

BAR NEWS ITEM

FEDERAL JUDICIAL NOMINATING COMMISSION TWO VACANCIES U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Two (2) vacancies exist in the U.S. District Court for the **Middle District** of Pennsylvania which must be filled immediately. The Commission is affirmatively charged by Senators Specter and Santorum to seek out qualified men, women and minority candidates for vacancies on the District Courts.

The Commission encourages all persons interested in being considered for these vacancies to obtain, complete and submit the Commission Questionnaire, which may be obtained from the Chairman of the Commission, Mr. Herbert Barnes, or his Assistant, Terri Brodheim at 975 Easton Road, Warrington, PA 18976, (215) 343-2780. To be considered for these vacancies the completed questionnaire must be returned by Monday, April 15th. Interviews for these vacancies will be held in Harrisburg.

BONNIE M. RIGGS AND ROBERT S. RIGGS, HER HUSBAND, PLAINTIFFS vs. EDWARD L. GARMAN, PHILIP D. GARMAN, AND ROGER G. MELLOTT t/a GARMAN, GARMAN AND MELLOTT ENTERPRISES AND ESSIS AND SONS CARPETS, DEFENDANTS
Franklin County Branch, Civil Action - Law No. A.D. 1991-483
Jury Trial Demanded

Riggs v. Garman et al.

Civil procedure- Judgment of non pros- Two-year delay- presumption of prejudice rebutted by inability to retain counsel.

1. Judgment of non pros may be entered where (1) a party has shown a lack of diligence by failing to proceed with reasonable promptitude, (2) there are no compelling reasons for the delay, and (3) the delay has caused prejudice to the adverse party.
2. A delay of two years or more with no activity on the docket is presumptively prejudicial.
3. The plaintiff has the burden of moving a case forward, and consequently the plaintiff bears the risk of failing to do so.
4. The plaintiff has presented compelling reasons for the delay where her first attorney had to disqualify himself because of a conflict of interest, she contacted a second attorney within a reasonable period of time, the second attorney also had to disqualify himself because of a conflict of interest, and the second attorney transmitted the case to current counsel within a reasonable period of time.

David W. Knauer, Esquire, Counsel for Plaintiffs
Steven D. Snyder, Esquire and Jayson R. Wolfgang, Esquire,
Counsel for Defendants

OPINION AND ORDER OF COURT

Douglas W. Herman, J.

Plaintiff Bonnie M. Riggs initiated this action by Writ of Summons on October 4, 1991. On October 15, 1993, counsel for defendants Edward L. Garman, Philip D. Garman, Roger G. Mellott t/a Garman, Garman and Mellott Enterprises ("Garman") entered an appearance and filed a praecipe requesting a rule upon the plaintiffs to file a complaint. The complaint was filed January 14, 1994. Both Garman and the other defendant Essis and Sons Carpets ("Essis") filed a motion for non pros on or about July 25, 1995, based on the lack of docket activity between October 4, 1991 and January 14, 1994.

Judgment of non pros may be entered where: (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) the delay has caused prejudice to the adverse party. *Penn Piping Incorporated v. Insurance Company of North America*, 529 Pa 350, 603 A.2d 1006 (1992); *James Brothers Lumber Company v. Union Banking Trust*, 432 Pa. 129, 247 A.2d 587 (1968). A delay of two years or more in docket activity is presumed prejudicial. *Penn Piping*, supra. Such prejudice can be overcome only by the plaintiff showing that the absence of such docket activity is explainable by compelling reasons. *Penn Ridge Electric v. Souderton School*, 419 Pa. Super, 201, 615 A.2d 95 (1992). Furthermore the law is settled that it is the plaintiff's burden to move a case forward to trial and it is the plaintiff not the defendant who bears the risk of failing to act within a reasonable time. *Penn Ridge Electric*, supra.

There is a lack of docket activity for over two years in this case between October 4, 1991 and January 14, 1994. The only docket activity which occurred was attributed to the defendant Garman on October 15, 1993. The plaintiff must therefore demonstrate there were compelling reasons for this delay under the reasoning of *Penn Piping*. Plaintiff contends the delay in docket activity in this case is attributed to a difficulty in obtaining representation in order to proceed with the case.

