

C. Weber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EARL SAMPSON,
Plaintiff

: CV-21-01261

vs.

SCOTT M. HARTZELL, M.D.,
Defendant

OPINION AND ORDER

AND NOW, this 16th day of November, upon consideration of Plaintiff's "Motion to Petition the Courts for Review/Appeal the Courts Decision for the Judgement in Favor of the Defendant Based on Rule 1042.3 @ Pa. R.P.D.", which the Court construes as a motion to open the judgment of non pros entered on February 25, 2022, the Court issues the following Opinion and Order.

BACKGROUND

The Court detailed the procedural history of this case up to the filing of the instant Motion in its May 5, 2022 Order. To summarize, Plaintiff commenced this matter by filing a *pro se* Complaint on December 17, 2021.¹ The Complaint alleged that Defendant "caused loss of sight due to neglect in or about June 2019" but did not provide further facts. The only relief requested in the "wherefore clause" of the Complaint was that the Court "grant[] [Plaintiff's] motion for a certificate of merit." Plaintiff did not file a certificate of merit with his Complaint.

On January 21, 2022, Defendant filed a Notice of Intention to Enter Judgment of Non-Pros for Failure to File Written Statement from an Appropriate Licensed Professional pursuant to Pa. R.C.P. 1042.6, informing Plaintiff that if he did not file a

¹ The docket contains no Return of Service pursuant to Rule of Civil Procedure 405. Defendant avers that he became aware of the filing of this Complaint despite never receiving service compliant with the Rules of Civil Procedure.

certificate of merit pursuant to Pa. R.C.P. 1042.3 within thirty days, Defendant would seek a judgment of non pros. Plaintiff did not subsequently file a certificate of merit, and the Prothonotary entered a judgment of non pros on February 25, 2022 in accordance with Defendant's praecipe filed early that day.

On April 18, 2022, Plaintiff filed the instant Motion, which the Court construes as a petition to open the February 25, 2022 judgment of non pros.² In the Motion, Plaintiff explained that he attempted to file certain documents with the Prothonotary on March 9, 2022, but was unable to due to being diagnosed with COVID-19. He suggested that he had never received notice of the February 25, 2022 judgment,³ and asserted he believed he “was not [allotted] the 60 days time toll to file[] his certificate of merit[.]”

In its May 5, 2022 Order, the Court indicated its belief that Plaintiff misunderstood the procedural rules governing certificates of merit, and explained that it did not fully understand Plaintiff's claims concerning lack of notice and the 60-day time limit. The Court further explained to Plaintiff that the judgment of non pros was entered on procedural grounds rather than due to a court decision concerning the merits.

In light of the principles that filings of *pro se* parties are to be liberally construed, the Court scheduled a hearing for June 29, 2022 to provide Plaintiff a

² Specifically, the Motion requests that “this court revisit its judgement rendered on February 25, 2022 in favor of Defendant.”

³ The docket reflects that the Notice of Defendant's intent to seek the judgment of non pros, Defendant's Praecipe to enter judgment of non pros, and the judgment itself were each served upon Plaintiff by mail at his home address. Plaintiff's December 17, 2021 Complaint (preceding those filings) and his April 18, 2022 Motion (following those filings) both list that address for Plaintiff.

chance to explain on the record what relief he was requesting and what facts he believes entitle him to that relief.

HEARING

At the June 29, 2022 hearing, Plaintiff appeared unrepresented and produced a written statement authored by David L. Cute, DO, a physician at Susquehanna Health. This written statement was dated August 9, 2021, and included Doctor Cute's opinion to a reasonable degree of medical certainty that Plaintiff presented to Defendant's practice with severe glaucoma, but that certain treatments he received there were only indicated for mild-to-moderate glaucoma and not severe glaucoma.⁴ Despite apparently receiving this written statement from Doctor Cute more than four months before he filed his Complaint, Plaintiff did not attach a certificate of merit to his Complaint, and did not file a certificate of merit within sixty days of the Complaint. Plaintiff also did not provide a certificate of merit, or the written statement itself, to Defendant or Defendant's counsel; the first time either the Court or Defendant's Counsel became aware of the existence of the written statement was when Plaintiff presented it at the June 29, 2022 hearing.

