

### BAR NEWS ITEM

Chambersburg, October 25, 1999 — Members of the Franklin County Bar Association support Carol L. Van Horn's candidacy for Judge of the 39th Judicial District, Pennsylvania (which consists, geographically, of Franklin and Fulton Counties, Pennsylvania), based on a recent survey. Sixty-five percent of the FCBA's members responded to a survey distributed earlier this month, asking them to evaluate Van Horn's qualifications for the vacancy created by the resignation of Judge William Kaye. Van Horn, who currently serves as FCBA president, is running unopposed.

There is not enough room herein, to spell out, fully the criteria used in this survey. Those criteria fell under four main categories: "Exceptionally Well Qualified," "Well Qualified," "Qualified," and "Not Qualified." According to press release issued on the above date, the majority gave Van Horn a ruling of "Well Qualified," for the Judgeship.

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WILLIAM C. CRAMER, ESQUIRE, ADMINISTRATOR  
OF THE ESTATE OF CORA WHEELER, A/K/A  
FELICIA ALLEN A/K/A FELICIA STEWART AK/A  
CORA STEWART, Plaintiff vs. CONSOLIDATED RAIL  
CORPORATION, NATIONAL RAILROAD  
PASSENGER CORPORATION and LARRY J.  
NICKERSON, Defendants, C.P. Franklin County Branch,  
Civil Action - Law, No. A.D. 1997-450

*Cramer v. Consolidated Rail Corporation*

*Discovery Sanctions - Judgment of Non Pros - Attorney's Fees*

1. The trial court has the discretion to impose the specific discovery sanctions provided under Pa.R.C.P. 4019.

2. Pursuant to Pa.R.C.P. 4019(a)(1), the court may make an appropriate order if a party fails to serve answers, sufficient answers, or objections to written interrogatories. An appropriate discovery sanction includes entering a judgment of non pros or default judgment against the disobedient party.

3. A court may enter a judgment of non pros when a party has (1) shown a want of due diligence in 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.

4. A court may order the noncomplying party to pay the other party's attorney's fees pursuant to Pa.R.C.P. 4019(g)(1).

5. In order to collect attorney's fees, the party seeking attorney's fees must first file a motion to compel compliance and then file a motion to impose sanctions.

*Gerard J. Jackson, Esquire, Attorney for Plaintiff*

*Craig J. Staudenmaier, Esquire, Attorney for Defendants*

### OPINION AND ORDER

WALKER, P. J., September 17, 1999:

#### Factual and Procedural Background

On March 1, 1995, Cora Wheeler, the decedent, was a passenger in a motor vehicle operated by her son, William E.

Foster. The motor vehicle was struck by an oncoming train at a rail-highway crossing located on Orchard Drive in the Borough of Chambersburg. The decedent was killed instantly. This litigation followed.

On February 27, 1997, plaintiff, administrator of decedent's estate, commenced this action by filing a praecipe for writ of summons in the Court of Common Pleas of Philadelphia County. The writ of summons was issued that same day. On March 27, 1997, the defendants filed a rule upon plaintiff to file the complaint which was subsequently filed on May 5, 1997. Shortly thereafter, the court granted defendants' petition and entered an order on July 22, 1997, transferring the action to this court on the basis of forum non conveniens. On October 31, 1997, defendants filed their answer with new matter to which plaintiff filed a reply on November 18, 1997.

On December 17, 1997, Defendant Conrail, on behalf of all defendants, filed interrogatories and a request for production of documents which was duly served on plaintiff's attorney. Plaintiff's answers to these discovery requests would have been due on January 16, 1998. On February 9, 1998, defendants' counsel sent a letter to plaintiff's counsel requesting answers to the overdue discovery within 10 days. On March 11, 1998, defendants' counsel again sent a letter to plaintiff's counsel requesting answers within 14 days. Defendants' counsel also indicated that he would file a motion to compel if plaintiff did not respond to the letters or the discovery within that time period.

