certificate of service identifying to whom this correspondence was mailed. The certificate of service indicates that such notice of intent to enter judgment non pros was mailed to Plaintiff's Counsel, as well as all other defense counsel. Plaintiff's Counsel contends that he never received the notice.

In support of its position that the judgment should not be opened, Defendant contends that the mailbox rule applies which would negate Plaintiff's argument that his failure to receive the notice is a reasonable explanation for the certificate of merit not being timely filed. This long standing rule of evidence stands for the proposition that "depositing in the post office of a properly addressed letter with prepaid postage

raises a natural presumption, founded in common experience, that it reached its destination by due course of mail." *Commonwealth v. Thomas*, 814 A.2d 754, 758 (Pa. Super. Ct. 2002) (quoting *In re Cameron's Estate*, 130 A.2d, 173, 177 (Pa. 1957)). "Evidence that a letter has been mailed will ordinarily be sufficient to permit a jury to find that the letter was in fact received by the party to whom it was addressed." *Shafer v. A. I. T. S., Inc.*, 428 A.2d 152, 156 (Pa. Super. Ct. 1981) (citing *Berkowitz v. Mayflower Securities., Inc.*, 317 A.2d 584 (Pa. 1974)).

Further, the appellate courts have also held that "when a letter has been written and signed in the usual course of business and placed in the regular place of mailing, evidence of the custom of the establishment as to the mailing of such letter is receivable as evidence that it was duly mailed." *Christie v. Open Pantry Food Marts Inc. of Delaware Valley*, 352 A.2d 165, 166-67 (Pa. Super. Ct. 1975) (citing McCormick, Evidence, s 195 at 464 (2d ed. 1972)). However, before this presumption is accepted the moving party, in this case Defendant Palmerton Hospital, must present some evidence that the notice of intent was signed in the usual course of business and placed in the regular place of mailing. *Shafer*, 428 A.2d at 156. The rationale for such is simple: "a presumption that a letter was received cannot be based upon a presumption that the letter was properly mailed." *Commonwealth, Department of Transportation*,

Bureau of Driver Licensing v. Whitney, 575 A.2d 978, 979 (Pa. Cmwlth. Ct. 1990). Thus, "a presumption cannot be based upon a presumption." *Id* (citing *Philadelphia City Passenger Railway Co. v. Henrice*, 92 Pa. 431 (1880)).

As previously stated both Plaintiff's and Defendant's Counsel, in lieu of presenting additional evidence in the form of direct testimony, relied upon the representations made in the motion and answer thereto respectively. Consequently, the Court can only examine Defendant's answer and attached exhibits to determine whether there is evidentiary support to establish the rebuttable presumption regarding the mailing of the notice of intent.

In *Breza v. Don Farr Moving & Storage Co.*, 828 A.2d 1131 (Pa. Super. Ct. 2003), the Appellate Court upheld the trial court's ruling that where no docket entries indicated that the complaint had been returned, there is a rebuttable presumption that the defendant received the mailing. *Id.* at 1135. While the case at bar does not involve docket entries evidencing mailing of the notice of intent, it does involve a certificate of service that indicates Defendant's Counsel served notice of intent to enter judgment non pros upon Plaintiff's Counsel on August 9, 2013, by United States first class mail, postage prepaid. Documentary evidence of mailing, or testimony from the author that a document was mailed, may establish the presumption

of receipt. *Geise v. Nationwide Life & Annuity Company of America*, 939 A.2d 409, 423 (Pa. Super. Ct. 2007). However, the Court does not equate the certificate of service furnished by Defendant with the quantity or quality of evidence necessary to support Defendant's claim that the mailbox rule applies and the presumption that the notice was mailed is established. Other than what is stated in the answer and accompanying exhibit "A", there is no direct evidence that the notice was actually mailed or even placed in the regular place of mailing.⁷

The consequence of such finding by the Court means it would be improper for the Court to presume the presumption that Plaintiff's Counsel received the notice in question. Accordingly, the mailbox rule does not apply and negate Plaintiff's Counsel's claim that he never received the notice of intent to enter judgment non pros. The result is that there is insufficient evidence to demonstrate that the necessary notice of intent to obtain judgment non pros was mailed. Thus this Court finds Plaintiff has a reasonable excuse and satisfied the second requirement to open the judgment.

Lastly, Plaintiff must set forth a meritorious cause of action in order for the Court to open the judgment. "[T]o prevail in a medical malpractice action, a plaintiff must

⁷ See, *Commonwealth v. Thomas*, 814 A.2d 754, 761 (Pa. Super. Ct. 2002); *Szymanski v. Dotey*, 52 A.3d 289, 293 (Pa. Super. Ct. 2012).

'establish a duty owed[,] . . . a breach of that duty[,] . . . that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm.'" *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1145 (Pa. 2003) (quoting *Hightower-Warren v. Silk*, 698 A.2d 52, 54 (Pa. 1997)).

At this stage of the process, all that Plaintiff is required to do is set forth in her complaint averments as to the negligence of Defendant, Palmerton Hospital, and more specifically its physicians, nurses, employees, and agents. This Plaintiff has done. Plaintiff's pleadings are sufficient to establish a meritorious cause of action against Defendant, Palmerton Hospital, at this stage of the litigation.

CONCLUSION

Upon finding that Plaintiff has met all three (3) criteria necessary to establish the right to open the judgment non pros, the Court enters the following order:

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Michael Perry, Esquire	Counsel for Defendant Braski, P.A.
Paul C. Troy, Esquire	Counsel for Defendant Palmerton Hospital

ORDER OF COURT

AND NOW, this day of January, 2014, upon consideration of Plaintiff, Claramaria Kochmann's "Motion to Lift Defendant, Palmerton Hospital's Judgment of Non Pros" and accompanying brief, the answer filed by Defendant, Palmerton Hospital and brief lodged in support thereof, and after an evidentiary hearing, it is hereby

ORDERED and DECREED that the Motion to Lift the Judgment Non Pros entered against Plaintiff Claramaria Kochmann, by Defendant, Palmerton Hospital is **GRANTED**.

It is **FURTHER ORDERED and DECREED** Defendant, Palmerton Hospital shall file a responsive pleading to the second amended complaint within twenty (20) days from the date hereof.

BY THE COURT:

Joseph J. Matika, J.