⁴ The written statement does not explicitly say that there is a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment of Plaintiff's injury fell outside acceptable professional standards, or that such conduct was a cause in bringing about Plaintiff's loss of vision. The written statement does, however, state a belief to a reasonable degree of medical certainty that Plaintiff's loss of vision was caused by severe glaucoma leading to "intraocular pressure [that was] not adequately controlled," that certain treatments Defendant provided were not indicated for that condition, and that severe glaucoma is typically treated by other procedures which Defendant did not provide. For the sake of this Opinion, the Court assumes without deciding that the written statement introduced by Plaintiff would have been sufficient to satisfy the requirements of Rule 1042.3 had Plaintiff filed a certificate of merit based on the written statement in a timely manner.

Regarding the judgment of non pros, Plaintiff explained that he received the January 21, 2022 Notice of Intention to Enter Judgment on Non Pros filed by Defendant. Upon receiving this Notice, Plaintiff partially completed a Continuance Request form; at the hearing, Plaintiff testified that he intended this form to be a request for extension of time to satisfy the requirements regarding the certificate of merit.⁵ On the form, Plaintiff put a checkmark in the space indicating he was requesting a continuance of "Argument"⁶ and handwrote "(Motions)" next to that space. Plaintiff indicated the matter he was seeking to continue was scheduled for "1-24-22," although nothing was scheduled for that day.⁷ In the space provided for Plaintiff to specify the basis for his continuance application, he wrote "due to illness." In the portion of the request addressing the opposing party's position, Plaintiff wrote that he contacted Defendant's counsel on "1-24-22" concerning the request, but did not mark either space indicating whether opposing counsel agreed or disagreed.⁸

Plaintiff attached to the continuance request a letter from a medical provider at River Valley Health & Dental Center indicating that he had a positive COVID-19 test which was administered on January 19, 2022. Next to this line, Plaintiff handwrote "Positive on Mon 24th." The letter indicated that Plaintiff was to quarantine according to the latest CDC guidelines.

⁵ It remains unclear why Plaintiff attempted to request an extension of time to file a certificate of merit when the Notice indicated Plaintiff had at least thirty days to file a certificate of merit, and he had been in possession of a written statement for over five months.

⁶ As opposed to trial, hearing, or conference.

⁷ Plaintiff also put "1-24-22" on the line for "Today's date," so it is possible he mistakenly put the date he filled out the request on the line indicating the date of the matter he was seeking to continue as well.

⁸ Counsel for Defendant asserted that Plaintiff did not contact him concerning the request.

Plaintiff never filed his Continuance Request form of record, and it did not become a part of the record until Plaintiff introduced it at the June 29, 2022 hearing.⁹ The docket reflects, however, that on January 24, 2022, Plaintiff paid the Prothonotary's office \$1.00 for "copies," which is consistent with using the Prothonotary's photocopier to make two copies of the continuance request and attachment. Thus, it appears that Plaintiff went to the Prothonotary's office on that day; it is not clear whether he attempted to file the continuance request and was rebuffed (possibly due to his COVID-19 diagnosis) or, if so, why he was able to make copies but not file the documents.¹⁰

Plaintiff's Motion to open the judgment of non pros does not mention any attempts to file the continuance request on January 24, 2022 or an inability to do so due to COVID; rather, the Motion indicates that on March 10, 2022, Plaintiff attempted to file a letter with the Prothonotary's office but "was denied his ability to do so" due to a COVID-19 diagnosis. It remains unclear whether Plaintiff was positive for COVID-19 on both January 24, 2022 and March 10, 2022, or whether Plaintiff was mistaken about which of his attempts to file documents was unsuccessful due to that diagnosis. Plaintiff did not produce a copy of the letter that he claims he attempted to provide to the Prothonotary on March 10, 2022, and no such letter has ever been filed of record in this matter.

⁹ As this Court explained in its May 5, 2022 Order, because no motion (including Plaintiff's January 24, 2022 continuance request) was ever filed of record in this matter before the instant Motion, the Court remained unaware of this matter until after the judgment of non pros had been entered.

¹⁰ It is similarly unclear why a COVID-19 diagnosis would require an extension of time for satisfying the certificate of merit requirements but not prevent Plaintiff from traveling to the Prothonotary's office to make copies.