On April 29, 1998, defendants filed a motion to compel answers to the overdue discovery. The next day the court issued a rule upon plaintiff to show cause why the relief requested in the motion should not be granted. Plaintiff was given 20 days to respond to the motion. Plaintiff's counsel received the rule on May 6, 1998. Plaintiff did not respond to the petition for the rule to show cause or the overdue

discovery. On December 21, 1998, defendants filed a motion to make the court's order dated April 30, 1998, absolute. The court entered its order granting the motion to make rule absolute on December 23, 1998, giving plaintiff 14 days to file verified answers to the previously served interrogatories and request for production of documents. In its order, the court warned that plaintiff might "suffer appropriate sanctions including, but not limited to, dismissal of the action in its entirety" if he did not answer the overdue discovery within 14 days. The order dated December 23, 1998, was duly served on plaintiff's counsel on January 5, 1999.

Defendant Conrail, on behalf of all defendants, filed a motion for default judgment on March 5, 1999. Due to an administrative error, defendants' counsel received an order dated May 6, 1999, on June 7, 1999. This order set a response date for plaintiff of June 7, 1999, and a hearing date of June 21, 1999. Defendants requested a continuance on June 11, 1999, to allow defendants' counsel to make service upon plaintiff's counsel prior to the response and hearing dates. The court granted the motion to continue by an order dated June 18, 1999. This order set a hearing for August 19, 1999, on defendants' motion for default judgment and required plaintiff to file any response by July 16, 1999.

On July 16, 1999, plaintiff filed his answer to defendants' motion for default judgment and brief in support of the motion.

At this same time, plaintiff also served purported answers to defendants' interrogatories. On August 19, 1999, an argument was held on defendants' motion for default judgment.

### Discussion

The trial court has the discretion to impose the specific discovery sanctions provided under Pa.R.C.P. 4019. *Poulos v. Commonwealth, Dep't. of Transp.*, 133 Pa. Cmwlth. 322, 325 (1990). The purpose of the rule is to guarantee that a party complies with court orders as well as allow for adequate and

prompt discovery permitted by the Rules of Civil Procedure. *Id.* at 325.

Pursuant to Pa.R.C.P. 4019(a)(1), the court may “make an appropriate order if (i) a party fails to serve answers, sufficient answers, or objections to written interrogatories...” An appropriate discovery sanction for failing to answer written interrogatories is provided for in Pa.R.C.P. 4019(c)(3) which allows the court to enter “an order...entering a judgment of non pros or by default against the disobedient party...”<sup>1</sup>

A judgment of non pros is a harsh penalty which should not be lightly entered. *Verbalis v. Verbalis*, 286 Pa. Super. 209, 211 (1981). In *Verbalis*, the Court held that the plaintiff ran a “grave risk” that the court would impose sanctions, including a judgment of non pros, upon him for failing to obey a court order requiring him to be deposed. *Id.* at 212. A court may enter a judgment of non pros when a party has (1) shown a want of due diligence in 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. *Moore v. George Heebner, Inc.*, 321 Pa. Super. 226, 229 (1983); *Poulos*, 133 Pa. Cmwlth. at 325-26.

The first factor to consider in determining whether to grant a judgment of non pros is whether the plaintiff has failed to act with due diligence. In *Lawrence v. General Medicine Association, Ltd.*, 412 Pa. Super. 163, 164 (1992), the defendant filed interrogatories on July 28, 1988. After a year of orders and requests, the court, in *Lawrence*, entered a

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<sup>1</sup> A judgment of non pros and a default judgment are essentially the same. A judgment of non pros is requested by the defendant when the plaintiff fails to proceed with the lawsuit. Pa.R.C.P. 1037(a). A default judgment is requested by the plaintiff when the defendant fails to respond to the cause of action. Pa.R.C.P. 1037(b). Although defendants filed a motion for default judgment, they are essentially seeking a judgment of non pros because plaintiff has failed to sufficiently answer defendants’ interrogatories.

judgment of non pros upon the request of the defendant. *Id.* at 165. In another case, the court entered a judgment of non pros after approximately 21 months of orders and requests upon the plaintiff to answer expert interrogatories. *McSloy v. Jeames Hospital*, 376 Pa. Super. 595 (1988). The expert interrogatories had been served on the plaintiff on May 29, 1985 and July 12, 1985. *Id.* at 597. The court dismissed the cause of action on February 9, 1987. *Id.* at 600.

