

Appeal from District Justice - Rule to File Complaint - Judgment of Non Pros

1. The entry of judgement is not automatic upon the running of the 20-day period following a rule to file a complaint.
2. When a defendant fails to file a praecipe for non pros before a complaint is filed, he waives the defect.

William H. Kaye, Esquire, Attorney for Plaintiff
Sally J. Winder, Esquire, Attorney for Defendant

OPINION AND ORDER

KELLER, J., November 18, 1986:

On July 23, 1986, the defendant, Barbara A. Nowak, appealed from the judgment entered by a district justice in favor of the plaintiff, Michael A. Nowak. The prothonotary, on the same date, issued a rule upon the plaintiff to file a complaint and the rule was served upon plaintiff's counsel by mail. The return receipt card indicates it was received on July 24, 1986. The plaintiff's complaint was filed in the office of the prothonotary on August 13, 1986.

On September 10, 1986, counsel for defendant filed a praecipe to enter a judgment of non pros against the plaintiff for failure to file a complaint within twenty (20) days after service of the rule to file a complaint. On the same date the prothonotary entered the judgment of non pros. The plaintiff presented a petition to strike the judgment of non pros on September 16, 1986, and an order was entered the same date directing the issuance of a rule upon the defendant to show cause why the judgment should not be stricken. The rule was returnable in twenty (20) days from service. The defendant's answer to the petition was filed on September 19, 1986. The matter was placed on the Argument List for November by praecipe of counsel for the plaintiff. Briefs were exchanged and arguments heard on November 6, 1986, and the matter is now ripe for disposition.

This same issue was before this Court in Noel L. Mellott vs. Terry Mellott and Diane Mellott, his wife, No. 235 of 1984-C Fulton County Branch (1985). We there held,

"The entry of judgment is not automatic upon the running of the twenty day period. The filing of a praecipe by defendant is a condition precedent to an entry of non pros under this rule."

By defendant's failure to file their praecipe for non pros before the complaint was filed, the defendant waived the defect. In *Homemakers Loan & Discount v. Rowe*, 4 D&C 3d 167 (1977), the Court of Common Pleas of Lawrench County addressed the same issue and reached the same conclusion. See also *Zook v. Watterson*, 31 D&C 3d 77 (Somerset County 1982).

Pa. R.C.P. 1037 (a) provides:

If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.

Pa. R.C.P.D.J. 1004 provides inter alia:

B. If the appellant was the defendant in the action before the district justice, he shall file with his notice of appeal a praecipe requesting the prothonotary to enter a rule as of course upon the appellee to file a complaint within twenty (20) days after service of the rule or suffer entry of a judgment of non pros.

The legal effect of both Pa. R.C.P. 1037 (a) and Pa. R.C.P.D.J. 1004 B. is the same, i.e., the defendant must file a praecipe as a condition of being entitled to the judgment of non pros. When the defendant failed to take advantage of the rights specifically given her by these rules, he cannot then complain if the plaintiff belatedly but prior to the filing of the praecipe filed his complaint pursuant to the rule.

ORDER OF COURT

NOW, this 18th day of November, 1986, the petition of Michael A. Nowak, Plaintiff, to strike the judgment of non pros is granted.

Exceptions are granted the defendant.