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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.

Shively Motors, Inc., Plaintiff vs. Buchanan Auto Park, Inc., Curtis Mummert, and Rodney Bumbaugh, Defendants vs. Better Way, Inc., Additional Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2008-4451

HEADNOTES

Termination of Inactive Cases Generally

1. Each year, the Prothonotary prepares a list of civil cases in which there has been no docketed activity or proceedings for the past two or more years. After receiving notice and upon hearing when necessary, the Court may terminate a case for inactivity. 39th Jud. Dist. R.C.P. 1901; Pa. R.J.A. 1901.

2. The plaintiff bears the risk of failing to reasonably move its case along. Shope v. Earle, 710 A.2d 1104, 1107-08 (Pa. 1998).

3. The Supreme Court of Pennsylvania laid out a three-part test for dismissal due to inactivity under Rule 1901: "To dismiss a case for inactivity there must first be a lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude. Second, the plaintiff must have no compelling reason for the delay. Finally, the delay must cause actual prejudice to the defendant. We further hold that equitable principles should be considered when dismissing a case inactivity pursuant to Rule 1901." Shope, 710 A.2d at 1107-08.

Termination – Lack of Due Diligence

4. Filing a certificate of active status or notice of intention to proceed is insufficient to establish due diligence and prevent dismissal under Rule 1901. Hughes v. Fink, Fink & Associates, 718 A.2d 316, 320 (Pa. Super. 1998) (holding non-docketed discovery was insufficient evidence of due diligence to prevent termination for inactivity).

Termination – No Compelling Reason for Delay

5. Whether a compelling reason for delay exists is a question which must be answered based on the factual circumstances and merits of each case. Streidl v. Community General Hosp., 603 A.2d 1011, 1012 (Pa. 1992) (holding where delay was caused by bankruptcy or other operation of law or where the parties awaited significant related caselaw, there is per se finding of compelling reason for plaintiff's delay).

6. Non-docketed activity can be evaluated in determining whether a compelling reason existed for delay. Marino v. Hackman, 710 A.2d 1108, 1111 (Pa. 1998).

7. Settlement negotiations, discovery and financial considerations are not considered compelling reasons for delay under Rule 1901. County of Erie v. Peerless Heater Co., 660 A.2d 238, 140 (Pa. Cmwlth. 1995).

8. Any event or circumstance beyond the plaintiff's control which impedes its process may be considered a compelling reason for delay under Rule 1901. MacKintosh-Hemphill International Inc. v. Gulf & Western, Inc., 679 A.2d 1275, 1280 (Pa. Super. 1996).

Termination – Actual Prejudice

9. Actual prejudice is defined as "any substantial diminution of a party's ability to properly

present its case at trial." Jacobs v. Halloran, 710 A.2d 1098, 1103 (Pa. 1998) (quoting Metz Contracting, Inc., v. Riverwood Builders, Inc., 520 A.3d 891, 894 (Pa. Super. 1987)).

10. Prejudice may be established by the death or absence of a material witness. James Bros. Lumber Co. v. Union Banking & Trust Co. of Du Bois, Pa., 247 A.2d 587, 598 (Pa. 1968).

Appearances:

Christopher Sheffield, Esq. *attorney for Plaintiff*

Kimberly Selemba, Esq. and Barbara Darkes, Esq. *attorneys for Defendants Buchanan Auto, Mummert, and Bumbaugh*

Scott W. Arnoult, Esq. *attorney for Better Way*

OPINION

Before Meyers, J.

PROCEDURAL HISTORY

On October 17, 2008, Shively Motors, Inc. ("Shively") filed a Complaint against Buchanan Auto Park, Inc. ("Buchanan"), Curtis Mummert, and Rodney Bumbaugh (collectively "the Defendants") for lost profits, unjust enrichment, fraud and punitive damages, civil conspiracy, and tortious interference with business relations in relation to the alleged misuse of Shively's proprietary customer list. The Defendants filed Preliminary Objections to the Plaintiff's Complaint on November 12, 2008.

