

MAX A. SHEELEY AND CHARLOTTE G. SHEELEY V.  
ALAN D. SHEELEY AND SAMEE S. SHEELEY, C.P. Franklin  
County Branch, A.D. 1990-502.

*Motion for Non Pros Judgment for failure of plaintiffs to proceed with the case with reasonable promptitude.*

1. A court may grant a motion for non pros where it is found that: (1) A party has shown a lack of due diligence by failing to proceed with reasonable promptitude; (2) there is no compelling reason for the delay; and (3) that the delay has caused prejudice to the adverse party.
2. Where there is a delay for a period of two years or more, the delay is presumed to be prejudicial and the court may grant a motion for judgment of non pros if the other two factors are present.
3. It is plaintiffs' duty to move the proceedings forward as he who brings another into court should prosecute the claim against him with reasonable diligence.
4. Plaintiff has available remedies for forcing a foot-dragging and recalcitrant party to proceed, for plaintiffs should have and could have answered the preliminary objections and requested the matter be scheduled for argument.
5. The specific circumstances of the divorce proceeding between defendants is not a per se situation demonstrating a compelling reason for delay which would defeat a motion to dismiss as there is no claim that the proceeding will result in a significant substantive development in the law not is the present action affected by operation of law as in a bankruptcy proceeding.
6. A delay of two years is presumptively prejudicial as is a delay of more than two years.

*Todd A. Dorsett, Esquire, Counsel for Plaintiffs*  
*Jeffrey S. Evans, Esquire, Counsel for Defendants*

### OPINION AND ORDER

HERMAN, J., December 14, 1994

### OPINION

Before the court is a Motion for Non Pros Judgment filed by one of the defendants, Samee S. Sheeley, for failure of the plaintiffs to proceed with the case with reasonable promptitude. Plaintiffs filed the complaint on or about October 10, 1990, alleging a breach of contract by the defendants for failure to make payments on a promissory note. At the time of filing the plaintiffs' complaint a divorce action was pending between the two defendants named in this

breach of contract action. The defendant, Samee S. Sheeley, (hereinafter referred to as "Samee") filed preliminary objections on December 4, 1990, requesting the complaint be dismissed for failure of the plaintiffs to make proper service under the Pennsylvania Rules of Civil Procedure. Subsequent to filing these objections Samee's previous counsel and counsel for the plaintiffs entered into informal discussions designed to resolve the preliminary objections. Nothing was resolved and the objections remain pending. The co-defendant, Alan D. Sheeley, executed an acceptance of service of the complaint which was filed by the plaintiffs on December 10, 1990.

The most recent docket entry prior to the Motion for a Non Pros Judgment was a praecipe to withdraw from the case filed by the defendant's previous attorney on June 7, 1991. Between the time of filing of the defendant's preliminary objections and the Motion for a Non Pros Judgment, no other docket activity has occurred. The defendant's Motion for Non Pros Judgment was answered by the plaintiffs on February 2, 1994. On June 14, 1994, Max A. Sheeley, one of the plaintiffs in this action, was deposed with regard to the issue before the court. The defendant's Motion for Non Pros Judgment is now before the court for decision.

### DISCUSSION OF THE ISSUES PRESENTED

The parties have agreed that the issue presented by the defendant's motion is controlled by Pennsylvania Supreme Court's decision in *Penn Piping, Inc. v. Insurance Co. of North America*, 529 Pa. 350, 603 A.2d 1006 (1992). Briefly stated, the court may grant a motion for non pros where it is found that: "(1) A party has shown a lack of due diligence by failing to proceed with reasonable promptitude; (2) there is no compelling reason for the delay; and (3) that the delay has caused prejudice to the adverse party." In *Penn Piping, Inc. v. Insurance Co. of North America* the Supreme Court explained the third factor by stating in cases where there is a delay for a period of two years or more, the delay is presumed to be prejudicial and the court may grant a motion for judgment of non pros if the other two factors are present.

