

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

MARCOS SANCHEZ, M.D. :
Appellee :

vs. :

No. 11-0247

MEHDI NIKPARVAR, M.D. and :
INCARE, LLC., :
Appellants :

Steven A. Bergstein, Esquire	Counsel for Appellee
Arsen Kashkashian, Esquire	Counsel for Appellant
Grant S. Palmer, Esquire	Counsel for Appellant
Michael D. Silberfarb, Esquire	Counsel for Appellant

BY:

CARBON COUNTY
PROTHONOTARY

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MEMORANDUM OPINION

Matika, J. - July 31, 2015

On February 4, 2013, this Court conducted a jury trial in which it took testimony and received exhibits into evidence in an action filed by Marcos Sanchez, M.D. (hereinafter "Appellee") against Mehdi Nikparvar, M.D., (hereinafter "Appellant Nikparvar") and InCare, LLC., (hereinafter "Appellant InCare") alleging, among other things, breach of contract and violation of the Pennsylvania Wage Payment and Collection Law.

At trial, the jury found in favor of Plaintiff and against Defendants, and entered such a verdict, notice of which was sent to each Defendant. On February 12, 2013, Appellant Nikparvar¹ filed a petition to open judgment; however, this Court denied such petition on the basis that said petition was premature as no

¹ This filing appears to have been filed pro se by Appellant Nikparvar individually, and no reference is made to his capacity in that filing vis-à-vis Appellant InCare.

judgment has been entered against either Defendant. Subsequently, both Appellants filed a post-trial motion, which was also denied. An appeal followed² and this opinion is in support of this Court's underlying rulings and jury verdict in favor of Appellee.

FACTUAL AND PROCEDURAL BACKGROUND³

Appellee instituted this action on January 31, 2011, claiming, *inter alia*, violation of the Pennsylvania Wage Payment and Collection Law and breach of contract. Default judgment was entered for Appellee in March of 2011, but later opened by this Court when it granted Defendants' petition in September of that same year. Appellee filed a number of motions to compel discovery, to which both Appellants failed to respond or appear before the Court when hearings were scheduled. Following a pre-trial

²By Order of Court dated May 17, 2013, and docketed May 20, 2013, this Court directed Appellants to file a concise statement of the matters complained of on 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 June 12, 2013, when this Court filed its Memorandum Opinion, no concise statement had been filed. On June 10, 2015, this Court received only Appellant Nikparvar's statement of matters complained of on appeal. In the statement, Appellant Nikparvar averred that Appellant InCare sought relief pursuant to the Bankruptcy Code in the Bankruptcy Court for the Eastern District of Pennsylvania. Appellant Nikparvar contends that the automatic stay extended to him as well, because an appellate decision that Appellant Nikparvar violated the law would require a finding that Appellant InCare breached its employment contract with Appellee. On May 7, 2015, Appellee filed a motion seeking to lift the automatic stay as applicable to Appellant Nikparvar, which was lifted by the bankruptcy court on June 4, 2015. At no point from June of 2013 until June 10, 2015, when this Court received the statement of matters complained of on appeal, did any party inform this Court of any proceedings in the Bankruptcy Court that would have stayed this appeal.

³A more thorough and detailed accounting of this Court's Factual and Procedural Background can be found in the June 12, 2013 "Memorandum Opinion", which the Court has attached hereto for the Superior Court's convenience.

conference, at which both Appellants again failed to appear, a jury trial was scheduled for February 4, 2013. The trial was held on that date, and once again, neither Appellant appeared. Following Appellee's case-in-chief, the jury entered a verdict in favor of Appellee. On February 12, 2013, Appellant Nikparvar, pro se, filed a petition to open the judgment, which this Court denied as no judgment had been entered against either Appellant.

On March 1, 2013, Appellants filed a post-trial motion, for which a hearing was held on March 22, 2013. This Court denied Appellants' post-trial motion on April 17, 2013 by Order of Court.⁴ Thereafter, Appellants filed an appeal to Superior Court and eventually on June 10, 2015, only Appellant Nikparvar filed a Concise Statement of Matters Complained of on Appeal, pursuant to Pennsylvania Rules of Appellate Procedure 1925(b).⁵ In this statement, Appellant Nikparvar raised the following two issues:

- 1) The Court erred in its February 7, 2013 Order because InCare compensated Plaintiff/Appellee for all amounts owed under Plaintiff/Appellee's employment contract and thus, neither Dr. Nikparvar nor InCare was liable under the Wage Payment and Collection Law. See 43 P.S. § 260.1 et seq.; and
- 2) The Court erred in its April 17, 2013 Order because the verdict against Dr. Nikparvar was invalid since Dr. Nikparvar

⁴The Order is attached to this Opinion for the Superior Court's convenience.

