IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TORINA A. COLLIS,	)	
	)	C.A. No. K11C-04-007 JTV
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TOPPER'S SALON AND HEALTH SPA, INC., and TINA CASEY,	)	
	)	
	)	
Defendants.	)	

Submitted: November 19, 2011
Decided: March 29, 2012

Torina A. Collis, *Pro Se.*

Elizabeth A. Saurman, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware. Attorney for Defendants.

Upon Consideration of Defendant Topper's Motion For Judgment on Pleadings
DENIED

Upon Consideration of Defendant Casey's Motion To Dismiss
DENIED

Upon Consideration of Plaintiff's Motion to Strike Defendant Topper's Answer and Enter Default Judgment
DENIED

VAUGHN, President Judge

Collis v. Topper's Salon and Health Spa, Inc.
C.A. No. 11C-04-007 JTV
March 29, 2012

OPINION

This is a personal injury action in which the plaintiff alleges that she was injured while receiving a massage. Three motions are before the Court. One is a plaintiff's Motion to Strike the Answer of Topper's Salon and Health Spa, Inc., and Enter Default Judgment against that party. Another is defendant Topper's Motion For Judgment on the Pleadings. The third is defendant Tina Casey's Motion to Dismiss the complaint against her.

FACTS

The pertinent facts are as follows: On April 5, 2009, plaintiff Torina A. Collis went to the business premises of defendant Topper's in Dover to have a message. She states that she did not have any medical condition, injury or ailment; she just wanted a massage. A massage was performed upon the plaintiff by Topper's employee, Tina Casey. The plaintiff alleges that the massage was performed in a negligent manner which caused her physical injury. She filed this suit against Topper's and Ms. Casey on April 5, 2011.

On July 28, 2011, the Prothonotary's Office sent the plaintiff a letter informing her that no proof of service of process upon the defendants had been filed and that under the Court's rules she had 120 days to accomplish service or provide the Court with a written explanation of good cause as to why service had not completed. On August 2, 2011, the plaintiff wrote a letter to the Court informing it that she had attempted service via certified mail on April 6, 2011, but that the mailing was returned to her because the address she used was unknown. She explained in her letter that the address she used was one she had gotten off of a web site of

Pennsylvania corporate addresses.[1] She further explained that she was making another attempt that same day (August 2) and that the mailings would be delivered the next day.

On August 15, 2011, the plaintiff filed two U.S. mail green cards with the Prothonotary which showed that two mailings addressed to Topper's Spa and Health Spa, Inc., 117 South St., #300, Philadelphia, PA., 19103 were received by Topper's on August 3, 2011.

Next, on September 1, 2011 counsel entered an appearance on behalf of Topper's. That was followed by the filing of defendant Topper's answer on September 6, 2011. On October 6, 2011, the plaintiff filed a Motion to Strike Topper's Answer and for Default Judgment, which is one of the motions before the Court. In her motion, she asks the Court to strike the answer, alleging that it does not state a sufficient defense, was untimely, and contains numerous conflicting statements. She also asks the Court to enter default judgment against defendant Topper's because the answer was untimely. On November 3, 2011, defendant Topper's filed a Motion for Judgment on the Pleadings seeking dismissal of the complaint on grounds of insufficiency of process, lack of jurisdiction over the subject matter, and failure to state a claim upon which relief could be granted. That same day Ms. Casey filed a Rule 12(b) motion through the same counsel seeking dismissal of the complaint against her based upon insufficiency of process, lack of jurisdiction over the subject matter, and failure to state a claim upon which relief could be

[1] Defendant Topper's Salon and Health Spa, Inc. is a corporation of the Commonwealth of Pennsylvania.

granted.

On November 15, 2011, the plaintiff filed an unsworn "Affidavit" stating that she had made service of process upon both defendants by express mail to the Philadelphia address mentioned above on August 2, 2011.

Finally, on December 1, 2011, the plaintiff filed a supplement to her Motion to Strike and for Default Judgment in which she asks the Court to strike portions of Topper's answer which allege contributory negligence on the plaintiff's part.

The Plaintiff's Motion to Strike Topper's answer and for Default Judgment Against Topper's

Rule 55 provides that a default judgment may be entered when a party has failed to appear, plead, or otherwise defend as provided by the rules. A grant of default judgment is subject to the Court's discretion.[2] Under the facts and attendant circumstances of this case, where Topper's has filed an answer, although untimely, and is actively defending the case, I am not persuaded that default judgment should be granted.

As to that part of the motion which seeks to strike all or part of Topper's answer, I find that the answer is a proper answer and no part of it will be stricken.

Defendant Casey's Motion to Dismiss

As mentioned, Ms. Casey moves to dismiss the complaint on the grounds of insufficiency of process, lack of jurisdiction over the subject matter, and failure to state a claim upon which relief can be granted. There is no merit to the contention that the Court lacks subject matter jurisdiction. As to the claim that there has been

[2] *Fedirko v. G & G Constr., Inc.*, 2007 WL 1784184, *1 (Del. Super. May 22, 2007).

insufficiency of process, the fact of the matter is that Ms. Casey has not been served at all. In her response to Ms. Casey's motion, the plaintiff explains that she asked a Topper's corporate manager for Ms. Casey's address so that she could effect service on Ms. Casey, but the manager refused to give the address. She further states that the manager advised her to send Ms. Casey's complaint and summons to Topper's and that she, the manager, would forward it on to Ms. Casey. However, service upon Topper's is not effective as service upon Ms. Casey, even if Topper's agreed to accept service on her behalf. There is nothing in the record to suggest that Ms. Casey authorized Topper's to accept service on her behalf.

