

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

PATRICK CARPENTER	:	
	:	TRIAL DIVISION – CIVIL
Appellant/Plaintiff	:	
V.	:	MAY TERM, 2010
	:	NO. 1623
	:	
MICHAEL WILLIAMS	:	Superior Court Docket No.
	:	1195 EDA 2011
Appellee/Defendant	:	

OPINION

PROCEDURAL HISTORY

Plaintiff, Patrick Carpenter, appeals from the Order dated April 8, 2011 denying Plaintiff’s Petition to Open Judgment Non Pros.

FACTUAL BACKGROUND

On June 22, 2008, Patrick Carpenter (hereinafter “Plaintiff”) and Michael Williams (hereinafter Williams) were operating their motor vehicles near the intersection of 7th and Tasker Streets in Philadelphia, Pennsylvania. (Complaint ¶ 3). Plaintiff vaguely asserts that, “suddenly and without warning, defendant negligently, carelessly and/or recklessly operated defendant’s motor vehicle in such a manner as to strike plaintiff’s vehicle.” (Complaint, ¶5). As a result of the accident, Plaintiff states that he suffered neck and back injuries which he alleges to be permanent and serious. (Complaint ¶¶ 6, 9). The police report for the accident listed 2 separate addresses for

Williams (38 Church Street, Willow Grove Pennsylvania) and (P.O. Box 827 Glenside, Pennsylvania). (See Police Report).

On May 12, 2010, Plaintiff commenced this action by filing his Complaint. On May 26, 2010, Plaintiff attempted service of the Complaint at only one of the addresses (38 Church Street, Willow Grove Pennsylvania) and was informed that Williams did not reside there. (See Affidavit of Service). Upon receipt of the information that service was not effectuated, Plaintiff did not attempt service for another two (2) months. (Memo of Law in Support of Defendant's Preliminary Objections, pg.2).

A Case Management Conference was scheduled on July 19, 2010, and Notice was given to Plaintiff on July 21, 2010. The Conference was scheduled to take place on August 11, 2010. Plaintiff then filed a Praecipe to Reinstate the Complaint on July 21, 2010. After the Complaint was reinstated, Plaintiff again attempted service on August 9, 2010. The attempted service was at an address which was not listed on the police report (2644 Lamott Avenue, Willow Grove Pennsylvania). This second attempted service on Williams was unsuccessful.

Consequently, this Court rescheduled the Case Management Conference of August 11, 2010 for October 4, 2010. Plaintiff was electronically notified of the rescheduled Conference the same day. On October 4, Plaintiff again requested a continuance of the Case Management Conference. The Court granted Plaintiff's request the same day as the request and a new Case Management Conference (3rd Listing) was listed for November 25, 2010, with notice to Plaintiff received on October 6, 2010.

Plaintiff again requested a continuance on the case on November 23, 2010, which was granted by this Court (4th Listing). The action was again listed for a Case

Management Conference, and notice was given to Plaintiff on November 25, 2010. In the meantime service on Williams had still not been obtained. On January 7, 2011, this Court issued a Rule upon Plaintiff to Show Cause why the matter should not be Non-Prosessed for failure to prosecute. The docket shows that notice of the hearing was given January 7, 2011. The Rule Returnable Hearing was scheduled for February 15, 2011. Defendant's attorney entered his appearance on January 20, 2011. Plaintiff failed to appear at the Rule Returnable Hearing on February 15, 2011 and this Court entered a Judgment of Non Pros against the Plaintiff for failure to prosecute the case. Notice of the Judgment was given the same day. Plaintiff then re-attempted service of the Complaint a day later, on February 16, 2011. This was the third attempted service by Plaintiff, and the first since August 9, 2010, almost six (6) months since the last attempt at service. Plaintiff still had not effectuated service at the time of his filing his Notice of Appeal.

A Petition to Open the Judgment of Non-Pros was filed on March 15, 2011. In Plaintiff's Memorandum in Support of the Petition to Open, Plaintiff cites the three-pronged test used to Open a Judgment Non Pros in Pennsylvania. Plaintiff asserts (1) that he has filed his petition in a timely fashion; (2) that he has a reasonable excuse for failing to appear at the Rule Returnable hearing; and (3) that the facts of the case support a meritorious claim. (Memorandum in Support of Petition to Open, pg. 2). Plaintiff argues that the Judgment of Non Pros should be opened because he was not put on notice of the February 15 Rule Returnable Hearing.

On April 5, 2011, Williams filed his Answer in Opposition to Plaintiff's Petition to Open. Williams first claims that Plaintiff has violated Pa.R.Civ.P. 218. Next, Williams claims that Plaintiff has not satisfied the requirements to open a Judgment Non

Pros. Specifically, Defendant asserts that Plaintiff has not provided the Court with a reasonably explanation for his failure to prosecute the case.