⁵ See Note 2 for explanation as to the supposed timeliness of Appellant Nikparvar's 1925(b) statement. We would also recommend that Appellant InCare's appeal be dismissed for not filing a concise statement once the bankruptcy stay was lifted. "Our Supreme Court intended the holding in *Lord* to operate as a bright-line rule, such that 'failure to comply with the minimal requirements of Pa.R.A.P. 1925(b) will result in **automatic waiver** of the issues raised.'" *Greater Erie Indus. Dev. Corp. v. Presque Isle Downs, Inc.*, 88 A.3d 222, 224 (Pa. Super. Ct. 2014), quoting *Commonwealth v. Schofeld*, 888 A.2d 771, 774 (Pa. 2005) (emphasis in original).

did not receive notice of, and did not attend, the trial. See Helper v. Urban, 518 Pa. 482, 484 (1988) (opening judgment where, "the petition to open [is] promptly filed; (2) the failure to appear or file a timely answer [is excused]; and (3) the party seeking to open the judgment [has a] meritorious defense."

The Court will address these issues accordingly.

DISCUSSION

I. Timeliness of the Post-Trial Motion

Following the Jury's Verdict on February 4, 2013, Appellants filed two separate post-trial motions: a *pro se* motion, filed by Appellant Nikparvar only, to open judgment on February 12, 2013, which was denied on the basis that it was premature as no judgment had been entered; and a motion on March 1, 2013, twenty five (25) days after the jury verdict, claiming that Appellants did not receive notice of the jury trial. This Court held a hearing on March 22, 2013 to ensure Appellants did not have a meritorious defense for their failure to appear at the trial.

Pennsylvania Rule of Civil Procedure 227.1 states that "[p]ost-trial motions shall be filed *within ten days* after . . . verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial". Pa.R.C.P. 227.1(c)(1) (*emphasis added*). Further, "[i]t is well-established that issues not raised in post trial motions are waived for purposes of appeal." *Deiner Brock Co. v. Mastro Masonry Contractor*, 885 A.2d

1034, 1038 (Pa. Super. Ct. 2005). When a party files post-trial motions at a time when the trial court has jurisdiction over the matter, but does so outside of the ten-day statutory requirement, the trial court's decision to consider the motions should not be subject to review unless the opposing party objects. If the opposing party does object, then the trial court must consider the fault of the late-filing party and any prejudice to the opposing party. See *Watkins v. Watkins*, 775 A.2d 841, 845 n.1 (Pa. Super. Ct. 2001).

In the instant matter, the March 22, 2013 hearing was conducted over the objection of Appellee, who claimed the post-trial motion was untimely, and therefore, should be dismissed. The reason that hearing was conducted was to determine, *nunc pro tunc*, as required by the Superior Court in *Watkins*, among other cases, the fault of Appellants and any prejudice to Appellee. In that hearing, this Court determined that the claim of Appellants, in suggesting that they did not receive notice of the trial, was such that the post-trial motion should be denied as meritless and therefore untimely filed.⁶ Therefore, as no timely post-trial motions were filed, this Court considers any and all issues brought forward by Appellants as waived. In the event that they

⁶ A copy of the April 14, 2013 Order, which further states and explains the reasons for the denial of Appellants' Post-Trial Motion, is attached hereto for the Superior Court's convenience.

are not waived, the following sections also include an explanation as to why denial of Appellants' post-trial motions was proper.

II. Determination as to the Court's February 7, 2013 Order

As stated above, only Appellant Nikparvar filed a concise statement as required by Pa.R.A.P. 1925(b). Accordingly, Appellant InCare's appeal should be dismissed. *Greater Erie Indus. Dev. Corp. v. Presque Isle Downs, Inc.*, 88 A.3d 222, 224 (Pa. Super. Ct. 2014).

The first issue in Appellant Nikparvar's Matters Complained of on Appeal was that "the Court erred in its February 7, 2013 Order." In reviewing the records in this case, this Court did not enter any orders on February 7, 2013. According to the dockets, the only things entered in this case on that date are Verdicts entered in favor of Appellee based on the Jury's Answers to Interrogatories from the trial held on February 4, 2013. However, and notwithstanding this mistake, we will still address Appellant Nikparvar's argument that there was a meritorious defense to Appellee's claims at trial. Thus, this appears to be an appeal challenging the weight and sufficiency of the evidence; evidence not contradicted by either Appellant for want of appearing at the trial.