Plaintiffs argue that the court should deny the defendant's motion because it was the defendant who filed preliminary objections on December 4, 1990, and failed to bring about a resolution of those objections. It was therefore the defendant's lack of due diligence in

failing to proceed with reasonable promptitude. The plaintiffs cite *Schrump v. Philadelphia Electric Co.*, 440 Pa. 383, 269 A.2d 502 (1970) in support of this argument. We believe, however, that *Penn Piping, Inc. v. Insurance Co. of North America*, supra, and *Schrump v. Philadelphia Electric Co.*, supra, both support the position that it was the plaintiffs' duty in this case to move the proceedings forward. As the Supreme Court noted in quoting *Schrump v. Philadelphia Electric Co.*, ". . . he who brings another into court should prosecute the claim against him with reasonable diligence . . ." 440 Pa. at 386-87, 269 A.2d at 504. Further, as the Pennsylvania Supreme Court noted in *Penn Piping*, supra, at Footnote 3, it is the plaintiff who has available remedies for forcing a foot-dragging and recalcitrant party to proceed. In the instant case the plaintiffs should have and could have answered the preliminary objections and requested the matter be scheduled for argument. The case of *Pennridge Electric, Inc. v. Souderton Area Joint School Authority*, 419 Pa. Super. 201, 615 A.2d 95 (1992) adds further authority to the position. In *Pennridge Electric*, supra, the Pennsylvania Superior Court stated that ". . . the law is settled that it is the plaintiff's burden to move a case to trial, . . ." 419 Pa. Super. at 209.

Having established that it was the plaintiffs' duty to move the case forward, the court must now decide whether or not there was a compelling reason for the delay of more than 38 months from the time the preliminary objections were filed by the defendant in December of 1990 to the time that the present motion for judgment of non pros was filed. The plaintiffs argue that the divorce proceeding pending between the defendants, Alan D. Sheeley and Samee D. Sheeley, is an example of the per se situation demonstrating a compelling reason similar to those referred to by the Pennsylvania Supreme Court in *Penn Piping*. The plaintiffs argue that the debt which is the subject of the present action was also listed as a marital asset in the divorce proceedings pending between the defendants. Plaintiffs claim that it was necessary to await the outcome of the divorce proceedings to determine what property might be available to satisfy a judgment obtained on a note that is the subject of the present action. The delay in this case is characterized as the type of delay noted in *Penn Piping* which is entitled to a per se determination that there is a compelling reason for delay which would defeat a motion to dismiss. However, we agree with the defendant that in this case it would have been more prudent for the plaintiff to proceed to judgment in the instant case in

order to preserve their claim regardless of the outcome of the proceedings in the divorce court. As noted by the defendant, plaintiffs' delay in this case could result in marital property being disposed of and no longer available to the plaintiffs for levy or execution. The specific circumstances noted in the *Penn Piping* case under which the court should find a per se compelling reason for delay do not appear in this case. The plaintiffs do not claim that the divorce proceeding will result in a significant substantive development of the law but only that the decision may affect the instant case. The present action is not affected by operation of law as would occur in a bankruptcy proceeding. The plaintiffs do argue that the divorce proceeding is a liquidation similar to what occurs in bankruptcy proceedings and therefore it would be economical and worthwhile for the plaintiffs to await the outcome of the liquidation to determine if further litigation is necessary. As stated previously, we believe the divorce proceeding in this case is not the type of liquidation that was envisioned in *Penn Piping*. If anything, the plaintiffs would have stood a better chance of preserving their claim if they had proceeded without delay in the instant case.

Finally, we decline to accept the plaintiffs' invitation to apply the rule of laches mentioned by the dissent in *Penn Piping* to determine the appropriate period of time which is presumptively prejudicial in this case. We are constrained to follow the rule set out in *Penn Piping* that a two year period of delay is presumptively prejudicial. We find that the period of delay in this case was longer than two years and that the plaintiffs had the responsibility for moving the case forward and failed to demonstrate a compelling reason for not doing so. Therefore we will grant the defendant's Motion for Non Pros Judgment by appropriate order.

#### ORDER OF COURT

NOW this 14th day of December 1994, the defendant's Motion for Judgment of Non Pros is hereby GRANTED. *Penn Piping, Inc. v. Insurance Co. of North America*, 529 Pa. 350, 603 A.2d 1006 (1992).