Shively filed its First Amended Complaint on December 1, 2008. The Defendants filed Preliminary Objections to the First Amended Complaint on December 10, 2008.

Shively filed its Second Amended Complaint on December 30, 2008. The Defendants filed Preliminary Objections to the Second Amended Complaint on January 20, 2009. On May 18, 2009, the Honorable Judge Douglas W. Herman, P.J., dismissed Shively's claims of civil conspiracy, fraud and punitive damages, and tortious interference with business relations only applied to "other customers" on the list. The Defendants filed their Answer and New Matter to the Second Amended Complaint on June 8, 2009. Shively did not file a response to the Defendants' New Matter.

Just two days later, on June 10, 2009, the Defendants filed a Complaint Against Additional Defendant against Better Way, Inc. ("Better Way") for their alleged involvement in the alleged misappropriation of Shively's proprietary customer list. Better Way filed Preliminary Objections on August 9, 2009. However, the Defendants filed an Amended Complaint Against Additional Defendant on September 22, 2009. Better Way again

filed Preliminary Objections to the Defendants' Second Amended Complaint Against Additional Defendant on November 9, 2009. On September 20, 2010, Judge Herman dismissed all of the Defendants' claims against Better Way except for one count of Misappropriation and Misuse of Proprietary Information. Better Way filed an Answer to the Amended Complaint Against Additional Defendant on October 12, 2010.

No action of record was taken by any party in this case until January 30, 2012 when the Defendants filed a Motion to Compel Discovery from Shively. Judge Herman granted this Motion on February 6, 2012.

Since that date, no substantive docket activity has taken place. Due to this inactivity, a Notice of Intent to Terminate the Case pursuant to Pa. R.J.A. 1901 and 39th Jud. Dist.R.Jud.Admin. 1901 ("Rule 1901") was filed on February 14, 2014. Shively filed a corresponding Statement of Intention to Proceed on March 6, 2014. A second Notice of Intent to Terminate Case was distributed on June 9, 2016 due to continued inactivity. Shively filed a Statement of Intention to Proceed on August 3, 2016. Subsequently, this court issued a Notice to Appear at the Civil Call of the List on November 1, 2016. Counsel for Shively and the Defendants appeared. However, counsel for Better Way did not appear.

A subsequent hearing on whether this case should be terminated under Rule 1901 was scheduled for November 18, 2016 ("the Rule 1901 hearing"), pursuant to court order.[1] The Rule 1901 hearing occurred as scheduled with counsel for both Shively and the Defendants present. Having allegedly not received notice of this hearing, this court requested Better Way certify whether it consents or objects to termination of this case. On January 3, 2017, Better Way filed a certification stating it is not opposed to termination of this case due to inactivity.

This matter is now ripe for decision by this court.

FACTUAL HISTORY

Shively is a licensed new Dodge-Jeep-Chrysler and used car dealership, which provides ancillary products and services. Plaintiff's Second Amended Complaint, ¶2 ("Second Amended Complaint"); Defendants' Answer with New Matter, ¶2 ("Answer with New Matter"). Buchanan is also a licensed new Dodge-Jeep-Chrysler and use car dealership. Second Amended Complaint, ¶4. Curtis Mummert is the President of Buchanan and is therefore involved in the management of Buchanan. Answer with New Matter, ¶4. Rodney Bumbaugh is the Sales Manager of the new Dodge-

1 Although scheduling was explicitly discussed at the civil call of the list on November 1, 2016, the scheduling order for the Rule 1901 hearing on termination was docketed under 2015-2651, where Shively and Buchanan are both opposing parties. Therefore, counsel for Shively and the Defendants were aware of and attended the Rule 1901 hearing, despite it being docketed incorrectly.

Jeep-Chrysler dealership and is therefore involved in the management and daily operations of Buchanan. Answer with New Matter, ¶4. Mr. Bumbaugh was previously employed with Shively prior to accepting employment with its competitor, Buchanan. Second Amended Complaint, ¶15.

