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Eugene G. Scarlett and Kathleen A. Scarlett, his wife, Plaintiff vs.  
State Auto Insurance Co., Defendant, Franklin County Branch Civil  
Action - Law No. A.D. 1994-105 Jury Trial Demanded

SCARLETT V. STATE AUTO INSURANCE CO.

*Motion for judgment non pros granted pursuant to Penn Piping.*

1. Judgment *non pros* is proper where (i) a party has shown a lack of due diligence by failing to prosecute his case with reasonable promptitude; (ii) there has been no compelling reason for the delay; and (iii) the delay has caused some prejudice to the adverse party.
2. It is the plaintiff, not the defendant, who has the affirmative duty to monitor the docket and prosecute his action within the set time frame.
3. A delay of substantive docket activity for two years or more is presumed prejudicial; this presumption can be rebutted if the plaintiff shows diligence and a compelling reason for the delay by reference to litigation-related events not reflected on the docket.
4. As a general rule, sufficiently compelling reasons include only those situations in which events beyond the plaintiff's control impeded progress of the case.
5. Judgment *non pros* was appropriate where: plaintiff did not hire new counsel despite original counsel's repeated urging; the court did not find credible plaintiff's allegation that he had relied on a statement of counsel's secretary that the complaint would remain valid for at least four years and/or indefinitely; even if the court accepted that the secretary made such a statement, plaintiff's delay in promptly hiring new counsel revealed that he did not genuinely feel the case was important and worth pursuing.

*Stephen D. Kulla, Esquire, Counsel for Plaintiffs*

*Peter J. Speaker, Esquire, Counsel for Defendant*

#### OPINION AND ORDER OF COURT

Herman, J., November 14, 1997:

#### PROCEDURAL HISTORY

The plaintiffs, Eugene and Kathleen Scarlett, commenced an action for breach of a fire insurance contract against the defendant State Auto Insurance Company by filing a praecipe for writ of summons on March 15, 1994. On March 28, 1994, the defendant filed a praecipe for a rule upon the plaintiffs to file a complaint. The plaintiffs filed a complaint on April 20, 1994 and the defendants subsequently filed preliminary objections to the complaint on May 2, 1994. The Honorable William H. Kaye disposed of the preliminary objections by Opinion and Order dated November 1, 1994.

The plaintiffs filed an amended complaint on January 30, 1995 and the defendant answered the complaint on February 14, 1995.

Counsel for the plaintiffs filed a petition for leave to withdraw as plaintiffs' counsel, and on February 16, 1995, a rule was issued upon the plaintiffs to show cause as to why the petition of plaintiffs' counsel for leave to withdraw should not be granted. On March 6, 1995, counsel for the plaintiffs filed an affidavit of service stating that he had served the petition and rule. The plaintiffs filed no answer to the rule, which was then made absolute and counsel was permitted to withdraw.

On May 20, 1997, the defendant filed a motion for judgment of *non pros* on the ground that there has been no activity in the case for more than two years. A rule was issued upon the plaintiffs to show cause why a judgment of *non pros* should not be entered and the action dismissed. The plaintiffs filed an answer and an Order was entered setting a hearing on the defendant's motion. A hearing was held on July 8, 1997 and this matter is ready for decision.

#### DISCUSSION OF THE LAW

The court may enter a judgment of *non pros* where: (1) a party to the proceedings has shown a lack of due diligence by failing to proceed with reasonable promptitude; (2) there has been no compelling reason for the delay; and (3) the delay has caused some prejudice to the adverse party. *Penn Piping Inc. v. Insurance Co. of North America*, 529 Pa. 350, 603 A.2d 1006 (1992). The plaintiff has the affirmative duty to prosecute his action within the set time frame. *MacKintosh-Hemphill v. Gulf & Western*, 451 Pa. Super. 385, 679 A.2d 1275 (1996). It is not the defendant's responsibility to monitor the docket to ensure that the plaintiff is pursuing his action in a diligent manner. *Aimee's Touch, Inc. v. Kramer*, 441 Pa. Super. 415, 657 A.2d 992 (1995); *Penn Piping*, supra.

A delay of substantive docket activity for two years or more is presumed prejudicial. *Id.*; *State of the Art Medical Products, Inc. v. Aries Medical, Inc.*, \_\_\_ Pa. Super. \_\_\_, 689 A.2d 957 (1997). This prejudice can be overcome only if the plaintiff shows that the absence of docket activity is excusable by a compelling reason. In making this finding, the court may consider the specific circumstances of the case, in particular, whether the plaintiff has established his diligence and a compelling reason for the delay by reference to litigation-related events not reflected on the docket. *State of the Art*, supra; *Herb v. Snyder*, 454 Pa. Super. 612, 686 A.2d 412 (1996). In this regard, it

has been held that where the delay was caused by bankruptcy, liquidation or other operation of law, or where the case was awaiting significant developments in the law, there will be an automatic determination that a compelling reason for the delay has occurred. Other compelling reasons may be determined on a case-by-case basis. *Dorich v. DiBaccio*, 440 Pa. Super. 581, 656 A.2d 522 (1995); *Penn Piping*, supra.

