

KATHRYN E. MEDINETS and DAVID MEDINETS, Plaintiffs vs.
KENNETH PAUL BETZKO, Defendant, Franklin County Branch,
CIVIL ACTION - LAW A.D. 1994 - 107

Medinets v. Betzko

*Non pros granted for lack of docket activity - appeal nunc pro tunc not proper method -
petition to open judgment denied*

1. Plaintiffs' appeal nunc pro tunc to Superior Court from judgment of non pros is not proper, because Pa.R.C.P. 3051 requires that relief must be sought by a petition to trial court to open the judgment of non pros.
2. Plaintiffs' appeal nunc pro tunc from judgment of non pros is moot after filing of petition to open the judgment, because the court's ruling on the petition to open will be a final order appealable to the Superior Court.
3. Petition to open was not timely filed, because plaintiffs waited two and a half months after receiving actual notice of the judgment of non pros to file a petition to open; fact that they used that time to improperly pursue appeal nunc pro tunc to Superior Court is not reasonable justification for the delay.
4. Because there was no docket activity for one year and two days, delay is presumed prejudicial under *Penn Piping*.
5. Besides prejudice, court must also consider the other two prongs of *Penn Piping* test.
6. Plaintiffs did not diligently pursue their case by merely engaging in three depositions, answering defendants' discovery requests, and forwarding one settlement proposal in the two year period of docket inactivity; if delays are created by others, plaintiffs have duty to take action to move the case forward.
7. Plaintiffs do not have a compelling reason for the delay based on the fact that one of the plaintiffs had to undergo surgery which would have effected damages; this fact could have been taken into account in the scheduling of the trial and in the calculation of the damages.

Robert B. Gidding, Esquire, counsel for plaintiffs
Michael M. Badowski, Esquire, counsel for defendant

OPINION AND ORDER

Walker, P.J., December 8, 1997:

Factual and Procedural Background

The plaintiffs in this case are Kathryn and David Medinets, who commenced their suit against Kenneth Betzko by Writ of Summons on March 16, 1994. On April 14, 1997, a judgment of non pros was granted by this court based on plaintiffs' failure to prosecute the case. Because of this, the procedural history of this case is very important.

On May 17, 1994, a Rule was issued directing plaintiffs to file a complaint within 20 days. The complaint was filed on July 6, 1994, alleging defendant's negligence, based on a collision which occurred in March 1992, between plaintiff's and defendant's automobiles. Plaintiff's husband, David Medinets, asserted a cause of action for loss of consortium.

Defendant filed preliminary objections to the complaint on July 26, 1994. In response, plaintiffs filed preliminary objections to defendant's preliminary objections. This matter was listed for the October 1994 argument court. Subsequently, on October 6, 1994, plaintiffs withdrew their preliminary objections. On November 3, 1994, the Honorable William H. Kaye denied defendant's preliminary objections to plaintiffs' complaint. On November 7, 1994, defendant filed an answer, asserting as a defense that the collision had been unavoidable because the car had slid on ice on the road. On December 2, 1994, defendant filed a motion for summary judgment and listed this for the January 1995 argument court. On December 12, 1994, plaintiffs filed a response to the motion for summary judgment. By order of court dated January 5, 1995, this motion was denied. On February 9, 1995, the court also denied plaintiffs' oral motion for counsel fees. This was the last entry on the docket until February 11, 1997, when defendant filed a motion for judgment of non pros for lack of docket activity.

Defendant's motion for judgment of non pros was put on the April 1997 argument list. After hearing argument, Judge Kaye issued a very thorough opinion and order on April 14, 1997, granting defendant's motion for judgment of non pros. The next docket entry reflects that on July 10, 1997, plaintiffs filed an appeal nunc pro tunc from this court's order to the Superior Court. However, on July 28, 1997, plaintiffs were notified that they must first request permission from the trial court to appeal nun pro tunc. Plaintiffs then filed a petition with this court for an order allowing such an appeal on August 11, 1997. In their petition, plaintiffs allege that they never received a copy of the order granting non pros from the court. Eventually, plaintiffs allege, they became aware of the existence of the order when defense counsel forwarded a copy to them.