Under Rule 4(j) service of a summons and complaint must be completed within 120 days after the filing of the complaint, unless a party can show good cause why service was not made within that period. I accept the plaintiff's explanation, that is, her belief that sending the papers to Topper's was adequate service upon Ms. Casey as well, as showing good cause why effective service was not made. The plaintiff is granted an additional 120 days from the date of this opinion to make effective service of process upon Ms. Casey. Ms. Casey's contention that the complaint fails to state a claim upon which relief can be granted is also asserted in Topper's Motion for Judgment on the Pleadings and will be addressed in connection with that motion.

Defendant Topper's Motion for Judgment on the Pleadings

In its motion for judgment on the pleadings, Topper's seeks judgment in its favor on grounds of insufficiency of process, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. As mentioned, the argument that the Court lacks subject matter jurisdiction lacks merit.

When service of process is made upon a foreign corporation under Delaware's long arm statute, as was done here, Rule 4(h) requires that the return receipt and a plaintiff's affidavit of the defendant's non-residence and the sending of the summons and complaint be filed with the Court within 10 days of the plaintiff's receiving the return receipt. When the defendant's motion was filed, all that the plaintiff had filed were the above-mentioned return receipts. After the motion had been filed, the plaintiff attempted to correct her failure to comply fully with Rule 4(h) by filing an unsworn document which she called an affidavit, reciting, in substance, that she mailed process to Topper's at the address mentioned above. This second attempt does not comply with the rule because it is not notarized and does not expressly state Topper's non-residence. I am not persuaded, however, that the complaint should be dismissed for these defects. Topper's non-residence seems now to be established in the record. I do not consider that defect as warranting dismissal. However, the "affidavit" must be notarized. Instead of dismissal, I give the plaintiff 60 days from the date of this opinion to bring herself within substantial compliance with the rule by refiling her purported affidavit of service in the same form as she did except that it must be notarized.

Topper's final contention is that the complaint fails to state a claim upon which relief can be granted. This contention is based on an argument that Topper's and its employee are health care providers, that this is a health care negligence lawsuit, and that the failure to file an affidavit of merit is fatal to the plaintiff's case. Several statutory definitions are pertinent to this argument.

18 *Del. C.* § 6801 defines the terms "health care," "health care provider,"

"medical negligence," and "patient" as follows:

> (4) "Health Care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.
>
> (5) "Health care provider" means a person, corporation, facility or institution licensed by this State pursuant to Title 24, excluding Chapter 11 thereof, or Title 16 to provide health care or professional services or any officers, employees or agents thereof acting within the scope of their employment; provided, however, that the term "health care provider" shall not mean or include any nursing service or nursing facility conducted by or for those who rely upon treatment solely by spiritual means in accordance with the creed or tenets of any generally recognized church or religious denomination.
>
> (7) "Medical negligence" means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient. The standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed in the same or similar field of medicine as defendant, and the use of reasonable care and diligence.[3]
> (8) "Patient" means a natural person who receives or should have received health care from a licensed health care provider under a contract, express or implied.

[3] 18 *Del. C.* § 6801.

Where an affidavit of merit is required, it must be signed by an expert witness "familiar with the degree or skill ordinarily employed in the field of medicine on which he or she will testify."[4]

From these definitions, I conclude that the massage which the plaintiff received must have been "health care" in order for this case to be one for health care negligence. I further conclude that in order for the massage to be health care, it must have been an act or treatment performed during medical care or treatment.

18 *Del. C.* § 6801 does not define "medical care" or "treatment." However, there are several sources that prove useful in this context. Section 213 of the Internal Revenue Code defines "medical care" in relevant part as:

> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body....[5]

Medical care has been defined in the insurance context in 18 *Del. C.* § 3602 and 18 *Del. C.* § 7202. Both statutes define medical care in pertinent part as follows:

> "Medical care" means amounts paid for:
>
> a. The diagnosis, cure, mitigation, treatment or prevention of disease or amounts paid for the purpose of affecting any structure or function of the body;

A dictionary definition of "Treatment" is:

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[4] 18 *Del. C.* § 6854.

[5] 26 U.S.C. § 213(d)(1).

> The management of illness, by the use of drugs, dieting, or other means designed to bring relief or effect a cure.[6]

It might be argued that a massage is performed for the purpose of "affecting any structure or function of the body." However, while the definitions of medical care or treatment set forth above are quite broad, I am not persuaded that they are so broad as to include the massage in this case. The plaintiff alleges that she went to the salon for a "basic relaxing massage." She does not allege that she had any particular condition for which she sought medical relief or improvement. My conclusion is that this is not a health care negligence lawsuit. The plaintiff is not required to file an affidavit of merit. I further conclude that her complaint does state a claim upon which relief may be granted.

For the foregoing reasons, all three motions are ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

cc: Prothonotary
Order Distribution
File

[6] 2 WEBSTER DICTIONARY 1337 (Int'l ed. 1998).