

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

VENTURI, SCOTT BROWN AND ASSOC., INC.,	:	November Term 2007
	:	
Plaintiff,	:	No. 1589
v.	:	
JFK 734, L.P., JFK 734 G.P., LLC.,	:	COMMERCE PROGRAM
JFK 734 INVESTORS, L.P.,	:	
Defendants.	:	Control No. 123027

OPINION

Presently before the court is a Motion to Open Judgment of Non Pros improperly identified by defendants JFK 734 GP LLC, JFK 734 Investors LP, JFK 734 LP (hereinafter “Defendants”) as a Motion to Vacate. For the reasons discussed below, the Motion is granted in part and denied in part.

BACKGROUND

Plaintiff Venturi Scott Brown and Associates, Inc. (hereinafter “Plaintiff”) was hired by the JFK defendants to perform architectural services for a large residential condominium project located at 734 Schuykill Avenue in Philadelphia. Plaintiff was terminated from the project and filed the instant action to recover approximately \$469,000.00 in alleged architectural services rendered to defendants. Plaintiff filed suit in November 2007. Defendants filed a motion to compel arbitration and preliminary objections. The motion to compel arbitration was denied and the preliminary objections overruled.

On September 8, 2008, defendants filed an answer, new matter and counterclaim. The counterclaim alleged that plaintiff failed to timely deliver design documents and that the design documents delivered were incomplete, deficient and economically unfeasible.

Defendants also allege that plaintiff failed to consider defendants' design suggestions. On September 29, 2008, plaintiff filed preliminary objections to defendants' counterclaim.

On October 14, 2008, plaintiff filed a Notice of Intention to Enter Judgment of Non-Pros on Professional Liability Claim, as to all claims for failure to file a certificate of merit. On October 20, 2008, defendants filed an amended counterclaim. The amended counterclaim included counts for breach of contract, breach of good faith and fair dealing, unjust enrichment, professional malpractice, negligence and breach of implied warranty of fitness.

On November 10, 2008, plaintiff filed preliminary objections to defendants' amended counterclaim. On November 17, 2008, a praecipe for entry of judgment of non pros pursuant to Pa. R. Civ. P. 1042.7 for failure to file a certificate of merit was filed by plaintiff. On December 15, 2008, the court sustained in part the preliminary objections to the amended counterclaim and dismissed the claim for breach of the duty of good faith and fair dealing and the claim for attorney fees. The court also found the preliminary objections to the professional negligence claim to be moot since a judgment of non pros had been entered for failing to file a certificate of merit. On December 17, 2008, defendants filed the instant motion to vacate the judgment of non pros.

DISCUSSION

Pa. R. Civ. P. 3051 is applicable in proceedings to open a judgment of non pros entered pursuant to Rule 1042.6.¹ Pa. R.Civ. P. 3051 Relief from Judgment of Non Pros provides:

(a) Relief from a judgment of non pros shall be sought by petition. All grounds for relief, whether to strike off the judgment or to open it, must be asserted in a single

¹ See, Hoover v. Davila, 862 A.2d 591, 595 (Pa. Super. 2004).

petition.

(b) If the relief sought includes the opening of the judgment, the petition shall allege facts showing that

(1) the petition is timely filed,

(2) there is a reasonable explanation or legitimate excuse for the inactivity or delay, and

(3) there is a meritorious cause of action.²

Here, defendants' excuse for not filing a certificate of merit is the filing of an amended counterclaim. Defendants argue that the filing of the amended counterclaim voids the notice of intent to enter judgment of non pros filed on October 14, 2008 because the notice was filed to the original counterclaim and not to the amended counterclaim.

The period within which a certificate of merit must be filed runs from the date of filing the original counterclaim, regardless of the filing of preliminary objections or an amended counterclaim.³ Defendants' reliance upon the filing of the amended counterclaim as a "reasonable explanation" for delay in filing the certificate of merit is misplaced. The amended counterclaim does not "restart" the clock and nullify the previously submitted notice of intent to enter non pros filed on October 14, 2008.

