

KATHRYN E. MEDINETS and DAVID MEDINETS,
PLAINTIFFS vs KENNETH PAUL BETZKO, DEFENDANT,
Franklin County Branch, Civil Action - Law No. A.D. 1994 - 107

Medinets v. Betzko

Judgment of Non Pros - Penn Piping Standard

1. When ruling on a motion for 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. Only docketed activity will be considered when determining whether or not there has been at least a two year delay, regardless of ongoing discovery that is not reflected on the docket.
4. The plaintiff has the burden of moving the case forward diligently.
5. The plaintiff has the burden of demonstrating a compelling reason for the delay.
6. A plaintiff's personal difficulty and inconvenience in traveling to the place where he brought suit do not provide compelling reasons for him to cease proceeding with the case diligently.
7. An attorney's neglect may only prevent the entry of a judgment of non pros against his client if the attorney offers a reasonable explanation for his neglect.
8. Where the plaintiff has not acted diligently and fails to offer a compelling reason for the delay, and his attorney has offered no reasonable explanation for his neglect, a judgment of non pros will be entered against the plaintiff if there has been no docket activity in his case for at least two years.

Robert B. Gidding, Esq., Attorney for plaintiffs
Michael M. Badowski, Esq., Attorney for defendant

OPINION AND ORDER

Kaye, J., April 14, 1997:

OPINION

We have before us Defendant's Motion for Judgment of Non Pros dated February 11, 1997. The history of this case, insofar as it is relevant to this issue, is as follows: On March 16, 1994, Plaintiffs filed a Praecipe for a Writ of Summons against Defendant for an action arising out of an automobile accident which occurred on March 22, 1992. Also on March 16, 1994, the Prothonotary of Franklin County issued the Writ to Plaintiffs'

counsel who served it on Defendant's counsel. The Plaintiffs' Complaint was filed on July 6, 1994 and served on the Defendant on July 19, 1994. Thereafter, on July 26, 1994, Defendant filed Preliminary Objections alleging improper service of the Writ of Summons and expiration of the statute of limitations. After oral argument, this Court issued an Opinion and Order on November 3, 1994 denying these objections. The next day, Defendant filed an Answer and New Matter to Plaintiffs' Complaint. On December 2, 1994, Defendant filed a Motion for Summary Judgment again raising the issues of ineffective service of the Writ of Summons and expiration of the statute of limitations. By Order dated January 5, 1995, this Motion was denied by this Court. However, this Order also allowed Plaintiffs to submit an affidavit in support of their oral motion for counsel fees, which they did on January 25, 1995. Plaintiffs' Motion was denied by this Court in an Order issued on February 9, 1995. This was the last docket entry preceding the instant motion. Neither party disputes the absence of docket activity since that date.

Defendant filed his Motion for Judgment of non Pros with this Court on February 11, 1997 and oral argument was held on the motion on April 3, 1997. Plaintiffs advanced three reasons in opposition to Defendant's motion. First, Plaintiffs assert that the delay in this case was contributed to by the Defendant because of his continued requests for discovery. Second, Plaintiffs assert that they were unable to schedule a trial in Franklin County because they had responsibility for the constant care of Mrs. Medinets' grandmother who lived with them in New Jersey and that Mrs. Medinets had to undergo surgery on her shoulder. Alternatively, the Plaintiffs assert that any delay in proceeding with their case was caused by the negligence and oversight of their attorney. We will now address the merits of the parties' respective arguments.

DISCUSSION

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 'a 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 the case at bar, the last docket entry was this Court's Order on February 9, 1995, over two years before the filing of the Defendant's Motion for Judgment of Non Pros.¹ Neither party disputes this fact. Therefore, we are satisfied that the third prong of the *Penn Piping* test has been met. Accordingly, we can presume that the Defendant has been prejudiced by the delay. However, the Plaintiffs maintain that ongoing discovery at the request of the defendant should toll the two year period on docket inactivity.

This issue was recently addressed by the Superior Court in the case of *State of the Art Medical Products, Inc. v. Aries Medical, Inc., et al.*, _____ Pa.Super._____, _____ A.2d_____, No. 244 Phila. 1996, 1997 WL 75584 (February 24, 1997). in that case, the Superior Court was faced with "the novel question of whether a court is to consider only docketed activity when applying the *Penn Piping* prejudice test." *Id.* at 4. The Court made it very clear that only docket activity is to be considered when apply the *Penn Piping* test, regardless of ongoing discovery. *Id.*

It is the plaintiff's duty to move the case forward and to monitor the docket to reflect that movement. If there is no evidence of activity appearing *on the docket* for a period in excess of two years, under the standard of *Penn Piping* prejudice can be presumed.

