

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

ABRAHAM CONSTANTINO, M.D., AND : IN THE SUPERIOR COURT OF  
ROSE CONSTANTINO, HIS WIFE, : PENNSYLVANIA

Appellants

v.

DONALD M. YEALY, M.D., JOHN R. :  
BAKER, M.D.; UPMC, A NON-PROFIT :  
CORPORATION A/K/A UNIVERSITY OF :  
PITTSBURGH MEDICAL CENTER; UPMC :  
PRESBYTERIAN HOSPITAL; AND UPMC :  
MERCY HOSPITAL, :

Appellees

: No. 717 WDA 2013

Appeal from the Order entered April 11, 2013,  
Court of Common Pleas, Allegheny County,  
Civil Division at No. G.D. No. 11-17786

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.:

**FILED JULY 23, 2014**

Appellants, Abraham Constantino, M.D. and Rose Constantino (the “Constantinos”), appeal from the order entered on April 11, 2013 in the Court of Common Pleas, Allegheny County, granting Appellees’ motion to strike the Constantinos’ third amended complaint and dismissing the action with prejudice. For the reasons that follow, we reverse.

A brief summary of the relevant factual and procedural background is as follows. On December 12, 2011, the Constantinos, through their attorneys George R. Chada (“Attorney Chada”) and James A. Ashton (“Attorney Ashton”), filed a complaint in civil action against Appellees,

alleging corporate negligence and professional negligence. Appellees filed preliminary objections on February 1, 2012. The trial court entered an order of court on April 2, 2012, overruling Appellees' preliminary objections and directing the Constantinos to file an amended complaint with more specific allegations within 30 days.

The Constantinos filed an amended complaint on April 30, 2012. Appellees again filed preliminary objections. Before argument on the preliminary objections, Attorney Ashton withdrew his appearance. On October 29, 2012, the trial court entered an order of court, overruling Appellees' preliminary objections and granting the Constantinos 30 days to file an amended complaint. The trial court directed the Constantinos to plead each count against the defendants separately.

On December 2, 2012, Attorney Chada filed the Constantinos' second amended complaint. Appellees filed preliminary objections. On March 8, 2013, the trial court entered an order of court, granting in part and overruling in part Appellees' preliminary objections. In the order of court, the trial court directed the Constantinos to "file a Third Amended Complaint setting forth the specific allegations of negligence against each defendant in separate counts, each count containing specific allegations of negligence directed to each defendant" and directing the Constantinos to pay \$1,000 to Appellees for reasonable attorneys' fees.

The Constantinos, through Daniel W. Ernsberger (“Attorney Ernsberger”), filed a third amended complaint on March 27, 2013. In response, Appellees filed a Motion to Strike Third Amended Complaint and for Entry of Judgment *Non Pros* (“Appellees’ Motion to Strike”), alleging that the Constantinos “failed to file a Third Amended Complaint in accordance with this Honorable Court’s Order and in accordance with the Pennsylvania Rules of Civil Procedure.” Appellees’ Motion to Strike, 4/11/13, at ¶ 3. Appellees asserted that Attorney Chada had not withdrawn his appearance on behalf of the Constantinos and Attorney Ernsberger had not entered his appearance on behalf of the Constantinos in accordance with Pennsylvania Rules of Civil Procedure. ***Id.*** at ¶¶ 9-10. Therefore, Appellees argued that Attorney Ernsberger had no standing to file the third amended complaint. ***Id.*** at ¶ 11.

On April 11, 2013, the trial court entered the following order of court:

AND NOW, to wit, this 11th day of April, 2013, upon consideration of the within Motion to Strike Third Amended Complaint and for Entry of Judgment of Non Pros, it is hereby ORDERED, ADJUDGED and DECREED that the within Motion is GRANTED; that Plaintiff’s Third Amended Complaint is stricken, and the time having expired for filing such a complaint in the form previously ordered on March 8, 2013, this action is hereby dismissed with prejudice.

Order of Court, 4/11/13 (the “April Order”). As explained in detail in its 1925(a) opinion, the trial court granted Appellees’ Motion to Strike based on

Attorney Ernsberger's failure to properly enter his appearance in the matter. Trial Court Opinion, 12/19/13, at 4-5.

On April 24, 2013, the Constantinos filed a praecipe to enter judgment on the April Order granting Appellees' Motion to Strike. The Constantinos filed a notice of appeal to this Court on April 26, 2013. In their 1925(b) statement, the Constantinos raise the following two issues on appeal for our review:

1. Are the rules of civil procedure to be construed to preserve the substantive rights of the parties?
2. Did the trial court err in dismissing the case with prejudice after entry of judgment non-pros?

Constantinos' Brief at 4.

