

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

MARCOS SANCHEZ, M.D.,	:	
Plaintiff	:	
	:	
vs.	:	No. 11-0247
	:	
MEHDI NIKPARVAR, M.D. and	:	
INCARE, LLC.,	:	
Defendants	:	

Steven A. Bergstein, Esquire	Counsel for Plaintiff
Arsen Kashkashian, Esquire	Counsel for Defendants
Michael P. Gigliotti, Esquire	Counsel for Defendants

MEMORANDUM OPINION

Matika, J. - June 12, 2013

Before the Court is an appeal filed by Defendants, Mehdi Nikparvar, M.D. and InCare, LLC., (hereinafter "Defendants"), whereby Defendants appeal this Court's Order dated April 17, 2013, denying Defendants' post-trial motion. The Court files the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and respectfully recommend that Defendants' appeal be quashed for the reasons stated herein.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff instituted this action on January 31, 2011, alleging, among other things, breach of contract and violation of the Pennsylvania Wage Payment and Collection Law. On March 22, 2011, default judgment was entered in favor of Plaintiff and against Defendants. Several weeks later, Defendants obtained

legal counsel in the person of Attorney Gregory Moro who then in turn filed a petition requesting this Court to strike the judgment, or in the alternative open said judgment claiming they were never served with the complaint.¹ Thereafter a rule was issued upon Plaintiff as to why Defendants' petition should not be granted and a hearing was scheduled on the petition. On September 12, 2011, the Honorable Senior Judge Stine granted Defendants' petition to open judgment and required Defendants to file a responsive pleading thereafter.

Three months later, on December 13, 2011, Attorney Moro filed a petition to withdraw as counsel with said petition being granted on January 17, 2012. Thereafter, Plaintiff filed various motions to compel discovery to which Defendants failed to respond and failed to appear before the Court when hearings on the motions were held.

After a pre-trial conference, whereby Defendants failed to appear, the matter was scheduled for trial to be held on February 4, 2013. Notice of the trial order was sent on August 14, 2012 to Plaintiff and both Defendants to the addresses each party provided to the Court. On February 4, 2013, the trial in this matter was held despite Defendants' failure to appear for the trial. After Plaintiff presented his case-in-chief the jury found in favor of Plaintiff and against Defendants. The verdict

¹ Defendants did file an amended petition to strike or open the judgment two days later.

was entered on February 4, 2013, and notice of such was sent to each Defendant. On February 12, 2013, Defendant, Nikparvar, filed a petition to strike or open judgment; however this Court denied such petition on the basis that said petition was premature since no judgment had been entered against either Defendant.

On March 1, 2013, Defendants filed a post-trial motion and a hearing was scheduled for March 22, 2013. At the hearing Plaintiff's counsel objected to Defendants' post-trial motion as being untimely claiming Defendants waived such right to assert any post-trial motion. This Court however denied Plaintiff's objection to ensure Defendants did not have a meritorious defense for their failure to appear at trial and on the underlying breach of contract action. On April 17, 2013, this Court denied Defendants' post-trial motion. A month later Defendants filed this present appeal of this Court's Order of April 17, 2013.

By Order of Court dated May 17, 2013, and docketed May 20, 2013, this Court directed Defendants to file a concise statement of the matters complained of in the appeal within twenty-one (21) days from the date of the order being docketed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). As of the date of this Memorandum Opinion, Defendants have failed to file a concise statement pursuant to this Court's Order.

DISCUSSION

In accordance with Pennsylvania Rule of Appellate Procedure 1925(b):

the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

Pa.R.A.P. 1925(b). Pursuant to subsection (2) of Pennsylvania Rule of Appellate Procedure 1925(b),

The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed.

Pa.R.A.P. 1925(b)(2). "Appellant shall file of record the Statement and concurrently shall serve the judge[,] with service upon the judge to "be in person or by mail as provided in Pa.R.A.P. 121(a)." Pa.R.A.P. 1925(b)(1).

An examination of the docket entries in this matter establishes that this Court's Order directing Defendants to file a concise statement was docketed on May 20, 2013. Additionally, the docket entries verify that said order was mailed to counsel for Defendants by the Carbon County Prothonotary by way of first class mail on May 20, 2013. The consequence of such was that Defendants had until June 10, 2013, that being the twenty-first

day following the docketing of this Court's Order directing Defendants to file a concise statement, to serve upon the Court such statement of matters complained of. Defendants have failed to file their concise statement by June 10, 2013, or on any date thereafter.

As the Supreme Court of this Commonwealth has ruled, in order for an appellant to preserve his or her claims for appellate review, appellant must comply with a trial court's order requiring appellant to file a statement of matters complained of on appeal in a timely manner. *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005). Any issues not raised in an appellant's concise statement will be deemed waived. *Hess v. Fox Rothschild, LLP.*, 925 A.2d 798, 803 (Pa. Super. Ct. 2007). "Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases." *Kanter v. Epstein*, 866 A.2d 394, 400 n.6 (Pa. Super. Ct. 2004), *appeal denied*, 880 A.2d 1239 (Pa. 2005).

As stated previously, "any issues not raised in a 1925(b) statement will be deemed waived." *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998). However, there are caveats to a finding of waiver as delineated in *Forest Highlands Community Association v. Hammer*, 879 A.2d 223 (Pa. Super. Ct. 2005). To

determine that appellant has waived such issues the *Hammer* Court stated:

First, the trial court must issue a Rule 1925(b) order directing an Appellant to file a response within [twenty-one] days of the order. Second, the Rule 1925(b) order must be filed with the prothonotary. Third, the prothonotary must docket the Rule 1925(b) order and record in the docket the date it was made. Fourth, the prothonotary shall give written notice of the entry of the order to each party's attorney of record, and it shall be recorded in the docket the giving of notice. See Pa.R.C.P. 236. If any of the procedural steps set forth above are not complied with, Appellant's failure to act in accordance with Rule 1925(b) will not result in a waiver of the issues sought to be reviewed on appeal.

Id. at 309.

In the case at bar, this Court issued an order on May 17, 2013 directing Defendants to file a concise statement within twenty-one days from the date Prothonotary docketed said order. The order was filed, docketed, and made of record in the dockets by the Carbon County Prothonotary on May 20, 2013. The docket entries make evident that the Prothonotary provided notice of the order to Defendants' counsel, via first class mail, on May 20, 2013. In view of the fact that Defendants have failed to timely file a concise statement as prescribed by this Court's Order of May 17, 2013, Defendants thus have not complied with said order. Consequently, this Court believes Defendants have waived their right to appellate review. Accordingly, this Court

respectfully recommends that the Honorable Superior Court quash Defendants' appeal.

CONCLUSION

Based upon the foregoing, this Court concludes Defendants have waived their right to appellate review of this matter. Accordingly, this Court respectfully requests Defendants' appeal of the April 17, 2013 Court order denying their post-trial motion be quashed.

BY THE COURT:

Joseph J. Matika, Judge