Id. at 4-5 [emphasis added].

Having found prejudice from the delay, we must now examine the remaining two prongs of the *Penn Piping* test.

¹ The last pleadings filed by the parties were Defendant's Motion for Summary Judgment on December 2, 1994, followed by Plaintiffs' Response to Defendant's Motion for Summary Judgment filed on December 12, 1994.

Plaintiffs have the duty to move their case ahead to trial with due diligence. See *Pennridge Electric, Inc. v. Souderton area Joint School Authority*, 419 Pa.Super. 201, 615 A.2d 95 (1992); See also *Dorich v. DiBacco*, 440 Pa.Super. 581, 656 A.2d 522 (1995). In the present case, the Plaintiffs maintain that they did proceed with their case in a diligent manner. In support of their position, Plaintiffs argue that the absence of docket entries for a period in excess of two years is not indicative of the manner in which they were proceeding since discovery was being completed which was not reflected on the docket. They maintain that their failure to file a praecipe to list the case for trial is not evidence of a lack of due diligence on their part. The reason given for this is that Defendant's attorney, when corresponding with Plaintiffs' attorney about discovery matters, informed him that the case could not proceed until discovery was completed.

The basis for Plaintiffs' argument is that the Defendant was making continued discovery requests. These ordinary requests were complied with by the Plaintiffs in a timely manner. However, as we stated earlier, it is the Plaintiffs' duty to move the case forward. Therefore, the Plaintiffs' decision to sit back and allow the Defendant to dictate the course and pace of the case is clear evidence that the Plaintiffs did not act diligently.² Had they been acting diligently, they would not have relied upon the Defendant's statement that the case could not move forward until discovery was complete and they could and would have taken steps to prevent the possibility of entry of a judgment of non pros. from occurring. A plaintiff cannot relinquish control of a case to the defendant and then attempt to avoid a judgment on non pros. when the case is not moved forward by the defendant, who has no duty to do so. Therefore, we find that the Plaintiffs in this case showed a lack of due diligence in failing to proceed with their case. Additionally, it has been held that discovery requests are not compelling reasons for delay as required by *Penn Piping*. See *Gates v. Servicemaster Commercial Service*, 428 Pa.Super. 568, 575, 631 A.2d 677, 680 (1993). Therefore, we must reject the Plaintiffs' argument that ongoing, informal discovery relieved

² We note that plaintiffs have not alleged that defendant was acting in a wilfully dilatory manner in requesting discovery that might excuse the delay. We further observe that plaintiffs had only to provide the requested materials and/or responses to avoid this process from ever becoming an issue in the case.

them of a duty to move the case forward and provide a compelling reason for a delay in excess of two years.

Plaintiffs also assert that they had other compelling reasons for any delay. One such reason is that they live in northern New Jersey which is approximately five hours driving time from the Franklin County Courthouse, requiring them to stay in the Chambersburg area for the duration of the trial, estimated to last two or three days. This presents a problem for them since they live with and care for Mrs. Medinets' grandmother who requires constant care and supervision. Additionally, the Plaintiffs argue that Mrs. Medinets was scheduled to undergo shoulder surgery which would affect her availability for trial. However, we note that all of these suggested explanations for the delay in this case are dehors the record, and they have not sought an evidentiary hearing to establish the validity of these averments. Therefore, it would be improper for us to consider this argument when deciding the issue now before us.

However, even if we were able to consider these arguments, we do not find that they present compelling reasons for the Plaintiffs to cease moving their case forward. Franklin County is the forum which the plaintiffs themselves elected, and the difficulties inherent in this decision had to be apparent to them from the beginning of this case. If they have special circumstances that prohibit them from being away for more than one day, these concerns could have been presented to the court, and allowances could have been made. We cannot permit the parties to unilaterally decide that since they are unable to travel for an indefinite period of time, they may also delay moving litigation forward indefinitely.

