

WILLIAM LOWE, PLAINTIFF vs. CLARENCE H. BEAVER  
and ROSEMARIE BEAVER, DEFENDANTS, Franklin County  
Branch, Civil Action - Law No. A.D. 1992 - 541

*Lowe v. Beaver*

*Judgment of Non Pros - Delay using Penn Piping standard*

1. When ruling on a judgment of non pros, the court will look at the standard set forth in *Penn Piping*. The motion will be granted if a party has failed to diligently proceed in promptly moving the case forward, failed to demonstrate a compelling reason for the delay and the delay is in excess of two years.
2. Prejudice to the moving party will be presumed if the delay exceeds two years.
3. The plaintiff has the burden of demonstrating a compelling reason for the delay.
4. The plaintiff's involvement in numerous other lawsuits is not a compelling reason for complete lack of docket activity for more than two years where the plaintiff testified that he voluntarily ceased proceeding with this case since he felt his other lawsuits were of a higher priority.
5. Where the plaintiff fails to state a compelling reason for a delay, and all other *Penn Piping* factors have been met, the court will enter a judgment of non pros against the plaintiff.

*Beth Ann C. Gabler, Esquire, Attorney for plaintiff*  
*John W. Frey, Esquire, Attorney for defendants*

OPINION AND ORDER

Kaye, J., December 12, 1996:

We have before us Defendants' Petition for Judgment of Non Pros filed on February 9, 1996 with this Court. The history of this case, insofar as it is relevant to this issue, is as follows. On October 13, 1992, Plaintiff filed a Complaint alleging breach of a real estate sales contract. The Complaint was prepared by Forest Myers, Esquire of Shippensburg. However, for reasons not appearing of record, the Complaint was not served on Defendants until October 22, 1993. Plaintiff's Answer was filed on January 10, 1994. After this Answer was filed, there was no docket activity until January 15, 1996, more than two years later, when Plaintiff filed a Praecipe to list the matter for trial.

Defendants filed their Petition for Non Pros on February 9, 1996 and a hearing was held on the motion on May 24, 1996. Plaintiff, himself, gave testimony at this hearing as to why he failed to pursue this case in a timely manner. He testified that he

had numerous other lawsuits pending and that because of limited time and financial resources, he gave the other cases priority over this one. These facts are undisputed by the parties.

The controlling case on this issue is *Penn Piping, Inc. v. Insurance Co. Of North America*, 529 Pa. 350, 603 A.2d 1006 (1992), in which the Pennsylvania Supreme Court set forth a three pronged test to be used to determine whether a judgment of non pros should be granted. First, the court must determine if there was "lack of due diligence in failing to proceed with reasonable promptitude." *Id.* at 356, 603 A.2d at 1008. Second, the court must determine if there was a compelling reason for the delay. *Id.* Finally, the length of the delay must exceed two years since a delay of that length of time "will be presumed prejudicial for purposes of any proceeding to dismiss for lack of activity on the docket." *Id.*

In this case, Plaintiff concedes that the delay was in excess of two years and we are thus satisfied that the third prong of the *Penn Piping* test has been met. Accordingly, we can presume that Defendants have been prejudiced by the delay. We also find that the record demonstrates that Plaintiff did not act with due diligence in moving this case forward since no action whatsoever was taken between January of 1994 and January of 1996. Plaintiff does not even seem to dispute that this prong of the test has not been met. Therefore, our sole task is to determine whether Plaintiff has met his burden of demonstrating that he had a compelling reason for the delay. We find that he has not.

*Penn Piping* states that certain situations warrant a per se determination that a compelling reason for delay existed. These include bankruptcy, liquidation or pending developments in applicable law. *Id.* At 356n.2, 603 A.2d at 1009 n.2. Other reasons advanced by a party are to be determined on a case-by-case basis. *Id.* Plaintiff's sole argument is that his involvement in many other lawsuits simultaneously is a compelling reason for his cessation of docket activity in this case.