These are two distinct and separate standards of review. "The weight and credibility of [appellant's] evidence [are] for the

jury to determine. Conflicts in the evidence [a]re for the jury to resolve." *Bugosh v. Allen Refractories Co.*, 932 A.2d 901, 908 (Pa. Super. Ct. 2007), quoting *Juliano v. Johns-Manville Corp.*, 611 A.2d 238, 240 (Pa. Super. Ct. 1992). With regards to the authority of the appellate courts regarding the weight of the evidence, the Superior Court has held that "[b]ecause an appellate court, by its nature, stands on a different plane than a trial court, we are not empowered to merely substitute our opinion concerning the weight of the evidence for that of the trial judge." *Boutte v. Seitchik*, 719 A.2d 319, 326 (Pa. Super. Ct. 1998). "Instead, the focus of appellate review is on whether the trial judge has palpably abused his discretion, as opposed to whether the appellate court can find support in the record for the jury's verdict." *Id.*, citing *Thompson v. City of Phila.*, 493 A.2d 669, 673-74 (Pa. 1985).

Turning to the sufficiency of the evidence, the Superior Court has stated the standard as follows: "[w]hen reviewing the sufficiency of the evidence . . . this Court must determine whether the evidence and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the factfinder to find against the losing party." *Zeffiro v. Gillen*, 788 A.2d 1009, 1013 (Pa. Super. Ct. 2001); citing *Bannar v. Miller*, 701 A.2d 232, 238 (Pa. Super. Ct. 1997). The Superior Court has also stated that "[o]ur sole duty is to decide where

there was sufficient evidence to sustain the verdict." *Fannin v. Cratty*, 480 A.2d 1056, 1058 (Pa. Super. Ct. 1984).

The Pennsylvania Supreme Court has also stated that "credibility determinations are within the sole province of the jury." *Martin v. Evans*, 711 A.2d 458, 463 (Pa. 1998). "A jury is entitled to believe all, part, or none of the evidence presented [and] can believe any part of a witness' testimony that they choose, and may disregard any portion of the testimony that they disbelieve." *Randt v. Abex Corp.*, 671 A.2d 228 (Pa. Super. Ct. 1996).

In the case *sub judice*, Appellant Nikparvar avers that this Court erred in the February 7, 2013 "Order". In the course of the trial, the jury heard the testimony presented and found that Appellee presented credible and sufficient evidence convincing enough to find in his favor.⁷ Therefore, based on case law and the jury acting in its capacity as the finder of fact and the body that determines the weight and sufficiency of the evidence, their decision should not be disturbed and Appellant Nikparvar's challenge should be dismissed accordingly.

⁷ As Appellant Nikparvar was not present for the trial, the only evidence presented was that of Appellee. This Court's analysis of Appellant Nikparvar's claims as to why he failed to appear for the trial, as well as a subsequent post-trial motion on that matter will be addressed in a subsequent section of this Memorandum Opinion.

III. Denial of Post-Trial Motion

On April 17, 2013, this Court issued an Order on the second issue raised in Appellant Nikparvar's appeal, denying that as well. In the Order, this Court did not find the testimony of Appellant Nikparvar's witnesses credible when Nikparvar testified that he had not received notice of the proceedings prior to the trial date, yet had received notice of the jury finding against him within eight (8) days of the trial.⁸ The Superior Court has held that a simple averment by a party of not receiving notice is not sufficient to rebut the presumption of service, stating "it has long been the law of our Commonwealth that 'proof of a mailing raises a rebuttable presumption that the mailed item was received and it is well-established that the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the item mailed.'" *Samaras v. Hartwick*, 698 A.2d 71, 73-4 (Pa. Super. Ct. 1997); *quoting Commonwealth Dep't of Transp. v. Grasse*, 606 A.2d 554, 545 (Pa. Commw. Ct. 1991).

In the instant matter, Appellant Nikparvar offered nothing more than his own testimony that he never received notice of the trial date. The Carbon County Prothonotary's docket entries indicate that notice was mailed to Appellants at the address previously provided for them with the Office of the Prothonotary,

⁸ A copy of the April 14, 2013 Order, which further states and explains the reasons for the denial of Appellants' Post-Trial Motion, is attached hereto for the Superior Court's convenience.

informing them on August 14, 2012 of the February 4, 2013 trial. Thus, the facts of this case fall in line with the holding of *Samaras*, and Appellant Nikparvar's unsupported claim that he did not receive notice should not be sufficient to defeat the rebuttable presumption. Therefore, this Court respectfully believes denying Appellants' post-trial motion on these grounds was correct.

CONCLUSION

Based on the foregoing, this Court respectfully recommends that the February 4, 2013 jury verdict and February 19, 2013 judgment be allowed to stand and that this Court's Order, dated April 17, 2013, denying Appellants' Motion for Post-Trial Relief be affirmed for the various reasons stated herein.

BY THE COURT:


Joseph J. Matika, J.

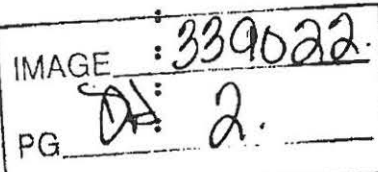
IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
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MARCOS SANCHEZ, M.D.,
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vs.