Subsequently, on August 28, 1997, plaintiffs filed a petition to open the non pros judgment. Both the petition to open the judgment

and the petition to allow the appeal nunc pro tunc were listed for argument court on November 6, 1997. The court heard oral arguments, and the matter is now before the court for a decision.

Discussion

1. Petition to allow appeal nunc pro tunc

It is plaintiffs' argument that they should be permitted to file an appeal nunc pro tunc. They argue that the period of appeal commences at the time of entry of the judgment. Under Pa.R.A.P. 108, the date of entry of the judgment is the day the clerk of the court mails or delivers copies of the order to the parties. Furthermore, Pa.R.C.P. 236(b) requires that the clerk shall make a notation on the docket that notice of the order was given to the parties' attorneys. Plaintiffs argue that because no entry was made on the docket regarding notice of the order granting non pros, the rules were not complied with and there was never a final order to set in motion the appeal period.

For two reasons, the petition to allow an appeal nunc pro tunc can be disposed of without having to decide the merits of plaintiffs' argument. First, the court notes that filing an appeal nunc pro tunc to the Superior Court is not the proper method to challenge a judgment of non pros. Under Pa.R.C.P. 3051, relief from such a judgment shall be sought by a petition to the trial court to open the judgment. The explanatory comment to Rule 3051 clearly states that with its amendment in 1992, the choice between filing an appeal and filing a petition to open has been eliminated.

Secondly, this issue has become moot with plaintiffs' filing of the petition to open. If this court were to grant the plaintiffs' petition to open the judgment, then there no longer is a need to appeal to the Superior Court. If, on the other hand, the court were to deny the plaintiffs' petition to open, there will be a final order which plaintiffs can appeal directly to the Superior Court, making the appeal nunc pro tunc unnecessary. Thus, this court will proceed to decide plaintiffs' petition to open.

2. Petition to open judgment of non pros

Pa.R.C.P. 3051(b) requires that a trial court, when presented with a petition to open a judgment of non pros, determine whether

plaintiffs have established three factors: (1) that the petition was timely filed; (2) that there is a reasonable explanation or legitimate excuse for the inactivity or delay; and (3) that there is a meritorious cause of action. See *State of the Art Medical Products, Inc. v. Aries Medical, Inc.*, 456 Pa. Super. 148, 151, 689 A.2d 957, 959 (1997).

Starting with the third factor, it appears to the court that there is a meritorious cause of action in this case. The pleadings establish that there was a rear-end collision of plaintiff's vehicle by that of the defendant. Defendant in his answer does not deny that such collision occurred, but rather raises the defense that there was ice on the road which caused him to hit plaintiff's car. These allegations appear to be sufficient to establish a meritorious cause of action.

The court has more trouble with the first factor, requiring that the petition to open be timely filed. The judgment of non pros was entered on April 14, 1997. Plaintiffs did not file their petition to open until August 28, 1997, four and a half months later. Plaintiffs allege that they never received a copy of the court's order granting defendant's motion for judgment of non pros. However, they do admit that they received a copy of the order from defense counsel on June 12, 1997. Therefore, they had actual notice of the judgment on that date. Even from this later date in June, a period of two and a half months went by before filing the petition to open.

The courts have held that without reasonable explanation, a period of 41 and of 37 days after a judgment of non pros is too long, and denied a petition to open on that basis. See *Toczykowski v. General Bindery Co.*, 359 Pa. Super. 572, 578, 519 A.2d 500 (1986); *Hatgimisios v. Dave's N.E. Mint, Inc.*, 251 Pa. Super. 275, 276-77, 380 A.2d 485 (1977). Plaintiffs justify their 78-day period of delay by stating that they have a reasonable explanation. They argue that they have not been inactive during this period, but have continually pursued attempts to get the non pros judgment set aside. This is evidenced, according to plaintiffs' counsel, by the fact that he filed an appeal nunc pro tunc to the Superior Court to get the judgment set aside.