When the underlying events of this case occurred, Shively and Buchanan were each utilizing the services of Better Way's Gold Key Lease Training Program which provided training to individual Dodge-Jeep-Chrysler dealerships across the country and had access to each dealership's proprietary information. Second Amended Complaint, ¶¶6-8, 20. Specifically, Better Way had access via Chrysler Financial Company, LLC, to each dealership's customer lease information which included personal data such as social security and phone numbers. Second Amended Complaint, ¶¶11-12. In addition, each dealership had its own lease information such as customer identities, lease maturity dates, and other financial information. Second Amended Complaint, ¶14.

In October 2007, Kevin Sommers as an employee of Better Way provided on-site training to Buchanan and Mr. Bumbaugh. Answer and New Matter, ¶22. During this training at Buchanan, Mr. Sommers allegedly accessed Shively's proprietary customer information on his secure laptop. Second Amended Complaint, ¶26. Shively alleges that Mr. Sommers left the laptop unattended and Mr. Bumbaugh subsequently printed Shively's proprietary lease customer list from that laptop. Second Amended Complaint, ¶28. Buchanan contends that the only proprietary customer lists received from Mr. Sommers in any way were given and represented to them as their own list of Buchanan customers with expiring leases. Answer with New Matter, ¶28. However, Shively further alleges that Mr. Bumbaugh in bad faith distributed this list to sales employees and instructed them to use it to steal Shively's customers away. Second Amended Complaint, ¶¶ 30-32. Buchanan contends throughout that they did not wrongfully access Mr. Sommer's laptop and were acting only on what Mr. Sommers represented as Buchanan's own proprietary customer list. Answer with New Matter, ¶¶30-32. However, Better Way denies that it provided Buchanan with Shively's proprietary list of customer information and maintains that they only gave Buchanan a list of their own customers. Answer to Amended Complaint Against Additional Defendant, ¶21 ("Better Way Answer").

After making numerous phone calls to customers on the list provided by Mr. Sommers, Buchanan at some point realized they actually had Shively's proprietary customer list and ceased using it. Answer with New Matter, ¶¶36, 38. As a result of these phone calls, Buchanan leased new vehicles to some of Shively's customers. Second Amended Complaint, ¶42; Answer with New Matter, ¶48. Specifically, Buchanan leased a vehicle

to Marilyn Dunkle, who questioned why Buchanan had contacted her and had even previously leased a vehicle from Mr. Bumbaugh during his time at Shively. Second Amended Complaint, ¶¶43-46. Throughout these events, Buchanan maintained that they only used the list because Mr. Sommers had represented that it was Buchanan's own proprietary list of customers and ceased using the list when they realized it was not. Answer with New Matter, ¶42. However, Better Way contends they did not provide the Shively list to Buchanan and that Buchanan must have wrongfully obtained the list by accessing Mr. Sommers' laptop, which absolves them of any potential liability. Better Way Answer, ¶¶22, 25, 33.

Shively alleges they received additional phone calls from other customers between October 2007 and November 2007 asking why Buchanan had been contacting them, at which point Shively realized that their proprietary customer information had been compromised. Second Amended Complaint, ¶55, 57. It is undisputed that Buchanan came to possess a list detailing Shively customer information. However, how the list was obtained and to what extent it was improperly used are still unanswered questions that will not be addressed by the court at this time.

DISCUSSION

I. APPLICABLE STANDARD: Rule 1901

The plaintiff bears the risk of failing to reasonably move its case along. Shope v. Earle, 710 A.2d 1104, 1107-08 (Pa. 1998). The Supreme Court of Pennsylvania laid out a three-part test for dismissal due to inactivity under Rule 1901:

> To dismiss a case for inactivity there must *first* be a lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude. *Second*, the plaintiff must have no compelling reason for the delay. *Finally*, the delay must cause actual prejudice to the defendant. We further hold that equitable principles should be considered when dismissing a case inactivity pursuant to Rule 1901.