Neither is the failure to file a certificate of merit excused by ignorance of the rule as amended. Ignorance of a properly promulgated rule is not grounds for vacating the judgment of non pros.⁴ The Supreme Court's order clearly provides that all amendments

² Pa. R.C.P. 3051.

³ See, Hoover v. Davila, 862 A.2d at 594.

⁴ Hoover, 862 A.2d at 595.

to the certificate of merit rules apply to all pending open actions in which no judgment of non pros had already been entered. At the time the rules for filing certificates of merit were amended no non pros had as yet been entered. The rule as amended is applicable.⁵

Defendants argue that the non pros should be opened as to those claims for which no certificate of merit was required, namely breach of contract, unjust enrichment, negligence and breach of the implied warranty of fitness. A certificate of merit must be filed with a complaint or within sixty days after the filing of the complaint in any action based upon an allegation that a licensed professional deviated from an acceptable professional standard.⁶

The Supreme Court, in Womer v. Hilliker,⁷ summarized the policies underlying the rules of civil procedure governing professional liability claims as follows:

By way of background, we begin with the circumstances of Pa.R.C.P. No. 1042.3's adoption. Pa.R.C.P. No. 1042.3 is one in a series of rules that "govern procedure in a civil action in which a professional liability claim is asserted against a licensed professional." Pa.R.C.P. No. 1042.1(a). See: Pa.R.C.P. Nos. 1042.1 - 1042.8. We adopted these rules in January of 2003, having determined that malpractice actions were being commenced in the Pennsylvania courts more frequently. We were concerned that this trend would lead to an increase in the filing of malpractice claims of questionable merit, and sought to avoid the burdens that such claims impose upon litigants and the courts. Therefore, we exercised our rule-making authority to devise an orderly procedure that would serve to identify and weed non-meritorious malpractice claims from the judicial system efficiently and promptly.⁸

⁵ A review of the record demonstrates that defendants have never filed a Certificate of Merit. Where a certificate of merit has not been filed, Pa. R. Civ. P. 126 is not an available remedy. See, Ditch v. Waynesboro Hosp., 917 A.2d 317 (Pa. Super. 2007)(citing Womer v. Hilliker, 908 A.2d 269 (Pa. 2006)).

⁶ Pollock v. Feinstein, 2007 PA Super 42, P5 (Pa. Super. 2007).

⁷ 908 A.2d 269 (Pa. 2006).

⁸ *Id.*

When a claim does not sound in professional liability, a non pros for the failure to file a certificate of merit is improper.⁹ Here, defendants' amended counterclaims are for breach of contract, unjust enrichment, professional negligence, negligence and breach of implied warranty.¹⁰ Without question, the claim for professional negligence required a certificate merit. Since no certificate of merit was filed in accordance with the rules and no reasonable excuse has been provided for this failure, the motion to vacate the judgment of non pros is denied.

The court must determine whether the substance of the allegations for breach of contract, unjust enrichment, negligence and breach of implied warranty, allege a claim of professional liability.¹¹ To prevail in any negligence action, the plaintiff must establish that the defendant owed him or her a duty, the defendant breached the duty and the plaintiff suffered actual harm as a causal result of that breach of duty.¹²

In a professional malpractice action, the duty is defined by the professional relation and whether a breach of that duty requires the plaintiff to additionally demonstrate that the defendant's conduct fell below the professional standard of care.¹³ In most cases, such a determination requires expert testimony because the negligence of a professional encompasses matters not within the ordinary knowledge and experience of

⁹ See Krauss v. Claar, 879 A.2d 302 (Pa.Super. 2005); Jackson v. Gary L. Sweitzer Enterprises, Inc., 67 Pa. D & C.4th 239, 244-45 (Pa.Com.Pl.2004).

¹⁰ The claim for breach of the duty of good faith and fair dealing was dismissed by order of the court dated December 15, 2008.

¹¹ It is the substance of the complaint rather than its form which controls whether the claim against a professionally licensed defendant sounds in ordinary negligence or professional malpractice. Varner v. Classic Cmtys Corp., 890 A.2d 1068(Pa. Super. 2006).