In the present case, defendants’ interrogatories and request for production of documents were duly served on plaintiff’s attorney on December 17, 1997. Plaintiff had until January 16, 1998, to answer the interrogatories. Defendants’ counsel sent plaintiff’s counsel two letters on February 9, 1998 and March 11, 1998, requesting answers to the outstanding discovery. Plaintiff did not respond to either letter. On April 30, 1998, the court entered a rule upon plaintiff to show cause why the relief requested in defendants’ motion to compel should not be granted. Again, plaintiff did not respond.

The court entered an order on December 23, 1998, making the rule absolute and giving plaintiff 14 days to answer the interrogatories or “suffer appropriate sanctions,” including dismissal of the action. Plaintiff did not respond. On March 5, 1999, defendants filed a motion for default judgment. Due to an administrative error, a hearing on the matter was rescheduled for August 19, 1999. Plaintiff had until July 16, 1999, to respond to defendants’ motion for default judgment. It was not until July 16, 1999, the last possible moment, that plaintiff filed his answer to defendants’ motion for default judgment and brief in support of the motion. At this time, plaintiff also served inadequate answers to the interrogatories on the defendants.

The plaintiff had 19 months to gather the information necessary to answer the interrogatories. Defendants served plaintiff with two motions and two letters requesting answers

to the interrogatories. Plaintiff did not respond to any of them. The court issued two orders giving plaintiff additional time to answer the outstanding discovery. Both times, plaintiff ignored the court's orders. Plaintiff only attempted to comply with unresponsive and incomplete answers at the last possible moment when faced with defendants' motion for default judgment. Because plaintiff has had ample time, 19 months, to answer the interrogatories as ordered to do so by the court, plaintiff has not proceeded with due diligence.

The second factor that is considered in determining whether to enter a judgment of non pros is the excuse offered by plaintiff for failing to answer the interrogatories and comply with the discovery orders. Until the hearing on August 19, 1999, plaintiff provided no excuse for his failure to comply. Plaintiff acknowledged that he was in default of the discovery orders in his brief of plaintiff in opposition to motion for default judgment. Plaintiff, however, suggested that the default was cured because plaintiff had answered the interrogatories after the motion for default judgment was filed.

At the hearing on August 19, 1999, plaintiff argued that he was hampered in answering the interrogatories because the decedent's children gave varied and contradictory information regarding the decedent. Furthermore, plaintiff argued that the decedent had many aliases which made it difficult for plaintiff to obtain the information necessary to answer the interrogatories. Plaintiff suggested that he had made a diligent investigation and had responded to the interrogatories with the best answers he could give at that time. After 19 months, plaintiff should have been able to gather information to adequately answer the basic questions about decedent's general background. After four years since the accident and 19 months of outstanding discovery, plaintiff could not say when and where the decedent was born or give the decedent's social security number. Plaintiff's excuse for failing to adequately answer the interrogatories or comply with the discovery orders

is not a justifiable reason for his delay in answering defendants' interrogatories.

