

Franklin County Legal Journal

Vol. 33, No. 2

July 10, 2015

Pages 1 - 8

Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Barbara J. Daymude, Plaintiff v. Mar-Eco, Inc., t/d/b/a Keystone RV Center; PNC Bank National Association; Consumers' Life Insurance Company; and Ed Tobin & Co., a/k/a Ed Tobin Agency Associates, Inc., a/k/a Ed Tobin Agency, Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2000-2486

HEADNOTES

Entry of Judgment of Non Pros Opinion

1. "A motion for a judgment of non pros is the vehicle by which a litigant asserts his or her common law right to a reasonably prompt conclusion to a case." Shope v. Eagle, 710 A.2d 1104, 1106 (Pa. 1998).
2. An entry of judgment of non pros is an equitable power of the Court and the decision to grant or deny a petition lies within the sound discretion of the court. Jacobs v. Halloran, 710 A.2d 1098, 1101 (Pa. 1998).
3. A judgment of non pros may be entered against a party if: (1) there is lack of due diligence by the party to proceed with reasonable promptitude; (2) there is no compelling reasons for the delay; and (3) the delay has caused actual prejudice to the adverse party. Jacobs, 710 A.2d at 1103 (citing James Bros. Lumber Co. v. Union Banking and Trust Co. of DuBois, 247 A.2d 587, 589 (1968)).
4. The party seeking dismissal based on an entry of judgment of non pros must do so with clean hands. Shope, 710 A.2d at 1106.
5. In construing whether a plaintiff has failed to proceed with due diligence or has a compelling reason for delay "it is plaintiff, not defendant, who bears the risk of failing to act within a reasonable time to move a case along." Shope, 710 A.2d at 1108.
6. "Due diligence requires more than merely filing a certificate of active status." Hughes v. Fink, Fink & Associates, 718 A.2d 316, 319.
7. Defendant failed to proceed with reasonable promptitude where the only activity within a thirteen year timeframe was mere statements of intention to proceed and an objection to dismissal of the case.
8. "[I]n determining what constitutes a compelling reason for delay, a trial court should focus on whether the events which allegedly impeded progress were beyond the plaintiff's control." Hughes, 718 A.2d at 320.
9. The Court may consider docket as well as non-docket activity to determine whether a part has a compelling reason for delay. Marino v. Hackman, 710 A.2d 1108, 1111 (Pa. 1998).
10. Defendant's bald assertion that discovery was conducted in 2005, ten years ago, is not a compelling reason for delay.
11. Actual prejudice is defined as "any substantial diminution of a party's ability to properly present its case at trial." Jacobs, 710 A.2d at 1103 (quoting Metz Contracting, Inc., v. Riverwood Builders, Inc., 520 A.2d 891, 894 (Pa. Super. Ct. 1987)).
12. The passage of time alone cannot be the basis for dismissal of a plaintiff's case. Jacobs, 710 A.2d at 1102.
13. Examples of prejudice include fading memories of witnesses, lost or destroyed documents, or death or absence of a material witness. Jacobs, 710 A.2d at 1102-03.

14. Key witness's fading memories regarding material events, inability to contact relevant witnesses, and difficulty obtaining relevant documents constitute actual prejudice where fourteen years have passed since the commencement of the action.

Appearances:

Anthony Stefanon, Esq., *Counsel for Barbara J. Daymude*

Thomas A. French, Esq., *Counsel for Mar-Eco, Inc.*

Joseph L. Hitchings, Esq., *Counsel for PNC Bank*

Robert E. Kelly, Jr., Esq., *Counsel for Consumers' Life Insurance Company*

John C. McNamara, Esq., *Counsel for Ed Tobin & Co., a/k/a Ed Tobin Agency Associates, Inc., a/k/a Ed Tobin Agency*

OPINION

Before Meyers, J.