Id. (emphasis added). The decision of whether to terminate an action pursuant to Rule 1901 is within the sound discretion of the trial court. Stephens v. Messick, 799 A.2d 793, 798 (Pa. Super. 2002).

ANALYSIS

A. PLAINTIFF'S LACK OF DUE DILIGENCE

Filing a certificate of active status or notice of intention to proceed is

insufficient to establish due diligence and prevent dismissal under Rule 1901. Hughes v. Fink, Fink & Associates, 718 A.2d 316, 320 (Pa. Super. 1998). In Hughes, the Superior Court held that even when considering the non-docketed discovery activities of the plaintiff, there was insufficient evidence of due diligence to prevent dismissal for inactivity. Id. For two months, the plaintiff had engaged in substantial discovery by filing interrogatories, requests for admissions and product of documents. Id. However, the court ultimately determined this short period of activity over a four year period of general inactivity was insufficient to establish due diligence. Id.

Here, the parties actively proceeded through the initial stages of the claims when Shively filed its Complaint on October 17, 2008, and the Defendants promptly filed Preliminary Objections. Shively filed its First Amended Complaint on December 1, 2008, which the Defendants countered with prompt Preliminary Objections. On December 30, 2008, Shively filed a Second Amended Complaint to which the Defendants responded with Preliminary Objections. For the first three months of litigation in this case, both Shively and the Defendants were actively engaged in moving the case forward. The Preliminary Objections on Shively's Second Amended Complaint were decided on May 18, 2009.

Although the Defendants filed an Answer to Shively's Second Amended Complaint with New Matter on June 8, 2009, Shively has yet to respond to the Defendants' New Matter.

Furthermore, after filing their Answer with New Matter, the docket shows the Defendants turned their attention to adding Better Way as an additional defendant. From June 10, 2009, to September 20, 2010, the Defendants and Better Way litigated amongst themselves regarding Better Way's status as an additional defendant. The docket in its entirety was silent from October 12, 2010 to January 23, 2012.

When the Defendants returned their attention to Shively by filing a Motion to Compel Discovery on January 30, 2012, Shively failed to file a response and the Motion was granted by President Judge Herman on February 6, 2012. Since that date, there have been no substantive filings by any party other than Shively's Statements of Intention to Proceed in March 2014 and August 2016. As stated in Hughes, this mere certification in the absence of any docketed or non-docketed activity is insufficient to establish the due diligence required to prevent termination under Rule 1901.

Furthermore, none of the non-docketed discovery evidence presented by the Defendants at the Rule 1901 hearing regarding discovery activities established Shively's due diligence in moving this case forward.[2] At the

2 The court notes that the only evidence heard at the Rule 1901 hearing, was testimony by Mr. Mummert and six Exhibits introduced via his testimony. Shively presented no evidence, only argument.

Rule 1901 hearing, the Defendants presented their Interrogatories from June 2009, which showed Buchanan prompting Shively to identify anyone who has knowledge of any of the issues or allegations set forth by Shively. Defendants' Exhibit 1, Buchanan Interrogatories, ¶4. The Defendants then presented Shively's hand-written responses to this interrogatory, which listed eleven individuals and "others unknown at this time" as persons with potential knowledge of the underlying events. Defendants' Exhibit 2, ¶¶2, 4. Only two of these individuals were deposed. The Defendants' also produced interrogatories from Mr. Mummert prompting Shively to identify anyone it expected to call as a non-expert witness at trial. Defendants' Exhibit 1, Mummert Interrogatories, ¶3. The Defendants' also presented Shively's responses to that interrogatory listing twenty-one witnesses to be called at trial, only four of which have been deposed. Defendants' Exhibit 3, ¶3.