Lastly, the court must determine if the adverse party suffered prejudice as a result of the party's delay. Prejudice includes death or absence of a material witness, disappearance of a record, or "any substantial diminution of defendants' ability to present factual information in the event of trial which has been brought about by plaintiff's delay". *Am. Bank and Trust Co. of Pennsylvania v. Ritter, Todd and Haayen*, 274 Pa. Super. 285, 288-89 (1980). Prejudice also includes being denied the opportunity to prepare a defense. *McSloy*, 376 Pa. Super. at 604. Furthermore, the memories of material witnesses fade with the passage of time which makes it more difficult to prepare a defense. *Id.* During the drawn out discovery period, the adverse party incurs prejudice by bearing the stigma of an unresolved lawsuit and incurring continuous legal expenses due to the other party's procrastination. *Id.*

In the present case, defendants have suffered ample prejudice. The accident occurred on March 1, 1995, and this litigation began on February 27, 1997. During plaintiff's period of noncompliance, the corporations involved as defendants in this litigation have gone through mergers, resulting in employees who have knowledge of this litigation leaving the employment of the corporations. Because the accident occurred almost four and one-half years ago, the memories of the witnesses have faded. During this period, defendants have had to bear the stigma of an unresolved lawsuit. Because of plaintiff's procrastination in answering the interrogatories adequately, defendants have accumulated legal expenses as a result of attempting to force plaintiff to answer the outstanding discovery requests.

As a result of plaintiff's delay in answering the interrogatories, defendants have not been able to determine the identity of witnesses or documents needed to prepare a proper

defense. With regard to the interrogatories concerning the accident and defendants' liabilities, plaintiff answered "See complaint." In order for defendants to prepare a defense, they need more information than what is in the complaint which is the reason defendants served the interrogatories. Plaintiff answered "unknown" to the interrogatories regarding income, assets, liabilities, education, and occupation. This information is essential for the calculation of damages.

For example, in plaintiff's complaint, he alleged that defendants' negligence caused plaintiff's estate to suffer loss of earnings, earning power, and household economic contributions. However, in plaintiff's answers to defendant's interrogatories, he answered "unknown to Plaintiff/Administrator" with regard to interrogatories based on decedent's employment and earnings background. Specifically, plaintiff answered that it was "unknown whether decedent was employed as of her death." If loss of earnings, earning power, and household economic contributions were alleged in the complaint, plaintiff should be able to provide this information in an answer to a valid interrogatory. Plaintiff's failure to provide information on allegations made in the complaint causes prejudice to the defendants.

Plaintiff was unable to tell the court when he would be able to fully answer defendants' interrogatories. Therefore, defendants may never be able to prepare a proper defense. Plaintiff's incomplete and unresponsive answers to defendants' interrogatories prejudiced defendants because they cannot be expected to prepare a proper defense without this general information. As a result of plaintiff's unjustifiable delay which prejudiced defendants and the insufficient answers subsequently provided, entering a judgment of non pros is an appropriate sanction. As in *Verbalis*, plaintiff "ran a grave risk" that the court would enter a judgment of non pros for his failure to answer defendant's interrogatories.

According to Pa R.C.P. 4019(g)(1), a court may order the noncomplying party to pay the other party's attorney's fees. The party seeking attorney's fees must follow a two-step procedure to collect the fees. *Commercial Trading Co., Inc. v. Milsan Mills Inc.*, 327 Pa. Super. 407, 414 (1984). The first step is a motion to compel compliance. *Id.* "If the order to comply is not obeyed, the aggrieved party may file a new motion to impose sanctions." *Id.* The award of attorney's fees is limited to those counsel fees "incurred in obtaining the order of compliance and the order for sanctions." *Id.*

Defendants have followed the required procedure in this case. Defendants filed two motions to compel. One motion was filed on April 29, 1998, and the other was filed on December 21, 1998. Both of these motions resulted in court orders compelling plaintiff to answer the interrogatories. These orders were subsequently ignored by the plaintiff. Defendants filed a motion for default judgment on March 5, 1999, which included a request for attorney's fees and expenses. Because plaintiff has ignored two court orders compelling compliance, defendants are entitled to attorney's fees and expenses incurred in seeking plaintiff's compliance and the sanctions.

#### ORDER OF COURT

September 17, 1999, after consideration of defendants' motion for default judgment, the briefs submitted to the court, and the arguments made by counsel, defendants' motion is granted. Defendants' counsel is directed to submit an affidavit confirming his counsel fees and expenses incurred in seeking plaintiff's compliance and the sanctions.