Before the Court is a Motion for Entry of Judgment of Non Pros. A Complaint was filed by Barbara J. Daymude ("Plaintiff") in 2000 and it is still pending before this Court. Defendant Consumers' Life Insurance ("Consumers' Life") filed cross-claims against the other Defendants. Those Defendants now request the Court to enter a judgment of non pros for the failure of Plaintiff and Defendant Consumers' Life to proceed with their claims. For the reasons that follow the Court will grant the Motion for Entry of Judgment of Non Pros.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff commenced this action on September 27, 2000 by filing a Complaint within which she claims that she and her husband entered into a contract with Defendant Mar-Eco Inc. ("Mar-Eco") on July 24, 1998 to purchase an RV along with a credit life insurance policy through Consumers' Life. Plaintiff claims she would not have entered into that contract without the inclusion of the life insurance policy. Plaintiff alleges that Mar-Eco thereafter assigned its right, title and interest in the installment contract to Defendant PNC Bank, National Association ("PNC Bank"). After Plaintiff's husband died in 1999, Plaintiff contacted Mar-Eco to present an insurance claim but was told that no insurance policy was in place and therefore it was rejected. Based on the foregoing, Plaintiff claims that she is entitled to the loss of the insurance coverage in the amount of \$84,520.87. By September 7, 2001 numerous answers with new matter, replies, and cross-claims had been filed by the parties. According to the docket, no action was taken in the case until March 1, 2004 when a Notice of Proposed Termination of

Court Case was sent to counsel for the parties. Defendant Consumers' Life filed a Statement of Intention to Proceed on April 28, 2004. More than three years later, in which no action was taken by any party, another Notice of Proposed Termination of Court Case was sent to counsel for the parties. On March 27, 2008 Consumers' Life again filed a Statement of Intention to Proceed. After a period of more than two years of inactivity the Prothonotary once again sent a Notice of Proposed Termination of Court Case on January 12, 2011. In response, Consumers' Life again filed a Statement of Intention to Proceed on March 15, 2011. On February 14, 2014, after a period of inactivity for over two years for a fourth time, a Notice of Proposed Termination was sent to the parties by the Prothonotary. On April 16, 2014 Consumers' Life again filed a Statement of Intention to Proceed. Based on the history of inaction in the case, on October 14, 2014 the Court sent out a Notice of Proposed Termination of Court Case pursuant to Pa. R.J.A. 1901 requiring that good cause be shown to proceed with the case.¹ Two days later on October 16, 2014 Mar-Eco filed a Motion for Entry of Judgment of Non Pros ("Motion for Non Pros") against Plaintiff Barbara J. Daymude, along with a brief in support. On November 17, 2014 Consumers' Life filed Objections to Dismissal of Case. On November 25, 2014 a Rule to Show Cause was issued upon the parties to show cause why Mar-Eco's Motion should not be granted. None of the parties responded to the Rule. On February 2, 2015 this case was reassigned to the Undersigned. On March 6, 2015, after review of the record, in the interest of due process relating to service of Mar-Eco's Motion for Non Pros, the Undersigned issued a Rule to Show Cause upon all parties to show cause why Mar-Eco's Motion should not be granted. Counsel for Mar-Eco filed a Proof of Service certifying that all parties were served. Defendants PNC Bank and Ed Tobin & Co., a/k/a Ed Tobin Agency Associates, Inc., a/k/a Ed Tobin Agency ("Ed Tobin Agency") filed answers to the Motion for Non Pros on April 1, 2015 and April 17, 2015, respectively. Both parties concurred with the relief requested by Mar-Eco. Consumers' Life Insurance failed to file an answer to the Motion for Non Pros. This matter is now ready for a decision.

DISCUSSION

Mar-Eco moves this Court for an entry of judgment of non pros for want of due diligence in Plaintiff's failure to proceed with her claims. "A motion for a judgment of non pros is the vehicle by which a litigant asserts his or her common law right to a reasonably prompt conclusion to a case." Shope v. Eagle, 710 A.2d 1104, 1106 (Pa. 1998).² An entry of judgment

¹ Judge Douglas W. Herman, who was previously assigned to the instant case, issued the Notice.

