

ROGER YEAGER, VS. YORK PENN MACHINERY AND  
STARTRITE CORPORATION, C.P. Franklin County  
Branch, NO. A.D. 1995 - 2

*Judgment of Non Pros- Delay under Penn Piping- Attorney's Dilatory Behavior*

1. Where there has been a delay of two years or more in a case, a defendant may properly move for a judgment of non pros under *Penn Piping v. Insurance Co. of North America*.
2. Plaintiff must rebut the presumption of prejudice caused by the delay by providing compelling reasons for the delay.
3. Where the delay was entirely due to the dilatory behavior of plaintiff's former attorney, the Court will not grant a judgment of non pros against an otherwise innocent plaintiff and his new counsel.

*Dennis R. Meakim, Esq., Attorney for Plaintiff*

*Phillip B. Rosenthal, Esq., Attorney*

for Defendant Startrite Corp.

*Kenneth A. Rapp, Esq., Attorney for Defendant York*

Penn Machinery

OPINION AND ORDER

JOHN R. WALKER, P.J., October 3, 1995:

**Findings of Fact**

1. Roger Yeager filed a praecipe for a writ of summons in October 1989.
2. Carleton G. Goodnow of the then-existing firm of McVan & Eslinger entered his appearance for plaintiff.
3. Mr. Goodnow left McVan & Eslinger in January 1992.
4. Mr. Goodnow did not withdraw his appearance until December 1994.

5. Mr. Goodnow was subsequently disbarred on consent due to mental and emotional problems interfering with his practice.

6. Dennis Meakim entered his appearance in December 1994 at the time of Mr. Goodnow's withdrawal.

7. Long periods of docket inactivity led to a delay of over two years.

8. Defendant Startrite Corporation was not otherwise prejudiced.

**Discussion**

In the present motion before the court, petitioner Startrite Corporation argues that respondent (plaintiff) Yeager's suit should be dismissed through a judgment of non pros under the standards set forth in *Penn Piping Inc. v. Insurance Company of North America*, 529 Pa. 350, 603 A.2d 1006 (1992). Yeager argues that the delay should not be chargeable to the plaintiff personally or to plaintiff's current counsel, so that a judgment non pros is inappropriate. For the reasons which follow, this court finds Yeager's argument persuasive.

In *Penn Piping*, the Pennsylvania Supreme Court modified the standards for the granting of a non pros upon motion of a party where the reason for seeking the judgment was delay. The original formula, reaffirmed in *Penn Piping* from *James Bros. Lumber Co. v. Union Banking and Trust*, 432 Pa. 129, 132, 247 A.2d 587, 589 (1968), held that such a judgment was appropriate where 1) the party has shown a lack of 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 other party. *Penn Piping* at 352, 603 A.2d at 1008. The *Penn Piping* court went a step further, based on the reasoning in the earlier case of *Schrum v. Philadelphia Electric Co.*, 440 Pa. 383, 269 A.2d 502 (1970) by holding that a delay of two years is presumptively prejudicial. *Id.* 1008.

Thus in cases involving a delay of two years or more, the effect is to force the dilatory party to justify the delay by presenting reasons for it. The *Penn Piping* court gave several examples of compelling reasons for delay, including bankruptcy, liquidation or other operation of law, but left the door open for other situations by stating that courts should look at each case separately. *Penn Piping* at 356 n.2, 603 A.2d at 1009, n.2.

Startrite in this case has shown a delay of over two years with no activity on the docket, and therefore Yeager must meet his burden under *Penn Piping* to present reasons for the delay sufficient to overcome the presumption of prejudice to the defendants. Yeager does this by showing that the original attorney for plaintiff is alone responsible for the delay.

The praecipe for writ of summons was filed by Carleton G. Goodnow, of the then existing firm of McVan and Eslinger, in October 1989. They then followed long periods of inactivity, with, as Startrite Corporation rightly avers, almost all activity in the case from the end of 1991 happening at defendant's initiative.

Yeager responds, and Startrite does not seriously dispute, that this delay was due to the dilatoriness of the original attorney responsible for the case, Mr. Goodnow. What is in dispute is whether that dilatoriness can be imputed to the firm of current counsel, McVan and Associates.

Mr. Goodnow was originally part of the firm known as McVan and Eslinger. Other attorneys in that firm did some work on the case, but only prior to Mr. Goodnow's departure from the firm in January 1992. That this case followed Mr. Goodnow is shown by a letter from Mr. Goodnow to Startrite's counsel in February 1992 under Mr. Goodnow's own separate letterhead, and the fact that neither the Philadelphia docket or the Franklin County docket shows any counsel for plaintiff

besides Mr. Goodnow until his withdrawal in December 1994, and the entry of Dennis Meakim of McVan and Associates. This court finds it is significant that Mr. Goodnow was disbarred on consent, at least in part because his personal problems were affecting his practice.

As current counsel for plaintiff points out, this motion would probably have never arisen had Mr. Yeager chosen an attorney other than one associated with a successor to McVan and Eslinger. It is clear from *Manson v. First National Bank in Indiana*, 366 Pa. 293, 77 A.2d 399 (1951), that where delay is due solely to the dilatoriness of counsel, that delay will not be held against the party personally. This principle has been recently reaffirmed in *Esslinger v. Sun Oil Refining & Marketing*, 379 Pa. Super 69, 74, 549 A.2d 600, 603 (1988). In this case, because Yeager has shown the delay was due solely to Mr. Goodnow's dilatory behavior, it would be inappropriate to penalize Yeager or his current counsel.

Therefore, the court finds it would not be in the interests of justice to enter a judgment non pros against the plaintiff in this case.

#### ORDER OF COURT

October 3, 1995, defendant Startrite Corporation's petition for entry of judgment of non pros is denied.