No. 11-0247

MEHDI NIKPARVAR, M.D. and
INCARE, LLC.,
Defendants



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PROthonotary

Steven A. Bergstein, Esquire
Arsen Kashkashian, Esquire
Michael P. Gigliotti, Esquire

Counsel for Plaintiff
Counsel for Defendants
Counsel for Defendants

ORDER OF COURT

AND NOW, this 17th day of April, 2013, upon consideration of Defendants' Motion for Post-Trial Relief pursuant to Pennsylvania Rule of Civil Procedure 227.1(a)(1), the response thereto, and after a hearing held thereon, it is hereby ORDERED and DECREED that Defendants' Motion for Post-Trial Relief is DENIED. Accordingly, judgment is hereby entered on the jury's verdict in favor of the Plaintiff, Marcos Sanchez, M.D., and against the Defendants, Mehdi Nikparvar, M.D. and Incare, LLC.¹

¹ After a review of the record in its entirety, Defendants' post-trial motion is denied on both procedural and substantive grounds. As mandated by Pennsylvania Rule of Civil Procedure 227.1(c), post-trial motions shall be filed within ten days after a jury verdict. See, Pa.R.C.P. 227.1(c). In this matter a jury verdict was rendered in favor of the Plaintiff and against the Defendants on February 4, 2013. Consequently, Defendants had until February 14, 2013 to file any motion for post-trial relief they sought necessary and appropriate.

Defendants did file a petition on February 12, 2013, but that petition requested this Court to open or strike a judgment. Since there was no judgment entered against the Defendants this Court appropriately dismissed said petition as unripe.

Twenty-five days later, almost a full month after the jury verdict was rendered against Defendants, Defendants file this present motion claiming they did not receive notice of the jury trial and thus they were unable to

BY THE COURT:


Joseph J. Matika, Judge

defend against the claims asserted against them. Consequently, Defendants ask this Court to grant a new trial. However, since Defendants received notice of the jury verdict within the allotted time to file timely post-trial motion, as evidenced by Defendants filing a petition to open or strike a judgment, accordingly Defendants' post-trial motion must be dismissed as untimely pursuant to Pennsylvania Rule of Civil Procedure 227.1(c).

Notwithstanding the procedural defect, and over Plaintiff's counsel's objection, this Court held a *nunc pro tunc* hearing on Defendants' post-trial motion. At this hearing, Defendant, Mehdi Nikparvar testified. The Defendant's testimony was that in May of 2012 he changed addresses and never received notice of the trial. Furthermore, if he had received notice of the trial date he would have been present to defend against the claims set forth against him and Defendant Incare, LLC.

In determining whether to grant Defendants' motion on the merits of their argument that they never received notice of the trial, the Court is guided by certain principles. See, *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984). These principles are: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery requests; 3) history of dilatoriness; 4) whether the conduct of the party was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal; and 6) the meritoriousness of the claim or defense. *Id.*

In examining these factors, it is apparent to the Court that the Defendants' course of conduct throughout this case has been to ignore Court proceedings and orders. The Court, although having no doubts about Defendant Mehdi Nikparvar's prodigious command of the English language, does not find him credible when he testified that he never received notice of any Court proceeding or order after May of 2012. From the date Defendants failed to appear in Court, that being May 17, 2012, for a sanctions hearing neither Defendant made any attempts to contact the Court or Prothonotary to ascertain the status of the case against them. It was not until after Defendants received notice of the verdict rendered against them that they inquired with the Court about the status of this case.

Although the Court does not doubt that Defendant Nikparvar changed addresses sometime in the fall of 2012, the Defendant had a duty and obligation to notify the Court or Prothonotary of his change of address. Defendants did not do so. The Pennsylvania Superior Court in *Rothstein v. Polysciences, Inc.*, 853 A.2d 1072 (Pa. Super. Ct. 2004), denied an appellant's appeal *nunc pro tunc* even though appellant's counsel notified the prothonotary of his change of address. *Id.* at 1075. Here, Defendants did not even do that.

Lastly, the Court also finds it puzzling how the Defendant Nikparvar can claim he did not receive any Court orders after May of 2012 or notice of the trial, yet he received notice of the jury verdict that was sent to the same Bloomsburg address as all previous Court orders.

As such, the Court must deny Defendants' post-trial motion as being untimely and meritless.

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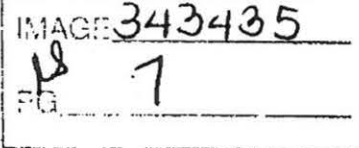
No. 11-0247

Steven A. Bergstein, Esquire
Arsen Kashkashian, Esquire
Michael P. Gigliotti, Esquire

Counsel for Plaintiff
Counsel for Defendants
~~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

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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.

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