² Shope related to termination of a case based on Pa. R.J.A. 1901. However, the Supreme Court specifically held that

of non pros is an equitable power of the Court and the decision to grant or deny a petition lies within the sound discretion of the court. Jacobs v. Halloran, 710 A.2d 1098, 1101 (Pa. 1998). A judgment of non pros may be entered against a party if: (1) there is lack of due diligence by the party to proceed with reasonable promptitude; (2) there is no compelling reasons for the delay; and (3) the delay has caused actual prejudice to the adverse party. Jacobs, 710 A.2d at 1103 (citing James Bros. Lumber Co. v. Union Banking and Trust Co. of DuBois, 247 A.2d 587, 589 (1968)). Furthermore, the party seeking dismissal must do so with clean hands. Shope, 710 A.2d at 1106.

Here, we are met with unique circumstances wherein it is a defendant and not a plaintiff who seeks to avoid entry of judgment of non pros.³ The only indication of Consumers' Life's basis for opposing the entry of judgment of non pros came in the form of its Objections to Dismissal of Case filed on November 17, 2014 in response to the Court's Notice of Intention to Dismiss the case pursuant to Pa. R.J.A. 1901. It requested that the Court not dismiss the case because "[t]his action at this time is an indemnity and contribution action by Consumers' Life subrogation against co-defendants in light of payments made by Consumers' Life to the Plaintiff." Thus, for purposes of the Court's analysis of the Motion for Non Pros, Consumers' Life will stand in the shoes of a plaintiff. Significantly, we note that Consumers' Life failed to file an answer to Mar-Eco's Motion for Non Pros when ordered to do so by the Court on November 24, 2014 and March 6, 2015.

I. Due Diligence

In construing whether a plaintiff has failed to proceed with due diligence or has a compelling reason for delay we note that "it is plaintiff, not defendant, who bears the risk of failing to act within a reasonable time to move a case along." Shope, 710 A.2d at 1108. In Shope, the plaintiffs failed to take action for a period of over three years. Id. at 1105. The plaintiffs claimed that their failure to proceed was the fault of the defendants because the defendants did not provide the plaintiffs with an x-ray. Id. at 1108. However, the Supreme Court found that the plaintiffs lacked due diligence in failing to proceed with reasonable promptitude and there was no compelling reason for the delay. Id. The Court noted that had the plaintiffs examined the x-rays that were provided by the defendants months earlier the plaintiffs would have realized that one of the x-rays was missing and could have requested the missing document from the defendants. Id. In Hughes v. Fink, Fink & Associates, the court found that a delay of almost four years along with the mere filing of a certificate of active status, and conducting

the same standard applies to cases involving judgments of non pros. Shope, 710 A.2d at 1105.

³ Plaintiff has failed to file anything since May 1, 2001 when she filed a Motion for Leave to Amend Complaint.

discovery in the nature of interrogatories, requests for admissions, and requests for production of documents within a small period in that timeframe amounted to a lack of due diligence. 718 A.2d 316, 319-20 (Pa. Super. Ct. 1998).

Here, according to the docket entries Consumers' Life and Plaintiff failed to take any action to move the case along for a period of over thirteen years between September 7, 2001 and the present. The only filings within that timeframe consisted of four Statements of Intention to Proceed by Consumers' Life. In fact, when looking at all of the docket entries subsequent to September 7, 2001, the only meaningful filing by Consumers' Life was its Objections to Dismissal of Case filed on November 17, 2014, which had no effect on moving Consumers' Life's case forward. The four Statements of Intention to Proceed are akin to the certificate of active status in Hughes and fail to demonstrate due diligence on the part of Consumers' Life. "Due diligence requires more than merely filing a certificate of active status." Hughes, 718 A.2d at 319. The thirteen year period of inactivity wherein Consumers' Life filed mere Statements of Intention to Proceed is three times longer than the four year period in Hughes where the court found a lack of due diligence. Therefore, we find there is a lack of due diligence on the part of Consumer's Life and Plaintiff to proceed with reasonable promptitude.