Moreover, evidence of correspondence between Shively and the Defendants fails to establish that Shively acted with due diligence in moving the case forward. The Defendants presented at the Rule 1901 hearing a November 15, 2011, letter from counsel for the Defendants requesting deposition dates for various witnesses identified by Shively in their Interrogatory responses. Defendants' Exhibit 4. The Defendants never received a response to this letter from counsel for Shively. In a January 4, 2012 letter from the Defendants to Shively, counsel for the Defendants indicated that they had previously requested more thorough responses to interrogatories three months prior and prompted response to the letter. Defendants' Exhibit 5. Furthermore, counsel for the Defendants once again requested deposition dates and voluntary appearance of the identified individuals. Id. No response was received and presumably the Defendants did not carry out their threats of subpoenaing those potential witnesses to attend a deposition. Id. The Defendants also presented a March 21, 2012 letter which, in responding to Shively counsel's request for the infamous customer list, also indicates that Shively's counsel has not served any formal discovery on either the Defendants or Better Way.[3] Defendants' Exhibit 6. In addition to neglecting the docket, the Defendants have also shown that Shively has taken little to no action to carry out any formal discovery which could usher the case to trial.

During argument at the Rule 1901 hearing, counsel for Shively briefly responded to this extensive evidence showing a lack of discovery efforts. He argued generally that the Defendants never filed subpoenas for the witnesses they sought to depose, and that even though no formal discovery was served by Shively, the Defendants were aware of his informal request for the customer list and should have provided it. Counsel for Shively reasserted the idea that the infamous customer list has never been provided

3 By this date, Better Way had been added as an additional Defendant by the Defendants.

to him, yet he has not served any interrogatories on the Defendants which would mandate the list's delivery. Counsel for Shively did not point to any evidence of any independent proactive efforts made by Shively, which was not in response to the Defendants' inquiries, that could establish due diligence in moving the case forward.

Therefore, since the docket has been substantively silent since February 2012, and no evidence was presented at the 1901 hearing of Shively taking steps to move the case forward with discovery, the court finds that Shively lacked due diligence in carrying out this case against the Defendants.

B. PLAINTIFF'S LACK OF COMPELLING REASON FOR DELAY

Whether a compelling reason for delay exists is a question which must be answered based on the factual circumstances and merits of each case. Streidl v. Community General Hosp., 603 A.2d 1011, 1012 (Pa. 1992) (holding where delay was caused by bankruptcy or other operation of law or where the parties awaited significant related caselaw, there is per se finding of compelling reason for plaintiff's delay).

Non-docketed activity can be evaluated in determining whether a compelling reason existed for delay. Marino v. Hackman, 710 A.2d 1108, 1111 (Pa. 1998). In Marino, the court held that to uniformly enforce Rule 1901 across the state, the court should take into account both docketed and non-docketed activity to determine whether a compelling reason existed for the plaintiff's delay. Id. Specifically, the Court held that the extensive activity occurring outside the confines of the docket sheet removed the case from the stereotypical cases which Rule 1901 seeks to weed out. Id. Settlement negotiations, discovery and financial considerations are not considered compelling reasons for delay under Rule 1901. County of Erie v. Peerless Heater Co., 660 A.2d 238, 140 (Pa. Cmwlth. 1995). However, any event or circumstance beyond the plaintiff's control which impedes its process may be considered a compelling reason for delay under Rule 1901. MacKintosh-Hemphill International Inc., v. Gulf & Western, Inc., 679 A.2d 1275, 1280 (Pa. Super. 1996).

Here, as extensively described in Section A above, not only has there been a lack of docketed activity since 2012, there has also been a lack of non-docketed discovery activity by Shively. Even if Shively had been responding to and serving extensive interrogatories, these actions would not be considered compelling reasons for delay under Peerless Heater Co. Furthermore, even if the parties had completed discovery and been engaged in settlement negotiations, these activities would not establish a compelling reason for delay under Peerless Heater Co.

