

ACTION MANAGEMENT INC./NCB,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-00,163
MICHAELE ESPOSITO,	:	
	:	
Defendant	:	

OPINION AND ORDER

This Opinion and Order are entered in determination of the Petition of Plaintiff filed March 4, 1999, to reinstate an appeal filed in this Court from an Appeal of a District Justice judgment.¹

The undisputed factual background of this case follows.

Facts

1. On November 9, 1998, Plaintiff filed a civil action against Defendant for \$8,000 arising out of an alleged default on a 1978 loan. Said civil action was filed in the office of District Justice Allen P. Page, III, M.D. 29-1-02.

2. On January 11, 1999, after hearing the evidence, District Justice Page rendered judgment for the Defendant against the Plaintiff. Plaintiff had thirty days to appeal from January 11, 1999, and timely filed a notice of appeal on February 4, 1999 (24 days after judgment was entered by the District Justice).

3. Plaintiff's Counsel marked his schedule to file the complaint and serve notice of appeal. However, because of the following said schedule was overlooked:

¹ Argument was held before this Court on June 4, 1999. The facts as set forth in the Petition were acknowledged. Both parties have filed briefs in support of their positions. It was also stipulated at argument that the facts set forth in both the brief of the Plaintiff filed May 28, 1999, as well as in the brief of the Defendant, filed May 27, 1999, were true and correct.

- a. On February 6, 1999, Plaintiff's Counsel's wife delivered their first child;
- b. Plaintiff's Counsel missed approximately two weeks time from work to help care for his child;
- c. Upon his return to work, Plaintiff's Counsel believed that he had accomplished the serving of the notice of appeal.

4. Plaintiff did not serve a copy of the notice of appeal upon Defendant or the District Justice as required by Court Rules (Pa.R.C.P.D.J. No. 1005A). Plaintiff did not file proof of service of copies of notice of appeal within ten days after filing the notice of appeal as required by Court Rules (Pa.R.C.P.D.J. No. 1005B). Plaintiff also did not file a complaint within twenty days of the notice of appeal required by Court Rules (Pa.R.C.P.D.J. No. 1004A).

5. Defendant's praecipe to strike the appeal from the record was acted upon by the Prothonotary on March 1, 1999. Plaintiff's appeal was thereby stricken from the record for failure to timely file his proof of service (Pa.R.C.P.D.J. Nos. 1005B & 1006).

6. When Plaintiff's Counsel received Appellee's Praecipe to Strike Appeal From Record on March 4, 1999, it was the first realization of Plaintiff's Counsel that he had failed to follow Pa.R.C.P.D.J. 1004A and 1005B.

7. Defendant has not been prejudiced by the delay in the proceedings.
8. On March 4, 1999, Plaintiff filed his petition to reinstate appeal.
9. Plaintiff's Counsel can proceed with service and filing of complaint.

Discussion

Under Pa.R.C.P.D.J. 1006 the Court of Common Pleas may reinstate an appeal upon good cause shown after the same has been stricken because appellant failed to comply with Rule 1004(a) or Rule 1005(b). The Court finds that Plaintiff has established such good cause. In reaching this decision, the Court has considered multiple cases, many of which appear to reach conflicting decisions, as would apply to this case.²

In this case the Court finds that the birth of Plaintiff's counsel first child was a circumstance, the date of which was beyond the control of Plaintiff's counsel.³ It appears that Plaintiff's counsel did have safeguards in his office to avoid mishaps of this type but was sufficiently distracted by the needs of the first-born child during the initial two weeks of the child's birth that caused counsel to deviate from those procedures. This is certainly equal to the illness of a secretary, the factual scenario as reviewed by the Pennsylvania Supreme Court in *Bass, supra*. *Bass* was subsequently considered by the Pennsylvania Supreme Court in a criminal appeal before it, wherein the Court stated:

As a general rule, an appeal *nunc pro tunc* is only granted in civil cases where there was fraud or a breakdown in the court's operation. However, this rule has been expanded to permit appeals *nunc pro tunc* in instances other than fraud or a breakdown in the court's operations. 'In recent years, however, the courts have somewhat liberalized this rigid standard' which required fraud or a breakdown in the court's operation.

² See, among others, *Allied Heating and Cooling, Inc. v. Reeves*, 596 A.2d 248 (Pa. Super. 1991); *Slaughter v. Allied Hearing*, 636 A.2d 1121 (Pa. Super. 1993); *Anderson v. Sentinel Homes, Inc.*, 594 A.2d 737 (Pa. Super. 1991) and cases cited therein as well as *Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979) and many cases decided under *Bass* including without limitation *In the Interest of C. K.*, 535 A.2d 634 (Pa. Super. 1987) and *Moring v. Dunne and City of Philadelphia*, 493 A.2d 89 (Pa. Super. 1985).

³ Although the birth was certainly the result of Plaintiff's counsel's action.

Commonwealth v. Stock, 679 A.2d 760, 763 (Pa. 1996), citing *Roderick v. Commonwealth of Pa., State Civ. Service Com.*, 463 A.2d 1261, 1263 (Pa. Cmwlth. 1983) (other citations omitted).

In addition, it is acknowledged that Defendant (through the efforts of Defendant's counsel) became aware that an appeal had been filed shortly after February 11, 1999, when Defendant's counsel apparently made a check of the records to see if the District Justice Judgment in Defendant's favor had been finalized. It is equally apparent that the Defendant, being aware that the appeal had been filed, did not take any action in reliance upon the judgment and was not otherwise prejudiced by the fact that a complaint had not been appropriately filed within the twenty days of the taking of the appeal.

Upon learning of the notice that the Defendant had praeciped to have the appeal dismissed under Pa.R.C.P.D.J. 1006, Plaintiff acted promptly to seek reinstatement of the appeal and has demonstrated an ability to promptly file a complaint.

This Court has noted that many of the standards to be applied in determining whether or not good cause has been shown by Plaintiff's counsel are conflicting when the factual circumstances of the cases referenced above are examined. Nevertheless, the Court does believe that this is an appropriate case to allow Plaintiff's counsel to act to reinstate the appeal. The occurrence of the birth of the child is equal to many of the non-negligent circumstances described in the cases that apply in *Bass*, allowing appeals to be filed *nunc pro tunc*. In addition, the equitable principles that are discussed in other cases of allowing judgments to be opened as well as to apply good cause standards of Pa. 1006 are applicable here in the matters of prejudice acting timely when the error is discovered and actual notice are considered. Accordingly, the following Order will be entered.

ORDER

AND NOW, this ____ day of July 1999, the Plaintiff's Petition filed March 4, 1999 to reinstate the appeal filed in this matter is GRANTED. Within ten days after notice of the entry of this Order Plaintiff shall comply with Pa.R.C.P.D.J. 1005 and shall within twenty days of notice hereof comply with Pa.R.C.P.D.J. 1004.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
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529 Court Street, Suite 208, Reading, PA 19601
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)