At the hearing on this matter, Plaintiff testified that his business involves buying, selling and renting real estate. Primarily, Plaintiff purchases properties at sheriff's and tax sales. As a consequence of the manner of sale of these properties,

frequent litigation is foreseeable and is inherent in this type of business. At the time of the hearing, Plaintiff stated that he had been doing business this way for at least four years. When asked by Defendants' counsel if his other legal matters took precedence, Plaintiff replied:

Well yes, that was - I would say yes to that, you know, that this with other issues that were more pressing that I legally had to take care of because of papers served on me to do something, and in this particular case I didn't own the property at the current time so I wasn't dealing with the property that was sold to the Beavers.

It was sold to another individual later and so it wasn't a piece of real estate. It was just an action that needed taken care of at some particular time.

[Testimony of William H. Lowe, May 24, 1996 at 11.]  
Therefore, the only reason advanced by Plaintiff was that he prioritized his legal caseload and financial resources and this action was at the bottom of the list.

Initially we note that we are not persuaded that Plaintiff's financial situation is a compelling reason for the delay. In *Dorich v. DiBacco*, 440 Pa.Super. 581, 656 A.2d 522 (1995), the superior Court affirmed the lower court's determination that the Plaintiff's inability to secure expert witnesses because of economic constraints was an insufficient justification for the delay. In the present case, Plaintiff testified that he never filed for bankruptcy or was declared insolvent. Therefore, there is no evidence on the record that his financial burden as a result of his multiple lawsuits provides a compelling reason for the delay.

Likewise, we are not persuaded that Plaintiff's time constraints as a result of ongoing litigation are sufficiently compelling. The record shows, and Plaintiff does not dispute, that the delay was entirely caused by Plaintiff himself and not a dilatory attorney or a failure to secure counsel. For this reason, prior cases decided by this court and cited by both Plaintiff and

Defendant are inapposite.<sup>1</sup> During the entire course of this case, Plaintiff was represented by counsel and there is no suggestion that counsel contributed in any way to the delay.

We have found no case law to support Plaintiff's contention that his involvement with other legal matters (which he deemed more important) is sufficiently compelling to prevent the entry of judgment of non pros. Plaintiff's extensive familiarity with the legal system and the processes of a lawsuit only serve to make his argument less persuasive. It is well settled that the plaintiff bears the burden of moving his case forward to trial. See *Penn Ridge Electric v. Souderton School*, 419 Pa.Super. 201, 615 A.2d 95 (1992). In this case, Plaintiff took a calculated risk when he chose to prioritize his lawsuits and cease all docket activity until he was less busy.

In the interim, Defendants have been subject to uncertainty about this case for over three years since it was initiated. As the court in *Penn Piping* noted,

where a plaintiff, without reasonable explanation, has delayed an inordinate time to pursue his action, a defendant may have difficulty defending because of the lapse of time, and we must make note of our cognizance of how anxiety based on apprehension of being sued can affect a defendant. Fairness demands that such anxiety not be unreasonably or unnecessarily prolonged.

529 Pa.Super. at 354, 603 A.2d at 1008.

Accordingly, we find that Plaintiff has failed to set forth a compelling reason for the complete lack of docket activity for a period in excess of two years as required by *Penn Piping*. Therefore, the interests of justice would be served by the entry of judgment of non pros against the Plaintiff.

<sup>1</sup> In *Yeager v. York Penn Machinery and Startrite Corp.*, 13 Franklin Co.L.J. 84 (October 3, 1995), this Court held that judgment of non pros would not be entered where the delay was solely the result of the dilatoriness of the plaintiff's former attorney who was later disbarred. In *Riggs v. Garman, et al.*, 13 Franklin Co.L.J. 206 (January 29, 1996), the delay was caused by conflicts of interest of the plaintiff's former and successor attorney. Judgment of non pros was denied on the basis that the plaintiff acted with due diligence to secure counsel.

**ORDER OF COURT**

NOW, December 12, 1996, defendant's petition for judgment of non pros is GRANTED.

**THANK YOU**

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I also want to thank LCL for being there and for assisting my friends and colleagues in getting me into treatment.

I owe my life, my happiness and my career to them

Thank you."

Anonymous Attorney

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