This court notes, however, that plaintiffs' counsel failed to employ the proper methods of doing so, in clear contradiction to the mandates of the Rules of Civil Procedure. Rule 3051, and its explanatory comment, clearly states that a plaintiff no longer has a choice between

filing an appeal to the Superior Court and a petition to open with the trial court. The Rule is unmistakably clear that relief from a judgment of non pros *shall* be sought by a petition to open. Additionally, this court notes that not only did plaintiffs' counsel erroneously file an appeal nunc pro tunc, he also filed the appeal in an improper manner because he failed to obtain permission from this court to pursue an appeal nunc pro tunc. This resulted in additional delay because the Superior Court had to direct plaintiffs' counsel that he had to obtain this permission. The court does not find that counsel's obvious mistakes and failure to abide by the Rules is a reasonable justification for having waited so long to file the proper petition. Therefore, this court is inclined to dismiss plaintiff's petition to open on the basis that it was not timely filed. However, to promote judicial efficiency, this court will now proceed to the merits of the petition and determine whether the judgment of non pros was properly granted.

"The question of whether to enter a judgment of non pros for a plaintiff's failure to prosecute an action within a reasonable time rests within the sound discretion of the trial court." *Chase v. National Fuel Gas Corp.*, ___ Pa. Super. ___, 692 A.2d 155, 156 (1997). Under the test set forth by *Penn Piping*, a judgment of non pros may be entered where the following three prongs have been established: (1) a party has shown 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. *State of the Art Medical*, at 152, 689 A.2d at 959, citing *Penn Piping, Inc. v. Insurance Co. of North America*, 529 Pa. 350, 603 A.2d 1006 (1992).

In *Penn Piping*, the Pennsylvania Supreme Court held that "in cases involving a delay for a period of two years or more, the delay will be presumed prejudicial for purposes of any proceeding to dismiss for lack of activity on the docket." *Penn Piping*, at 356, 603 A.2d at 1009. In the underlying case, there was no docket activity from February 9, 1995, until defendant filed a motion for entry of non pros on February 11, 1997. Because there is a period of docket inactivity for two years in the underlying case, prejudice will be presumed, and the third prong is fulfilled.

As plaintiffs correctly point out, a judgment of non pros cannot automatically be granted whenever the docket reflects inactivity for a period of two years or more. *State of the Art*, at 157, 689 A.2d at 962. A judgment of non pros may properly be granted only where the other two prongs are also satisfied. *Id.* Thus, this court must consider whether there was an absence of due diligence in prosecuting the case, and whether there was a compelling reason for the delay. *Id.*

In addressing the prong of due diligence, plaintiffs appeal to the court to consider the "equities" of this case, which would permit the non pros judgment to be opened, because they were "at all times moving the case forward." (Plaintiffs' petition to open non pros judgment, at 5). Plaintiffs argue that they exhibited due diligence by engaging in discovery activity. It is true that due diligence may be shown by engagement of the parties in discovery activity. *State of the Art*, at 158, 689 A.2d at 962-963. However, in *State of the Art*, the court held that an exchange of four discovery matters was too limited in nature to constitute due diligence. *Id.*, at 158, 689 A.2d at 963.

This court has reviewed the discovery activity which has taken place from February 1995 until February 1997, the relevant time period in which there was no docket activity, and it revealed the following discovery activity: on February 7, 1995, plaintiffs' counsel received additional medical records from referring counsel. On February 10, 1995, two depositions were taken, one of a plaintiffs' witness and one of defendant. On May 11, 1995, defendant requested dates for depositions of plaintiffs to be held in June or July. These depositions were eventually held on September 10, 1995. On September 11, in response to a request by plaintiffs' counsel, defense counsel sent a copy of defendant's insurance policy. Between September 11, 1995, and February 1996, plaintiffs refer to an exchange of various correspondence in which defense counsel requested certain documents to allow him to properly evaluate the case. This correspondence was attached by plaintiffs to their petition to open as Exhibit L. The documents contained in Exhibit L show several letters by defense counsel requesting certain documents from plaintiffs' counsel and supplemental interrogatories, as well as plaintiffs' response to those interrogatories dated December 7, 1995, and releases executed by plaintiffs allowing defense counsel to obtain medical and employment records. The last document in Exhibit L is a letter, dated February 5, 1996, from plaintiffs' counsel providing

defense counsel with the correct address to obtain plaintiff Kathryn Medinets' employment records. Nothing else appears to have occurred until September 18, 1996, when plaintiffs' counsel sent defense counsel a demand to settle for the policy limits of defendant's insurance policy. Defendant did not respond, and there was no further activity until defendant filed the motion for entry of the non pros judgment on February 11, 1997.