ANALYSIS

Rule 1042.3 requires a plaintiff to file a certificate of merit “[i]n any action based upon an allegation that a licensed professional deviated from an acceptable professional standard” with the complaint or within sixty days thereafter.¹¹ When a plaintiff alleges that a licensed professional is directly liable to plaintiff for harm caused by a deviation from an acceptable professional standard, the certificate of merit must assert that:

“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....”¹²

Rule 1042.3(e) specifies that “[i]f a certificate of merit is not signed by an attorney, the party signing the certificate of merit shall... attach to the certificate of merit the written statement from an appropriate licensed professional....”

Rule 1042.7 allows a defendant to obtain a judgment of non pros for failure to comply with Rule 1042.3. To obtain such a judgment, a defendant must first file a written notice of the intent to seek a judgment of non pros for the plaintiff’s failure to file a certificate of merit.¹³ A defendant must file the notice no sooner than the thirty-first day after the filing of the complaint, and must provide at least thirty days for the plaintiff to either file a certificate of merit or seek the court’s determination that a certificate of merit is not necessary.¹⁴

¹¹ As Plaintiff plainly alleges medical malpractice, there is no dispute that the certificate of merit requirements apply to this action.

¹² Pa. R.C.P. 1042.3(a)(1).

¹³ Pa. R.C.P. 1042.6.

¹⁴ Pa. R.C.P. 1042.6 and 1042.7.

Once a judgment of non pros is entered, a party may seek to either strike or open that judgment under Rule of Civil Procedure 3051. A motion to strike a judgment of non pros is only appropriate to challenge defects on the face of the record; if the record is facially sufficient to support the judgment of non pros, a party must seek instead to open the judgment.¹⁵ The opening of a judgment of non pros is an equitable remedy, and it is within the court's discretion to grant or deny such a request.¹⁶ To open a judgment of non pros, a party must establish the petition to do so was timely filed, "there is a reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment of non pros," and the underlying cause of action is meritorious.¹⁷

Here, the record demonstrates that Defendant followed the appropriate procedure to obtain a judgment of non pros pursuant to Rule of Civil Procedure 1042.7; therefore, there are no grounds to strike the February 25, 2022 judgment of non pros. For this reason, the Court construes Defendant's instant motion as a motion to open the judgment of non pros entered due to his failure to file a certificate of merit. Before the Court may grant such a request, Plaintiff must establish that his petition to open the judgment was timely filed, there is a "reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment of non pros," and there is a meritorious cause of action.

Based on the contents of the written statement presented at the hearing, Plaintiff has established that there is some support for his allegations, and therefore

¹⁵ See *Varner v. Classic Communities Corp.*, 890 A.2d 1068, 1072 (Pa. Super. 2006).

¹⁶ *Dorich v. DiBacco*, 656 A.2d 522, 524 (Pa. Super. 1995).

¹⁷ Pa. R.C.P. 3051.

he has satisfied the third of the three requirements for opening a judgment of non pros. Thus, the Court must address whether the Instant Motion was timely filed and whether Plaintiff has established a “reasonable explanation or legitimate excuse” for the conduct leading to the February 25, 2022 judgment of non pros.

The Court first concludes that Plaintiff’s Motion was not timely filed. The Superior Court of Pennsylvania has indicated that “unexplained delays of 37, 41, and 47 days render a petition to open untimely.”¹⁸ Here, Plaintiff indicates that he made some attempt to file a letter with the Prothonotary on March 10, 2022, but has not established the contents of the letter. Plaintiff filed nothing of record until April 18, 2022, fifty-two days after the February 25, 2022 entry of judgment of non pros.

More importantly, Plaintiff has not established a “reasonable explanation or legitimate excuse” for his failure to comply with Rule 1042.3. Despite having an ostensible written statement in hand as of August 9, 2021, Plaintiff did not file a certificate of merit or otherwise provide a certificate of merit to Defendant either at the time of the Complaint or within sixty days of its filing. Indeed, he did not file a certificate of merit after the entry of the judgment of non pros, along with the instant Motion, or at any time prior to the June 29, 2022 hearing in this matter, which was also the first time Plaintiff indicated that he had obtained a written statement.