This Court denied Plaintiff's Petition to Open on April 8, 2011. Plaintiff filed his Notice of Appeal on April 25, 2011 and issued his Statement of Matters Complained of on Appeal accordingly.

The sole issue before the court is whether the lower court abused its discretion in denying Plaintiff's Petition to Open Judgment Non Pros when Plaintiff failed to attend a Rule Returnable Hearing and has not made a good faith attempt to effectuate service upon Defendant.

LEGAL ANALYSIS

A trial court's discretionary decision on a petition for relief from a judgment of non pros will be overturned only if it reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will or such lack of support as to be clearly erroneous. *Womer v. Hilliker*, 589 Pa. 256, 908 A.2d 269 (2006).

To remove the Judgment of Non Pros: 1) a petition to open must be promptly filed, 2) the delay must be reasonably explained; and, 3) facts must be shown to exist which support a cause of action. Pa.R.C.P. 3051.

Having filed his Petition within 30 days, Plaintiff satisfied the first prong under Rule 3051. Plaintiff has also pled minimal facts sufficient to show that he has a cause of action against Defendant. However, Plaintiff still must satisfy the second prong of *Womer* to open the judgment.

In his Petition to Open the Judgment Non Pros, Plaintiff alleges that he was not given notice of the Rule Returnable Hearing on February 15, 2011. Prior to the Rule

Returnable Hearing, Plaintiff requested and was notified of four (4) prior listings of the Case Management Conference. Plaintiff received all of the notices which rescheduled the original and relisted Case Managements. Plaintiff now seeks to convince the court that, despite receiving notice of all prior Court events in this case, he did not receive the notice for the Rule Returnable hearing. In contrast to this, the docket reflects that all parties were notified of the scheduling of the Rule Returnable Hearing. The electronic case docket shows that Plaintiff was given notice of the February 15th Hearing. The Rule to Show Cause Hearing was issued on January 7, 2011, and the Order shows Plaintiff received a copy at the same address he received all other notices.

Plaintiff does not allege that his business contact information, previously provided to the Court upon filing the Complaint was inaccurate or changed since commencing the action. Considering these circumstances it seems clear that Plaintiff was notified of this hearing.

According to the Pa.R.C.P. 218:

(a) Where a case is called for trial, if without satisfactory excuse a plaintiff is not ready, the court may enter a nonsuit on motion of the defendant or a non pros on the court's own motion.

(c) A party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse.

The Pennsylvania Superior Court in *Petrone v. Whirlwind, Inc.*, 444 Pa.Super. 477, 480-481, 664 A.2d 172,174 (1995), equated the requirement that attorneys appear at conciliation or pre-trial conferences with the requirement that they appear at trial. Therefore, this Court finds its authority under Pa.R.C.P. 218 to enter non pros in this case for Plaintiff's counsel's failure to appear.

Plaintiff also has not provided a reasonable explanation for failing to serve Defendant Williams with the Complaint in a timely manner, nor has he shown that a good faith effort to locate Williams and make prompt service of the Complaint.

Plaintiff did not actively attempt to serve Defendant. Plaintiff initiated this action on May 12, 2010, and attempted to serve Defendant only three times since the action began. Prior to the Rule Returnable Hearing, Plaintiff only attempted service on June 2, 2010, and again on August 8, 2010. After almost six (6) months of inactivity, Plaintiff attempted to serve Defendant again on February 16, 2011 – one day after this Court issued the Judgment Non Pros and almost nine (9) months after initially commencing this action. Since the Judgment of Non Pros, Plaintiff still has not effectuated service on Williams. Plaintiff does not provide any explanation for such a delay or his lack of good faith effort.

Additionally, Plaintiff did not file any Motion for Alternative Service. Pa.R.C.P. 430 provides plaintiffs with an alternative method of service when a defendant cannot be found:

If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

Pa.R.C.P. 430(a).

After three failed attempts at service over the course of eleven (11) months the Plaintiff did not petition this Court to allow an alternative means of service. Plaintiff also did not put forth a good faith effort to determine Williams address to be served, which,

according to Rule 430, requires, “(1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act...(2) inquiries of relatives, neighbors, friends, and employers of the defendant, and (3) examinations of local telephone directories, voter registration records, local tax records, and motor vehicle records.” *Id.* Plaintiff did not assert that he pursued any of these avenues.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to deny Plaintiff’s Petition to Open Judgment Non Pros be **AFFIRMED**.

BY THE COURT:

8-30-2011

DATE

ALLAN L. TERESHKO, J.

**All Counsel:
David E. Kwartler, Esq., for Appellant
Min-Sun Kim, Esq., for Appellee**