This court agrees with Judge Kaye's findings in his opinion granting the non pros judgment that plaintiffs did not diligently pursue their case. They engaged in a total of three depositions in a two-year period, of which only one was initiated by plaintiffs. During the rest of the two-year period of docket inactivity, they merely answered defendant's requests for documents. Plaintiffs forwarded one settlement proposal, and then waited almost five months for defendant's response without doing anything at all. It is plaintiffs' duty to move the case forward to trial with due diligence. *Pennridge Electric v. Souderton Area Joint School Authority*, 419 Pa. Super. 201, 615 A.2d 95 (1992). If plaintiffs' counsel finds himself faced with delays created by others, he must take action to move the case forward. *Id.*, at 209, 615 A.2d at 99. In the underlying case, it appears that plaintiffs have given up control of the case and allowed defense counsel to dictate the proceedings. It is clear that defendant has no obligation to move the case forward, and plaintiffs could not have relied on defendant to do so. Instead, plaintiffs should have actively engaged in discovery to get ready for trial, and upon reaching that stage, they could have moved to compel defendant to file a certificate of readiness. *See Pennridge*, at 209, 615 A.2d at 99.

This court wholly agrees with Judge Kaye's opinion that "a plaintiff cannot relinquish control of a case to the defendant and then attempt to avoid a judgment of non pros when the case is not moved forward by the defendant, who has no duty to do so." (Opinion, at 4). Therefore, this court finds that plaintiffs have not proceeded with due diligence in this case.

Lastly, this court must determine whether plaintiffs have a compelling reason for the delay. This court first notes that settlement negotiations and engaging in discovery do not constitute compelling reasons for delay. *Chase v. National Fuel Gas Corp.*, ___ Pa. Super. ___, 692 A.2d 155, 156 (1997). As additional reason for the delay, plaintiffs argue that they could not proceed to trial, because Plaintiff

Kathryn Medinets was scheduled to undergo surgery in October 1996. Plaintiffs argue that because the surgery would have an impact on the damages, they could not in good faith put the case on the trial list.

First of all, the court notes that plaintiffs have not included in their petition any documentation to show how the surgery would have affected the damages element in the case. They have only included, as Exhibit N, a letter from a New Jersey attorney to plaintiffs' counsel stating that any medical testimony must await the outcome of the surgery. This alone is not sufficient, and the court thus has no factual basis for finding that the trial could not proceed because of the surgery. Furthermore, the surgery was to take place in October 1996, but in February 1997, four months later, plaintiffs still had not taken any action whatsoever to get the case moving forward. Additionally, this court notes that plaintiffs cannot wait for all possible medical treatments to be completed before being required to move the case forward to trial. Rather, the fact that a plaintiff may still be in need of further surgery can be testified to at trial and can be taken into consideration in calculating the damages. In as far as the surgery constituted a scheduling problem, this could have been dealt with at a pretrial conference, and could have been taken into consideration in scheduling a time for trial. The Superior Court has recognized that the compelling reasons for delay which have been accepted by the courts "all involve situations where events beyond the plaintiffs' control impeded the progress." *Chase*, at ___, 692 A.2d at 156. This is not the case here. Therefore, this court finds that plaintiffs did not have a compelling reason for the delay.

In conclusion, this court finds that all three prongs of *Penn Piping* were satisfied, and thus that the judgment of non pros was properly granted. This court notes that in this entire case, there appears to be a pattern of lateness in the actions of plaintiffs' counsel. Unfortunately for plaintiffs, this has now cut them off from their day in court.

ORDER OF COURT

December 8, 1997, the court denies plaintiffs' petition to open judgment of non pros.