¹² Freed v. Geisinger Med. Ctr., 910 A.2d 68, 72-73 (Pa. Super. 2006), appeal granted, 930 A.2d 1249.

¹³ Ditch v. Waynesboro Hosp., 917 A.2d 317, 321-22 (Pa. Super. 2007).

laypersons.¹⁴

The distinction between ordinary and professional negligence has been primarily addressed in the context of medical malpractice cases.¹⁵ Two questions determine whether a claim alleges ordinary as opposed to professional negligence, namely whether the claim pertains to an action that occurred within the course of a professional relationship; and whether the claim raises questions of professional judgment beyond the realm of common knowledge and experience.¹⁶

In regard to the contract claim, defendants allege the following:

106. The Plaintiff had an obligation pursuant to the May 24, 2005 and March 24, 2006 preliminary letter agreements (the “JFK Contracts”) to deliver to the JFK Defendants preliminary design documents and construction documents in a timely fashion.
107. Plaintiff also has an explicit duty under the JFK Contracts to coordinate with the JFK Defendants, their construction experts and value engineering consultants in order to incorporate cost concerns with the project.
108. Plaintiff also had an explicit duty under the JFK Contracts to incorporate, without objection, the comments and suggestions of the JFK Defendants with regard to design and cost concerns and cost-saving measures.

The professional judgment of an architect is not placed in issue by the claims contained in paragraph 106. Defendants allege that no design and construction documents were timely provided. The timetable for submission of the plans is contained within the contracts and is not governed by any standard within the industry. A jury can determine whether this breach occurred without any need for professional expertise. However, the professional judgment of an architect is placed in issue by the claims

¹⁴Yee v. Roberts, 878 A.2d 906, 912 (Pa. Super. 2005).

¹⁵ See Smith v. Friends Hosp., 928 A.2d 1072 (Pa. Super. 2007); Ditch, 917 A.2d at 321-22, 917 A.2d at 321-22; Varner, 890 A.2d at 1074; Grossman v. Barke, 868 A.2d 561, 570 (Pa. Super. 2005).

¹⁶ Merlini v. Gallitzin Water Auth., 934 A.2d 100 (Pa. Super. 2007)

contained in paragraphs 107 and 108. These paragraphs implicate the professional judgment of an architect concerning costs, cost saving measures and design. Expert testimony is necessary to inform the jury as to the standards in the industry. Hence a certificate of merit is required to these breaches.

Likewise, the claims for breach of implied warranty of fitness for particular purpose, negligence and unjust enrichment also require the filing of a certificate of merit. These claims allege that plaintiffs failed to produce adequate and satisfactory designs, failed to produce economically feasible designs and failed to produce useful designs.¹⁷ The questions of whether the designs were adequate and satisfactory, economically feasible and useful are questions that require professional judgment. As it pertains to these alleged breaches a certificate of merit is required.

CONCLUSION

For the foregoing reasons, defendants' motion to vacate the entry of non pros is denied as to the claims for professional negligence, negligence, breach of implied warranty, unjust enrichment and breach of contract for the claims contained in paragraphs 107 and 108 and granted only as to the claim for breach of contract alleged in paragraph 106 for failing to deliver the designs in a timely fashion.

BY THE COURT,

MARK I. BERNSTEIN, J.

¹⁷ Amended Counterclaim ¶¶ 123, 134, 135, 143, 145.

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JFK 734 INVESTORS, L.P.,	:	
	:	
Defendants.	:	Control No. 123027

ORDER

AND NOW, this 13TH day of February 2009, upon consideration of Defendants JFK 734, L.P., JFK 734 G.P., LLC. and JFK 734 Investors, L.P.'s Motion to Vacate Praecipe for Entry of Judgment of Non Pros and Plaintiff's response in opposition, it hereby it **ORDERED** that the Motion to Vacate is **granted in part** and the judgment of non pros is opened only as to the claim for breach of contract for failing to timely deliver design drawings and construction drawings to defendants. All other aspects of the motion are **denied**.

BY THE COURT,

MARK I. BERNSTEIN, J.