The only explanation or excuse the Court has been able to gather for Plaintiff’s failure to file the certificate of merit – or, indeed, his failure to file a legally sufficient complaint or satisfactorily respond to the procedural requirements of this case – is that he is *pro se* and did not understand his obligations under the Rules of

¹⁸ *Madrid v. Alpine Mountain Corp.*, 24 A.3d 380, 383 (Pa. Super. 2011).

Civil Procedure. This is not a “reasonable explanation or legitimate excuse.”¹⁹ It is well-established that although the Court must “liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit... To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing.”²⁰ Here, although Plaintiff appears to have attempted to file documents on a handful of occasions, he only succeeded in doing so on two occasions: when he filed his Complaint on December 17, 2021, and four months later when he filed the instant Motion on April 18, 2022. Most importantly, Plaintiff has never asserted that he attempted to file the one document crucial to this matter: a certificate of merit.²¹

The Court recognizes that a refusal to open a judgment of non pros against a *pro se* Plaintiff who is in fact in possession of a written statement from a licensed professional may appear hard-handed. It is commensurate, however, with the magnitude of Plaintiff’s failure to comply with the Rules of Civil Procedure. This is not a case in which Plaintiff substantially complied with the Rules of Civil Procedure, or even attempted to do so, as would allow the Court to overlook technical

¹⁹ *Id.* (“[I]gnorance of procedural rules does not justify or provide a reasonable explanation for failure to comply....”)

²⁰ *Norman for Estate of Shearlds v. Temple University Health System*, 208 A.3d 1115, 1118-19 (Pa. Super. 2019).

²¹ Plaintiff’s Complaint requested in the “wherefore clause” that the Court “grant his motion for a certificate of merit.” Thus, although he has not explicitly stated as much, it is possible that Plaintiff misunderstood the Rules of Civil Procedure to require him to *ask the Court to grant* a certificate of merit, rather than to file one himself. Certainly, such a reading is not tenable given the plain language of the Rules; furthermore, this is exactly the sort of misunderstanding of which a *pro se* party assumes the risk. Even setting those considerations aside, however, Plaintiff’s actions here would still be insufficient to demonstrate substantial compliance with even his own misunderstanding of the Rules, as it is unclear how the Court could grant a certificate of merit when Plaintiff took no action to provide the Court with the written statement.

noncompliance under Rule 126.²² Rather, it is a case in which Plaintiff “took no steps to comply with Pa. R.C.P. 1042.3,” as he “did not file a [certificate of merit], even one that was defective...”²³ The fact that Plaintiff obtained a written statement is irrelevant, as Rule 126 does not “excuse[] a party who does nothing that a rule requires, but whose actions are consistent with the objectives he believes the rule serves.”²⁴

Here, Plaintiff did not file a defective certificate of merit, or file his written statement in lieu of a certificate of merit because he believed that was sufficient. Rather, he took no action to comply with Rule 1042.3 at all. If Plaintiff did not take action because he misunderstood his obligations under the Rules of Civil Procedure, construing his misunderstanding as a satisfactory explanation or excuse would be to impermissibly grant him a “special benefit” due to his *pro se* status. Ultimately, Plaintiff has not demonstrated a “reasonable explanation or legitimate excuse” for his failure to file a certificate of merit or take any actions of record to address that failure when it became an issue in the case.

²² Rule 126 provides that “[t]he Rules [of Civil Procedure] shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.”

²³ See *Womer v. Hilliker*, 908 A.2d 269, 277 (Pa. 2006).

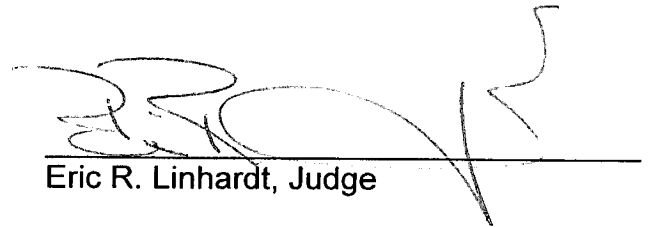
²⁴ *Id.* at 278.

ORDER

For the foregoing reasons, Plaintiff's April 18, 2022 Motion, which the Court construes as a Motion to open the judgment of non pros entered on February 25, 2022, is **DENIED**.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

cc: Earl Sampson

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