

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IRWIN B. CLARK and NANCY L. CLARK, Plaintiffs	:	NO. 08 – 00,038
	:	
vs.	:	CIVIL ACTION - LAW
	:	
	:	
JOHN J. AGNONI t/a HUMDINGER RESTAURANT, Defendant	:	Motion for Summary Judgment

OPINION AND ORDER

Before the Court is a motion for summary judgment, filed by Defendant on May 4, 2009. Argument on the motion was heard August 25, 2009.

This is a personal injury action commenced by a writ of summons issued on January 8, 2008, with respect to an accident alleged by Plaintiffs to have occurred on February 5, 2006. In the instant motion for summary judgment, Defendant seeks to dismiss the matter as the original writ expired without having been served, and the Complaint which was filed was not served until September 24, 2008.

Our Supreme Court has adopted a liberal approach in matters such as this, holding that a court should “dismiss only those claims where plaintiffs have demonstrated an intent to stall the judicial machinery or where plaintiffs' failure to comply with the Rules of Civil Procedure has prejudiced defendant.” McCreesh v. City of Philadelphia, 888 A.2d 664, 674 (Pa. 2005). There, since the plaintiffs had supplied the defendant with actual notice of the claim, the Court reversed the claim’s dismissal and remanded for a determination of whether the defendants had suffered any prejudice. Id.

A review of the procedural history in the instant case indicates that Plaintiffs did supply Defendant with actual notice. As stated above, the original writ was issued on January 8, 2008. After his inquiry with the Prothonotary revealed the filing of the writ, defense counsel entered his appearance and filed a praecipe for the issuance of a rule to file complaint, on February 25, 2008. Plaintiffs then filed a Complaint on April 25, 2008, which was sent to defense counsel by regular mail. In response to preliminary objections, the Court directed the correction of the improper service, and such was accomplished by the service of the Complaint on Defendant on

September 24, 2008. Defense counsel does not dispute having received the Complaint sent April 25, 2008, however.¹ Therefore, under McCreech, unless Defendant can show that he suffered some prejudice from the delay, which he has not, and as long as the Court does not find an intent on Plaintiffs' part to stall the process, which it does not, the action will not be dismissed.

ORDER

AND NOW, this 31st day of August 2009, for the foregoing reasons, Defendant's motion for summary judgment is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Jarrett Smith, Esq., 109 North Main Street, Coudersport, PA 16915
Norman Namey, Esq., 340 Market Street, Kingston, PA 18704
Gary Weber, Esq.
Hon. Dudley Anderson

¹ Inasmuch as Defendant received actual notice of the suit, his attempt to apply Englert v. Fazio Mechanical Services, Inc., 932 A.2d 122 (Pa. Super. 2007), is misplaced: in Englert the defendant had no actual notice of the claim.