

Lampkowski v Parra
2018 NY Slip Op 32098(U)
August 27, 2018
Supreme Court, New York County
Docket Number: 805213/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Henryk Lampkowski,

Plaintiff,

- against -

Raul Parra, M.D., and Memorial Sloan
Kettering Cancer Center,
Defendants.

Index No:
805213/2015

Decision/Order

Mot. Seq.: 1

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Henryk Lampkowski ("Plaintiff" or "Lampkowski"), moves for an Order permitting him to file a late Notice of Appeal. In the alternative, Plaintiff seeks an Order "accepting the timely served and already filed Notice of Appeal." Plaintiff submits the attorney affirmation of Darius A. Marzec ("Marzec"), the affidavit of Lampkowski, and the affidavit of Plaintiff's wife, Bozena Cesarski ("Cesarski"). Defendants oppose.

Background and Factual Allegations

Plaintiff commenced this action alleging medical malpractice by filing a Summons and Verified Complaint on May 21, 2015. Defendants filed their answer on August 6, 2015. A jury trial began on January 10, 2018 and concluded on January 24, 2018. Following the trial, the jury found for Defendants. A judgment for Defendants was entered on February 15, 2018. On February 15, 2018, Defendants served upon Plaintiff's counsel the Judgment and Affidavit Waiving Costs with Notice of Appeal. The deadline for the Notice of Appeal was March 19, 2018.

According to Plaintiff's affidavit, following the service of the Notice of Entry of the Judgment, Plaintiff sought to appeal this matter. Plaintiff first contacted his then attorneys, the Fuchsberg Law Firm. He was told that the attorney handling the matter had left for an extended vacation. He was

subsequently told that since the matter had concluded, that Fuchsberg Law Firm was no longer his attorneys. (Lampkowski Aff., ¶ 4). Plaintiff, who “[has] a very limited understanding of the English language,” proceeded to try to file the Notice of Appeal himself. (Lampkowski Aff., ¶ 2). Plaintiff, with assistance from his wife, used the forms available on the Court’s website to assist him in preparing his Notice of Appeal, which is dated February 20, 2018. (Lampkowski Aff., ¶ 5). After preparing the Notice of Appeal, Lampkowski’s wife “signed the affidavit of service,” and Lampkowski went to 60 Centre Street to file it. (Cesarski Aff., ¶4, Lampkowski Aff., ¶¶ 7, 9).

According to Plaintiff, when he went to 60 Centre Street to file his Notice of Appeal, the Clerk refused to accept the papers. Plaintiff was advised that he could not file any document on his own since he was represented by an attorney, and that his prior counsel would have to “delist” itself. (Lampkowski Aff., ¶¶ 7, 9). Plaintiff attempted to contact his counsel, who refused to assist him. (Lampkowski Aff., ¶ 8). Plaintiff then hired Marzec, who filed the instant motion on his behalf. On March 30, 2018, Marzec proceeded to file the Notice of Appeal exactly as served by Plaintiff. Marzec also filed an Amended Notice of Appeal, and served all parties entitled to notice.

Discussion

An appeal “must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.” CPLR 5513[a]. “The time period for filing a notice of appeal is nonwaivable and jurisdictional.” *Jones Sledzik Garneau & Nardone, LLP v. Schloss*, 37 A.D.3d 417, 417 [2d Dept 2007], citing *Haverstraw Park, Inc. v. Runcible Properties Corp.*, 33 N.Y.2d 637, 637 [1973] (holding that a stipulation of the parties could not preserve the appeal if the time has expired).

“CPLR 2004, which applies to permit the court in its discretion to extend almost any time period set forth in the CPLR, does not apply to the time in which to appeal or to move for leave to appeal. The few grounds on which an extension of the appeal time is statutorily recognized are contained in CPLR 5514 and 5520 in the appeals article, and in CPLR 1022 (involving substitution of parties).” (Practice Commentaries to CPLR. 5513 [McKinney]).

Under CPLR § 5520(a), “If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another required act within the time limited, the

court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the omission.” *See Messner v. Messner*, 42 A.D.2d 889, 890 [1st Dept. 1973] (“Since service of the notice of appeal was timely, the late filing of the notice can and will be excused by the court.”).

1. Request to deem the Notice of Appeal Timely-Filed under CPLR § 5520

Plaintiff contends that since he properly and timely served the Notice of Appeal dated February 20, 2018 on Defendants’ attorneys, the Court should deem that Notice of Appeal as having been timely filed under CPLR §5220(a).

Plaintiff’s counsel states that although the Clerk refused to accept Plaintiff’s Notice of Appeal for filing, Plaintiff “timely served the Notice of Appeal on Defendant’s counsel” on February 20, 2018, as demonstrated by the Affidavit of Service, which is signed by Ciesarski and notarized on February 20, 2018. Plaintiff contends that since he filed as a lay person without the assistance of his prior counsel, any irregularities should be excused.

Defendants, in opposition, contend that while Plaintiff’s Affidavit of Service is notarized on February 20, 2018, the date of service and the papers allegedly served on Defendants are not identified in the Affidavit of Service. Defendants further contend that since Plaintiff was represented by counsel at that time who had not withdrawn, Plaintiff’s service of his own Notice of Appeal has no legal significance.

Here, while Defendants allege that Plaintiff’s Affidavit of Service of the Notice of Appeal is deficient, Defendants do not dispute receipt of the Notice of Appeal. “Since the service of the notice of appeal was timely, the late filing of the notice can and will be excused by the court.” *Messner*, 42 A.D.2d at 890. Accordingly, the Notice of Appeal dated February 20, 2018 is deemed to be timely filed *nunc pro nunc*.

2. Request to permit Plaintiff to amend the Notice of Appeal and allow the Amendment Notice of Appeal

Plaintiff next requests that the court “permit plaintiff to amend the timely-filed appeal and allow the amended Notice of Appeal already filed to be accepted *nunc pro tunc* to the date of the service” pursuant to CPLR §5520(c). The

following are the changes that are made in the proposed amended Notice of Appeal from the Notice of Appeal: (1) describes the Judgment is described as being “for the Defendants” rather than “found defendants not guilty; (2) includes the correct title of the action rather than stating it as “appeal of judgment;” (3) includes Plaintiff’s current attorney’s information; (4) changes the description of the nature and object of the cause of action purportedly “in a more succinct manner”; (5) changes the description of the result; (6) purportedly describes “the grounds for appeal/issues to be raised on appeal in a more accurate manner, reflecting legal issues”; and (7) is typed.

CPLR §5220(c) provides, “Where a notice of appeal is premature or contains an inaccurate description of the judgment or order appealed from, the **appellate court**, in its discretion, when the interests of justice so demand, may treat such a notice as valid.” (emphasis added). “[M]inor defects in a notice of appeal may be disregarded ([see] CPLR 2001) and an appellate court may treat a notice of appeal which contains ‘an inaccurate description of the judgment or order appealed from’ as valid.” *Caudill v. Rochester Inst. of Tech.*, 125 A.D.3d 1392, 1393 [1st Dept 2015].

Plaintiff argues that the Notice of Appeal that Plaintiff attempted to file had minor defects, but the Amended Notice of Appeal cures them and should be permitted under CPLR §5520(c). Defendant opposes the relief.

Plaintiff is not entitled to any relief under CPLR §5520(c). An application under subdivision (c) must be made in the appellate court.

Wherefore, it is hereby

ORDERED that the Notice of Appeal dated February 20, 2018 served on Defendants is accepted as timely served and filed *nunc pro tunc*.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: AUGUST 27, 2018


____ Eileen A. Rakower, J.S.C.