For their first issue on appeal, the Constantinos argue that the trial court erroneously construed Rule 1012 of the Pennsylvania Rules of Civil Procedure regarding the procedure by which counsel may enter his or her appearance. *Id.* at 8; Pa.R.C.P. 1012. Specifically, the Constantinos argue that there was no basis to strike the third amended complaint under Rule 1012 because Attorney Ernsberger entered his appearance and because Rule 1012 does not require one counsel to withdraw before another can enter his appearance. Constantinos' Brief at 8-9; Constantinos' Reply Brief at 8-9. The Constantinos further argue that even if Rule 1012 required Attorney Chada to withdraw before Attorney Ernsberger entered his appearance, Rule 126 of the Pennsylvania Rules of Civil Procedure requires the trial court to

disregard the error or defect of procedure because it does not affect the substantial rights of the parties. Constantinos' Brief at 7.

Rule 1012(a) provides:

A party may enter a written appearance which shall state an address at which pleadings and other legal papers may be served in the manner provided by Rule 440(a)(1) and a telephone number. The appearance may also include a telephone facsimile number as provided in Rule 440(d). Such appearance shall not constitute a waiver of the right to raise any defense including questions of jurisdiction or venue. Written notice of entry of an appearance shall be given forthwith to all parties.

Pa.R.C.P. 1012(a).

Although Rule 1012 provides that an attorney "may" enter a written appearance, this rule does not require an attorney to do so. The official notes following Rule 1012 specifically provide that "[e]ntry of a written appearance is not mandatory." Rule 1012(a), *Note*. Moreover, this Court has previously held that entry of a written appearance is not required if the pleadings provide sufficient information to notify parties where legal papers may be served. **See Fleck v. McHugh**, 361 A.2d 410, 413 (Pa. Super. 1976); **see also** 2 Goodrich-Amram 2d § 1012(a):1.

In **Fleck**, the appellant filed a motion to strike a default judgment claiming that the Prothonotary lacked the authority to enter default judgment in an action in trespass. **Fleck**, 361 A.2d at 412. The appellant argued that he previously entered an appearance by filing preliminary

objections. **Id.** The trial court disagreed, finding that when the preliminary objections were stricken before the entry of default judgment, it had “the same effect as if no preliminary objections were filed.” **Id.** Thus, the trial court found that the appellant never entered an appearance. **Id.**

This Court reversed the trial court’s decision, holding that the trial court should not have denied the appellant’s motion to strike “on the basis that [the] appellant had never entered an appearance.” **Id.** at 413. In its decision, this Court stated that a written entry of appearance “does no more than designate an address in the county (now Commonwealth) where papers may be served.” **Id.; see also** Goodrich-Amram 2d § 1012(a):1. This Court declined to “deprive[] [the] appellant of his only opportunity to defend the underlying cause of action, solely because his original attorney neglected to file a piece of paper stating ‘Please enter my appearance on behalf of the defendants.’” **Fleck**, 361 A.2d at 413. Instead, we held that the appellant was not required to enter a written appearance because the appellant’s preliminary objections contained the name and address of the attorney, the docket identified the appellant’s attorney alongside the docket entry, and because “[t]he prosecution of [the] appellee’s claim was not hindered by the failure of [the appellant’s] counsel to file a virtually meaningless slip of paper.” **Id.**

In the instant case, there is no dispute that Attorney Ernsberger did not enter a written appearance. Nevertheless, Attorney Ernsberger satisfied

Rule 1012(a) by providing his name and an address where pleadings and other legal papers could be served on the cover page of the Constantinos' third amended complaint. Like the situation in **Fleck**, Attorney Ernsberger filed the Constantinos' third amended complaint, providing his name and his address. Appellees easily obtained Attorney Ernsberger's name and address from the third amended complaint.<sup>1</sup> In addition, although Attorney Ernsberger did not enter a written appearance on the docket itself, the trial court acknowledged that he "asked the clerk in the Department of Court Records, Civil Division (a/k/a the Prothonotary in other Court of Common Pleas in Pennsylvania), to note his name and address [on the docket]." Trial Court Opinion, 12/19/13, at 4. Attorney Ernsberger's name and address appeared on the electronic docket as "Plaintiff's Attorney" in the section labeled "Attorney." **Id.** Finally, Attorney Ernsberger appeared in court to argue against Appellees' Motion to Strike.

For these reasons, the record reflects that Attorney Ernsberger satisfied Rule 1012 and entered his appearance in this case. As a result, we conclude that the trial court erred in granting Appellees' Motion to Strike on the basis that Attorney Ernsberger did not enter his appearance.

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<sup>1</sup> We note that Appellees served their Motion to Strike on both Attorney Chada and Attorney Ernsberger. Appellees identified Attorney Chada as counsel of record for Plaintiffs, and identified Attorney Ernsberger as **Not** counsel of record for Plaintiffs. **See** Appellees' Motion to Strike, 4/11/13, at Notice of Presentation.