Counsel for Shively attempted to justify the delay by alleging that the parties had agreed to wait for a decision from this court in a 2015 action in which Shively asserted a Dragonetti claims against Buchanan.[4] However, counsel for the Defendants denied any such agreement existed. Furthermore, this attempted excuse does not explain or justify the period of inactivity prior to the Dragonetti action from 2009 to 2015.

Counsel for Shively also claimed the delay in proceeding forward with the case was required because Shively had to wait four to five years to see any leases that resulted from Buchanan's use of Shively's customer list mature. However, any transactions from October and November 2007 when the underlying events occurred, would have presumably matured on or about November 2012. Again, Shively's justification fails to establish a compelling reason for a delay in prosecuting this case from 2012 to present.

Shively presented no evidence or argument that any events beyond their control prevented prosecution of this case. Furthermore, no docketed or non-docketed activity was presented which could prevent this case from being categorized as one of the inactive cases Rule 1901 seeks to weed out. Therefore, Shively has failed to provide a compelling reason for this delay and lengthy period of inactivity.

C. PLAINTIFF'S DELAY CAUSED ACTUAL PREJUDICE

Actual prejudice is defined as "any substantial diminution of a party's ability to properly present its case at trial." Jacobs v. Halloran, 710 A.2d 1098, 1103 (Pa. 1998) (quoting Metz Contracting, Inc., v. Riverwood Builders, Inc., 520 A.3d 891, 894 (Pa. Super. 1987)).

Prejudice may be established by the death or absence of a material witness. James Bros. Lumber Co. v. Union Banking & Trust Co. of Du Bois, Pa., 247 A.2d 587, 598 (Pa. 1968). In James, the court found no abuse of discretion in the trial court's finding of actual prejudice when multiple officers of both the corporate plaintiff and defendant had died or become incompetent to testify due to the delay in prosecution. Id. at 589-90.

Here, the Defendants alleged they would be greatly prejudice by the absence of Buchanan's former General Sales Manager, Huey Mellott, who passed away unexpectedly in 2011. Upon discovery that Buchanan's list actually listed Shively customers, Mr. Mellott allegedly took possession of the list and prevented further use of the list by Buchanan sales persons. Despite being available for three years prior to his untimely passing, Mr. Mellott was not deposed with respect to his involvement in this matter. As such, his testimony regarding how the list was handled by Buchanan would be completely absent from any future trial.

Furthermore, Shively listed in its responses to the Defendant's

4 This case is docketed at No. 2015-2651.

interrogatories around twenty-one individuals who would have knowledge of what transpired at Buchanan or was a Shively customer called by Buchanan. However, only a few of these witnesses were deposed and at the Rule 1901 hearing, neither party indicated any knowledge of where those individuals may be now. Even if a fraction of these witnesses was located and available to testify at trial, they would likely be unable to remember the events that transpired over eight years ago. If Shively had conducted even menial discovery, it would have been able to contact some of its own proposed witnesses and potentially depose them. However, because Shively failed to conduct any discovery of its own, they have failed to preserve the testimony and memories of any relevant witnesses.

Therefore, the Defendants have been actually prejudiced by Shively's delay due to the lack of testimonial evidence available to either party regarding what factually transpired with Buchanan's use of the Shively list.

CONCLUSION

Both the docket and non-docketed inactivity illustrate that Shively has taken no affirmative steps to pursue this claim and therefore lack due diligence. In addition, Shively has presented no compelling reason for the delay in prosecution and lengthy period of inactivity. Furthermore, due to Shively's inactivity, the locations and memories of fact witnesses have not been preserved which leaves both Shively and the Defendants at a substantial disadvantage in presenting their case at trial, the Defendants have suffered actual prejudice. Therefore, it is hereby order that pursuant to Rule 1901, this case is **TERMINATED**

ORDER OF COURT

AND NOW THIS 4th day of January, 2017,

IT IS HEREBY ORDERED that the above-captioned case is **TERMINATED** pursuant to Pa. J.R.A. 1901 and 39th Jud. Dist. R. Jud. Admin. 1901.

This Order is pursuant to the attached Opinion

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.