Plaintiff's first attorney was Denis L. DiLoreto of the Firm DiLoreto, Cosentino and Bolinger. Attorney DiLoreto filed the Writ of Summons on October 4, 1991 to toll the statute of limitations. Attorney DiLoreto could not continue to represent the plaintiff due to a conflict of the interest. Plaintiff then consulted Attorney Jan G. Sulcove of the firm of Black & Davison. However, Attorney Sulcove did not undertake her representation because of a conflict of interest. Attorney Sulcove wrote a letter on February 4, 1993, to Attorney Timothy A. Shollenberger of the firm of Meyers, Desfor & Shollenberger explaining the conflict and conveying an interest in referring the case to Attorney Shollenberger. On February 15, 1993, Attorney Shollenberger replied to Attorney Sulcove's letter, requesting information about the case. The complaint was filed January 14, 1994. Plaintiff's current counsel, David W. Knauer, entered his appearance for the

plaintiff on December 19, 1994. On that same day, Attorney Shollenberger withdrew his appearance for the plaintiff.¹

The plaintiff argues she was diligent in seeking counsel after the Writ of Summons was filed. She consulted with Attorney Sulcove sometime before February 4, 1993. Attorney Sulcove's letter to Attorney Shollenberger opens with the statement "Sometime ago I discussed with you the case of Bonnie M. Riggs" (emphasis supplied). The record does not show when the plaintiff first consulted Attorney Sulcove and when Attorney Sulcove first spoke with Attorney Shollenberger regarding the case, but the February 4, 1993, letter indicates the two attorneys had not discussed the plaintiff's case for some period of time. The issue is whether the plaintiff's attempt to retain counsel is a satisfactory explanation for the two year, three month and ten day delay in plaintiff's docket activity through January 14, 1994.

Informal and sporadic settlement discussion is an insufficient explanation for over four years of delay in docket activity. *Penn Ridge Electric*, supra. In *Pilon v. Bally Engineering Structures*, 435 Pa. Super. 227, 645 A2d 282 (1994) the plaintiffs were trailer park residents claiming injuries caused by the disposal of hazardous waste on a nearby property. The court held that a three year delay in docket activity was not sufficiently excused by ongoing investigations by state and federal environmental regulatory agencies, where counsel for the plaintiffs had only unspecified and undocumented contacts with those agencies during the period of docket inactivity. In both *Penn Ridge Electric* and *Pilon v. Bally*, the court found that the reasons given for the delay in docket activity were not compelling and were insufficient to overcome the two year presumption of prejudice under *Penn Piping*.

Our own Court recently held that where a two year delay in docket activity is attributable to the dilatory behavior of

¹ On December 12, 1995, the plaintiff filed an Affidavit and letters exchanged between Attorney Sulcove and Attorney Shollenberger. These are part of the record for our consideration. In her brief, plaintiff states she met with Attorney Shollenberger on May 25, 1993 and executed a fee agreement on September 17, 1993. Her statements in the brief are not part of the record, however, and we do not consider them here.

plaintiff's original counsel, an entry of a judgment non pros against the plaintiff is inappropriate. *Yeager v. York Penn machinery and Star trite Corporation*. Volume 13, Franklin County Legal Journal 84 (October 3, 1995). Yeager's original attorney was subsequently disbarred on consent because of mental and emotional problems which interfered with his ability to practice law.

Defendants argue that unlike *Yeager*, Mrs. Riggs herself was partly responsible for the delay in moving her case forward in that she failed to promptly retain counsel. While we acknowledge that *Yeager* is so distinguishable, we find that Mrs. Riggs, a non lawyer, acted with reasonable diligence to obtain representation between October 4, 1991 and February 5, 1993. Her original attorney Denis DiLoreto could not continue to represent her. At sometime prior to February 5, 1993, she consulted Attorney Sulcove who later found he could not represent her and referred her case to Attorney Shollenberger who filed the complaint on her behalf on January 14, 1994. We conclude the difficulties experienced by the plaintiff in moving her case forward were largely attributable to the conflict of interest of Attorney DiLoreto and Attorney Sulcove and we are satisfied that Mrs. Riggs acted with reasonable promptness sufficient to overcome a judgment of non pros.

ORDER OF COURT

Now this 29th day of January, 1996, the defendants' Motion for Non Pros is DENIED.

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