II. Compelling Reasons for the Delay

"[I]n determining what constitutes a compelling reason for delay, a trial court should focus on whether the events which allegedly impeded progress were beyond the plaintiff's control." Hughes, 718 A.2d at 320. The Court may consider docket as well as non-docket activity. Marino v. Hackman, 710 A.2d 1108, 1111 (Pa. 1998). In Marino, the Supreme Court found that the plaintiffs had a compelling reason for the delay. Id.

This case had an unusual amount of activity not entered on the docket: the death of Appellants' first attorney and the substitution of his partner, an attorney not known to or selected by Appellants; the taking of depositions of all the parties; the replacement of Appellants' second attorney because of Appellants' perception that he was not moving their case forward; the difficulties encountered by Appellants' third attorney in obtaining the case file from Appellants' second attorney as well as difficulty in getting the second attorney to withdraw his appearance; the exchange of letters seeking a settlement of the case; and, finally, a telephone discussion of certifying the case

ready for trial.

Id. The Court further stated that “any one of the cited factors would be insufficient to salvage this case from dismissal for inactivity, yet the total picture painted by this record is that of a case proceeding, albeit slowly, towards disposition.” Id.

In Hughes, the plaintiff claimed that the lengthy delay in his prosecuting his case was caused by the defendants’ failure to produce requested documents. Hughes, 718 A.2d at 320. In holding that the plaintiff’s assertion was not a compelling reason for the delay, the court reasoned that it is the responsibility of the plaintiff to move the case forward. Id. “[I]f plaintiff’s counsel finds [himself] faced with delays created by others, [he] must take action to move the case forward, such as filing praecipes for argument on undecided motions, moving to compel [his] opponent to file a certificate of readiness, or requesting a conference with the judge . . . to have the case put on the trial list.” Id. at 320-21 (citations omitted). The court found that even though the defendants did not provide requested documents it was actually the plaintiff who was responsible for the delay because he failed to file a motion to compel. Id. at 321. The court further held that failure of the defendants to produce requested documents did not amount to an unusual amount of docket activity sufficient to demonstrate a compelling reason for the plaintiff’s delay. Id.

As we have alluded to, the docket entries do not appear to demonstrate any compelling reason for Plaintiff’s or Consumers’ Life’s delay in prosecuting the case. Nevertheless, we must also look to non-docket activity. In its Objections to Dismissal of Case, Consumers’ Life claims that “[d]iscovery has occurred in the case in 2005, subsequent to the last substantive docket entry.” However, Consumers’ Life gives no indication of the content or the extent of discovery. Furthermore, even if discovery was conducted in 2005, we are now in 2015, ten years later. We find it implausible that discovery is still continuing at this stage. Aside from its statement regarding discovery, Consumers’ Life offers no compelling reason for its delay in its action against the other Defendants. Unlike Marino, there is not a substantial amount of non-docket activity here. There exists no evidence that the case is moving slowly towards a disposition. Rather, the case appears to be halted in perpetuity. Consumers’ Life had ample opportunity to provide the Court with a valid justification for the delay and it failed to do so. We cannot sift through an empty docket to surmise an explanation for the failure of Consumers’ Life to prosecute its claims. Accordingly, we find that there is no compelling reason for Plaintiff’s or Consumers’ Life’s delay in prosecuting the case.