The trial court's opinion also granted Appellees' Motion to Strike based on Attorney Chada's failure to withdraw his appearance in the case and Attorney Ernsberger's failure to explain to the court whether Attorney Chada still represented the Constantinos or intended to withdraw his appearance. Trial Court Opinion, 12/19/13, at 3-4. The Constantinos' argue that Rule 1012(b) does not require one lawyer to withdraw his appearance before another lawyer enters his appearance. Constantinos' Brief at 8.

Rule 1012(b) provides:

(1) Except as provided in paragraph (2), an attorney may not withdraw his or her appearance without leave of court.

(2) An attorney may withdraw his or her appearance without leave of court if another attorney (i) has previously entered or (ii) is simultaneously entering an appearance on behalf of the party, and the change of attorneys does not delay any stage of the litigation.

Pa.R.C.P. 1012(b).

In this case, Attorney Chada did not withdraw as counsel of record prior to Attorney Ernsberger's filing of the third amended complaint.<sup>2</sup>

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<sup>2</sup> In their Motion to Strike, Appellees provided a copy of an email from Attorney Chada to Appellees' counsel on March 19, 2013, stating that he had prepared a motion to withdraw appearance in this case. Appellees' Motion to Strike, 4/11/13, at Exhibit B. Appellees' counsel replied to the email requesting that Attorney Chada serve Appellees with the motion and present the motion to the trial court judge since she retained jurisdiction in the matter. ***Id.*** Attorney Chada failed to respond to the email and failed to present the motion to withdraw prior to argument on Appellees' Motion to



However, Rule 1012(b) does not require withdrawal of counsel before additional counsel can appear. To the contrary, Rule 1012(b) only discusses the manner in which a lawyer withdraws his appearance.

Furthermore, the Constantinos argue that even if the rule required Attorney Chada to withdraw as counsel, the change of attorneys did not affect the substantial rights of the parties and accordingly, the trial court should have disregarded the error or defect of procedure, pursuant to Rule 126. Constantinos' Brief at 8-9.

Rule 126 provides:

The rules 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.

Pa.R.C.P. 126.

In this case, the failure of Attorney Chada to withdraw his appearance did not affect the substantial rights of either Appellees or the Constantinos. Attorney Ernsberger timely filed the Constantinos' third amended complaint. Moreover, the record contains ample evidence that Appellees knew Attorney Ernsberger filed the third amended complaint and knew Attorney Ernsberger's contact information whereupon they could serve papers and

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Strike. ***Id.*** at 3. Attorney Chada filed his withdrawal of appearance on June 12, 2013, two months after argument. Trial Court Opinion, 12/19/13, at 3.

pleadings on the Constantinos. Among other things, Appellees received notice from Attorney Ernsberger that he (rather than Attorney Chada) filed the third amended complaint, and the cover page of the third amended complaint listed Attorney Ernsberger's contact information and identified him as counsel of record. In response, Appellees served their Motion to Strike on Attorney Ernsberger at the address provided in the third amended complaint and the docket. As a result, the certified record reflects that, like the appellees in **Fleck**, Appellees here were not delayed or prejudiced by Attorney Ernsberger's entry of appearance or Attorney Chada's failure to withdraw as counsel. As such, the trial court erred in granting Appellees' Motion to Strike on these bases.

For their second issue on appeal, the Constantinos claim that the trial court erred in dismissing the case with prejudice after entry of judgment *non pros*. Constantinos' Brief at 10. After a review of the April Order, we conclude that the trial court did not enter a judgment of *non pros*.

Appellees prepared and submitted an order of court with its motion to strike third amended complaint and for entry of judgment of *non pros*. Appellees' order of court provided as follows:

AND NOW, to wit, this \_\_\_ day of \_\_\_\_\_, 2013, upon consideration of the within Motion to Strike Third Amended Complaint and for Entry of Judgment of Non Pros, it is hereby ORDERED, ADJUDGED and DECREED that the within Motion is GRANTED; that (1) Plaintiff's Third Amended Complaint is stricken, **(2) judgment of non pros is entered in favor of**

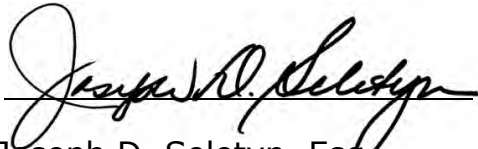
***the defendants and against plaintiffs; and, (3) the Prothonotary is instructed to mark the docket accordingly that a judgment of non pros has been entered thus bringing this matter to a conclusion.***

Appellees' Motion to Strike, 4/11/13 (emphasis added).

The trial court deliberately struck parts (2) and (3) of appellees' order of court, and handwrote the remainder of the order, dismissing the Constantinos' action with prejudice. **See** April Order. The trial court never entered judgment of *non pros* and no relief is required based on the Constantinos' second claim of error.

Order reversed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/23/2014