Entry of appearance by new counsel is not a substantive step toward the diligent prosecution of the case. *Collura v. L&E Concrete Pumping, Inc.*, 454 Pa. Super. 572, 686 A.2d 392 (1996). Other reasons for delay which are not seen as compelling include settlement negotiations, on-going discovery and financial limitations. *Chase v. National Fuel Gas Corporation*, \_\_\_ Pa. Super. \_\_\_, 692 A.2d 155 (1997). As a general rule, compelling reasons include only those situations where events beyond the plaintiff's control impede progress of the case. *Chase*, supra; *MacKintosh*, supra; *County of Erie v. Peerless Heater Co.*, \_\_\_ Pa. Commw. \_\_\_, 660 A.2d 238 (1995).

This court has held that an example of an event beyond the plaintiff's control is where a two-year delay in docket activity is attributable to the dilatory behavior of plaintiff's counsel. *Yeager v. York Penn Machinery and Star Trite Corporation*, Volume 13, Franklin County Legal Journal 84 (October 3, 1995). The granting of a judgment *non pros* under those circumstances would have been inappropriate. Also, where a plaintiff shows she diligently attempted to obtain an attorney but was told by both original and subsequent counsel they could not represent her because of a conflict, and where she finally was able to obtain counsel on her third attempt, this court has found that the presumption of prejudice was successfully rebutted. *Riggs v. Garman*, Volume 13, Franklin County Legal Journal 206 (January 29, 1996).

#### DISCUSSION OF THE FACTS

Plaintiff Eugene Scarlett, age fifty-three, has an 8th grade education and some trouble reading. In either the end of 1992 or the beginning of 1993, he retained Attorney David C. Cleaver to represent him and his wife Kathleen in the contract dispute with the defendant insurance company. In June of 1993, Mrs. Scarlett gave a statement under oath which differed from that given by her husband. Attorney Cleaver informed the plaintiffs that he could not represent

both of them because of this discrepancy. Attorney Cleaver told Mr. Scarlett to hire a different attorney to represent him. He urged Mr. Scarlett to obtain new counsel throughout 1994 because the defendant was pressing to move the case forward.

Mr. Scarlett testified that in the spring of 1994, he asked Attorney Cleaver's secretary Carol Varner how long the complaint would remain valid. His testimony regarding her response was unclear. On the one hand, he testified she told him the complaint would be valid for four or five years. On the other hand, she allegedly told him there really was no time limit on its validity and that he would receive communication from Attorney Cleaver regarding the two-year docket period.<sup>1</sup>

Mr. Scarlett still had not hired new counsel by early 1995. Attorney Cleaver then formally withdrew as counsel for both parties and referred Mr. Scarlett to Attorney David Breschi. Mr. Scarlett testified he spoke with Attorney Breschi approximately six times in July and August of 1995. He also testified Attorney Breschi agreed to take the case and that he (Mr. Scarlett) could pay one-half of the fee up front. Attorney Breschi was never hired, however. Mr. Scarlett had a meeting with counsel for the defendant on April 5, 1995. He also spoke on the phone with defense counsel on May 10, 1995. He had no further conversations with defense counsel and did not speak to anyone at State Auto Insurance Company.

Mr. Scarlett testified he did not hire new counsel because he did not have the money at the time Attorney Cleaver withdrew and believed he was under no time constraints to move the case forward. He maintained he would have spoken to an attorney immediately if he had known about the two-year deadline. He obtained current counsel Attorney Stephen Kulla to represent him immediately upon receiving the defendant's motion for *non pros*.

Attorney Cleaver recalled that his last conversation with Mr. Scarlett about the case occurred around the time he withdrew as his counsel in March of 1995. The case was proceeding at a proper pace at that juncture. Although he could not recall a specific discussion with Mr. Scarlett about the two-year deadline for docket activity, he did recall believing there would be no problem complying with the

<sup>1</sup>Ms. Varner was not called to testify at the *non pros* hearing.

did recall believing there would be no problem complying with the deadline if Mr. Scarlett acted upon his urgings and immediately obtained new counsel to continue prosecuting the case. Attorney Cleaver maintained that his legal secretary does not give legal advice to clients.

The key questions are whether Mr. Scarlett diligently pursued his case in light of his failure to hire new counsel, and whether he has shown there was a compelling reason for the delay in substantive docket activity. In particular, we must decide whether the statement allegedly made by Carol Varner constitutes a reasonable excuse for Mr. Scarlett's failure to promptly hire new counsel.

Even if we were to accept Mr. Scarlett's allegation that Ms. Varner made such a statement, which we do not, he has not shown under *Penn Piping* and its progeny that he made a diligent effort to obtain counsel or that the case was delayed for a compelling reason. If he genuinely felt the case was important and worth pursuing, he would have promptly hired an attorney regardless of his understanding of the time constraints. Consequently, the defendant's motion for judgment *non pros* will be granted.

An appropriate Order will be entered as part of this Opinion.

#### ORDER OF COURT

NOW this 14th day of November, 1997, the motion for judgment *non pros* filed by the defendant, State Auto Insurance Company, is hereby GRANTED. The action filed by the plaintiffs is hereby DISMISSED with prejudice.