Similarly, Mrs. Medinets' surgery is another concern that could have been presented to the court during a pre-trial conference. Certainly all efforts would have been made to schedule trial for a date that would not interfere with the dictates of the physician in charge of her medical treatment. Therefore, even if we were to consider the aforementioned arguments, we would find that the Plaintiffs have not presented any compelling reasons for a delay in docket activity for a period in excess of two years.

Accordingly, we find that the three prongs of the *Penn Piping* test have been satisfied, seemingly making the entry of a judgment of non pros. against the Plaintiffs proper. However, the Plaintiffs have made an additional argument which must be addressed before an Order may be entered.

The Plaintiffs argue in the alternative that any delay in proceeding with their case was entirely due to the dilatoriness of their counsel. However, we do not find this argument sufficient to make the entry of a judgment of non pros. improper. In rejecting this argument, we recognize that generally courts will not turn plaintiffs out of court if they have placed their case in the hands of reputable counsel who, through neglect or oversight, fails to proceed with their case. *Esslinger v. Sun Refining & Marketing*, 379 Pa.Super. 69,549 A.2d 600, 603 91988). See also *Manson v. First National Bank in Indiana*, 366 Pa. 211, 77 A.2d 399 (1951). However, this rule does not allow a party to avoid a judgment of non pros. in every situation merely by having his attorney confess to being neglectful of his case. A close reading of a line of cases addressing this issue reveals that attorney neglect *may* prevent an entry of a judgment of non pros but only if the attorney offers a reasonable explanation for his neglect. See *Moore v. Heebner*, 321 Pa.Super. 226, 467 A.2d 1336 (1983).

Contrary to the Plaintiffs' interpretation of the law in this area, the Superior Court has not made a blanket rule that attorney neglect will always prohibit the entry of a judgment of non pros. In fact, the law in this area was explained in *Dupree v. Lee*, 241 Pa.Super. 259, 361 A.2d 331 (1976).

In so holding we are not unmindful of the line of cases which allow for the vacating of a non pros. or the opening of a default judgment where the reason for the non pros. or default judgment is merely mistake, oversight or neglect of counsel. [Citations omitted]. These cases, however, do not support of a blanket rule that all judgments of non pros. can be vacated simply by an admission of counsel that he was negligent. Such of a rule would allow the purpose behind of a non pros. to be easily circumvented. If counsel's mistake, oversight or neglect is to be of a reason to vacate a non pros., that mistake, oversight or neglect must be *reasonably* explained. [Citations omitted].

Id. at 265-266, 361 A.2d at 334-335.

In the instant case, Plaintiffs' counsel has offered no explanation of why the delay should be blamed entirely on his oversight. It can be inferred from Plaintiffs' brief that counsel's explanation is that Defendant's counsel did not make any "attempts to draw the attention of plaintiffs' counsel to the case, no attempts to apprise counsel that discovery was complete, etc." [Plaintiffs' Brief at 7]. It is not the duty of opposing counsel to keep the other party apprised of approaching deadlines. As we stated earlier in this Opinion, *the plaintiff* has the duty of proceeding with the case. Therefore, we are left with merely a confession of neglect with no reasonable explanation of the reason behind that neglect.

We find that the facts now before this Court present the precise situation that the Superior Court cautioned against in *Dupree, supra*. We have an attorney presenting two reasons why the Plaintiffs delayed proceeding with their case and then, if this Court did not find those reasons compelling, alternatively confessing to being neglectful. Therefore, Plaintiffs' counsel's argument that he is to blame for any delay is insufficient to act as a bar to the entry of a judgment of non pros. against the Plaintiffs.

Finally, we recognize that because of the plaintiffs' inaction, the Defendant has been subject to impending litigation for nearly five years since the motor vehicle accident occurred. In *Penn Piping*, the Supreme Court sought to mitigate the effect of litigation on a defendant when it recognized that

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 take 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. at 354, 603 A.2d at 1008.

In conclusion, we find that plaintiffs have failed to set forth a compelling reason for the complete lack of docket activity for a period in excess of two years as mandated by *Penn Piping*.

Further, we find Plaintiffs' argument that this lack of docket activity was the result of attorney oversight insufficient and without reasonable explanation. Therefore, in the interests of justice, we will enter a judgment of non pros. against the Plaintiffs.

ORDER OF COURT

NOW, April 14, 1997, defendant's motion for judgment of non pros. is hereby GRANTED.