III. Actual Prejudice to the Defendant

Actual prejudice is defined as “any substantial diminution of a party’s ability to properly present its case at trial.” Jacobs, 710 A.2d at 1103 (quoting Metz Contracting, Inc., v. Riverwood Builders, Inc., 520 A.2d 891, 894 (Pa. Super. Ct. 1987)). The previous standard in Pennsylvania allowed courts to presume prejudice when the passage of time exceeded two years. However, the Jacobs Court has since held that the passage of time alone cannot be the basis for dismissal of a plaintiff’s case. Id. at 1102. Examples of prejudice include fading memories of witnesses, lost or destroyed documents, or death or absence of a material witness. Id. at 1102-03. In Shope, the Supreme Court found that the defendants were prejudiced where they were denied the opportunity to discover the findings of a possible expert witness regarding his examination and his opinion on the elements of the plaintiff’s negligence claim because the witness died during the period of inactivity. Shope, 710 A.2d at 1108. In Neshaminy Constructors, Inc. v. Plymouth Twp., the court found actual prejudice where witnesses were unable to specifically recall key facts relating to the considerations taken into account and methods used to calculate a building permit fee almost ten years after the action commenced. 572 A.2d 814, 818 (Pa. Commw. Ct. 1990).

Here, Mar-Eco asserts that it is prejudiced by the delay because, based on affidavits attached to its Motion for Non Pros: Aldine Martin, the president of Mar-Eco, does not recall what took place regarding the subject matter of the litigation, i.e., the transaction or purchase of any life insurance due since it has been over 14 years since the RV was purchased; anyone connected to the sale of the RV to Plaintiff in 1998 are no longer working for or with Keystone RV and Mar-Eco has no way to contact them; and any documentation requested by way of discovery, that was not already requested, will be difficult to obtain because the sale took place over 14 years ago. In addition, Ed Tobin Agency avers in its answer to the Motion for Non Pros that the memories of the employees who worked for it at the time of the RV transaction have faded since it took place in 1998.

We are inclined to agree with these Defendants. Plaintiff filed her claim on September 27, 2000. It has now been more than 14 years since the commencement of the action. While the Supreme Court has held that passage of time alone is not sufficient to demonstrate actual prejudice, Defendants assert that people associated with the RV transaction are no longer available and are not able to be contacted, and the memories of crucial witnesses that *are* available have diminished. Furthermore, Mar-Eco claims that documentation regarding the transaction would be hard to obtain at this point in time. Plaintiff and Consumers’ Life do not refute any

of these contentions as they have failed to file an answer to the Motion for Non Pros, and thus we deem them admitted.⁴ Fading memories of witnesses lost or destroyed documents, or death or absence of material witnesses are specifically cited by the Supreme Court as examples of actual prejudice. Like Neshaminy, Aldine Martin is unable to recall the facts surrounding the incident which is the subject of this litigation. Accordingly, we find that actual prejudice has been established.

CONCLUSION

For the foregoing reasons we will grant Mar-Eco's Motion for Entry of Judgment of Non Pros. All claims will be dismissed with prejudice. An order consistent with this Opinion is attached.

ORDER OF COURT

AND NOW, this 30th day of April, 2015, upon consideration of Defendant Mar-Eco Inc.'s Motion for Entry of Judgment of Non Pros Against Plaintiff Barbara J. Daymude, its brief in support, the Objections of Defendant Consumer Life Insurance Company to Dismissal of Case, Defendant PNC Bank's Answer to Motion for Entry of Judgment of Non Pros, Defendant Ed Tobin & Co., a/k/a Ed Tobin Agency Associates, Inc.'s Answer and Joinder of the Motion for Entry of Judgment of Non Pros Against Plaintiff, noting that Plaintiff has failed to file an answer, and it appearing there is no need for oral argument,

IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED** pursuant to the attached Opinion.

IT IS FURTHER ORDERED that all claims by Plaintiff against Defendants are **DISMISSED WITH PREJUDICE**.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.

⁴ Consumers' Life's Objections to Dismissal of Case was filed in response to the Court's Pa. R.J.A. 1901 Order, not in response to the Motion for Non Pros. Nonetheless, it does not refute any of the contentions regarding prejudice averred by Mar-Eco and Ed Tobin Agency.