

DAVID MEDINETS AND KATHRYN MEDINETS,
Plaintiffs v. KENNETH PAUL BETZKO, Defendant, C.P.
Franklin County Branch, Civil Action - Law, No. A.D.
1994-107

Medinets V. Betzko

Judgment of Non Pros - Presumption of Prejudice - Actual Prejudice Laches - Docket Activity.

1. To enter a judgment of non pros, a three-prong test must be met: 1) the party has shown a lack of due diligence by failing to proceed with reasonable promptitude; 2) there has been no compelling reason for the delay; and 3) the delay has caused some prejudice to the adverse party.
2. The two-year presumption of prejudice rule, first created in *Penn Piping*, has been abandoned.
3. Actual prejudice must be shown for a judgment of non pros to be granted.
4. Traditionally, a judgment of non pros was based on the equitable principle of laches, which does not involve the passage of any set amount of time, but requires a showing of prejudice or injury to the opposing party due to the moving party's delay in pursuing the action.
5. Mere docket inactivity is not enough to show prejudice.
6. Non-docket activity, such as discovery, should be considered in determining if there was a compelling reason for delay in advancing a case.

Robert B. Gidding, Esquire, Attorney for Plaintiffs
Philip S. Cosentino, Esquire, Successor Attorney for Plaintiffs
Michael M. Badowski, Esquire, Attorney for Defendant

OPINION AND ORDER

WALKER, P. J., December 7, 1999:

Factual Background

This matter stems from a car accident which occurred on March 22, 1992, between plaintiffs and defendant. The action was commenced by writ of summons on March 16, 1994. The last docket entry was on February 9, 1995, when the court denied plaintiffs' oral motion for counsel fees. On February 11,

1997, two years and two days after the last docket entry, defendant filed a motion for judgment of non pros. This trial court entered the judgment of non pros on April 14, 1997.

Plaintiffs claim they did not receive notice of the judgment until June 12, 1997. On July 10, 1997, plaintiffs filed an appeal nunc pro tunc from the judgment of non pros to the Superior Court, and were notified on July 28, 1997, that they must first request permission from the trial court to appeal nunc pro tunc. Plaintiffs filed that request with this court on August 11, 1997, and, additionally, filed a petition to open the non pros judgment on August 28, 1997. The petition to open rendered moot the request to appeal nunc pro tunc. By order dated December 8, 1997, the trial court denied plaintiffs' petition to open the judgment of non pros. Plaintiffs appealed this decision to the Superior Court, which, on November 20, 1998, reversed this court's denial of plaintiffs' petition to open the judgment of non pros. The Superior Court remanded this matter to the trial court for reconsideration in light of new case law on the granting of a judgment of non pros that was decided by the Supreme Court during the time plaintiffs' appeal was pending with the Superior Court.

The Superior Court's decision directed that the judgment of non pros should be reversed on the merits, but added the proviso that this court may still retain the judgment of non pros if it finds that plaintiffs' had not preserved the issue by timely filing their petition to open the judgment of non pros. That leaves two options before this court. First, the court can determine whether the petition to open was decided and denied on the merits, and then reverse it and the judgment of non pros under the recently decided Supreme Court cases. Second, the court can decide that plaintiffs' petition to open was not timely filed, and the issue was not procedurally preserved for reconsideration under the new case law.

Holding

This court finds that the decision to enter the judgment of non pros and the decision to deny the petition to open were both made on the merits; and therefore, the judgment of non pros will be reversed under the new case law. The court further finds that the petition to open the judgment of non pros was timely filed under the circumstances.

Discussion

The opinion in which this trial court denied the petition to open the judgment of non pros stated that the court was inclined to deny the petition for untimely filing. However, the court preferred to deny the petition on its merits. The judgment of non pros was then reviewed on the merits, and it was determined that all the criteria had been met for entry of the original judgment. The petition to open was denied, and the earlier trial court's decision to grant the judgment of non pros was upheld. Because these decisions were made on the merits of the case, the trial court will now review the decisions under the recently decided cases of *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998); *Marino v. Hackman*, 551 Pa. 369, 710 A.2d 1108 (1998); and *Shope v. Eagle*, 710 A.2d 1140 (1998), as ordered by the Superior Court.

The trial court had followed the case of *Penn Piping v. Insurance Company of North America*, 529 Pa. 350, 603 A.2d 1006 (1992), as controlling law for the entry and affirmation of the judgment of non pros. *Penn Piping* was good law when this issue was first brought before the trial court. *Penn Piping* states that a judgment of non pros may be entered when the three-prong test, first established in *James Brothers Lumber Co. v. Union Banking and Trust Co. of DuBois*, 432 Pa. 129, 247 A.2d 587 (1968), has been met. The three prongs of the test are that: 1) the party has shown a lack of due diligence by failing to proceed with reasonable promptitude; 2) there has been no compelling reason for the delay; and 3) the delay has caused some prejudice to the adverse party. It is required that all three prongs be satisfied to properly enter a judgment of non pros.

The *Penn Piping* case then added a presumption of prejudice if there was no docket activity for two years or more, although the *Penn Piping* case itself concerned a six-year period of inactivity. According to *Penn Piping*, if the two-year time limit was met, the presumption precluded an obligation to show actual prejudice as originally required by prong three of the *James Brothers* test. Defendant in the instant case had filed the motion for a judgment of non pros after a two-year and two-day period of docket inactivity, which occurred from February 9, 1995, to February 11, 1997. Defendant argued that the prong three requirement was met because the two-year period of inactivity provided a presumption of prejudice.

Plaintiffs countered that there was non-docket activity between the parties during that time to show that the suit was not dormant. However, the trial court relied on *State of the Art Medical Products, Inc. v. Aries Medical, Inc.*, 456 Pa. Super. 148, 689 A.2d 957 (1997), which had ruled that the court did not need to look beyond docket activity to determine if the two-year presumption of prejudice had been met. Therefore, the trial court did not examine non-docket activity when it employed the *Penn Piping* presumption and concluded that this prong of the *James Brothers* test had been met, without looking further for actual prejudice.

New case law has now reversed *Penn Piping*, and the presumption of prejudice has been abandoned. *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998). *Jacobs* stated that a grant of non pros had been traditionally based on the equitable principle of laches, which does not involve the passage of any set amount of time. Laches requires a delay that results in prejudice or injury to the opposing party. By this reasoning, the *Jacobs* court concluded that the presumption of prejudice created by the *Penn Piping* court was erroneous.

"In cases where no activity has occurred for a period of two years, but the defendant has not lost his ability to adequately prepare a defense, it serves no equitable purpose to dismiss the plaintiff's case solely due to the passage of time."

Jacobs, supra at 1102.

The original *James Brothers* three-prong test has been reinstated as the applicable standard for dismissal of a case due to inactivity. This includes the requirement that defendants must show actual prejudice in order to receive a judgment of non pros. The *James Brothers* test gives an example of prejudice as “the death of or unexplained absence of material witnesses.” Prejudice is further defined as “any substantial diminution of a party’s ability to properly present its case at trial,” by *American Bank & Trust Company v. Ritter, Todd and Haayden*, 274 Pa. Super. 285, 418 A.2d 408 (1980). No issues showing prejudice of the variety defined by *James Brothers* or meeting the definition of prejudice in *American Bank & Trust* have been raised by defendant in the instant case.

Additionally, new case law defeats the rule that simply showing docket inactivity can meet the presumption of prejudice. The court held in *Marino v. Hackman*, 551 Pa. 369, 710 A.2d 1108 (1998), that non-docket activity should be considered in determining whether plaintiffs were moving their case forward when the case was being reviewed for dismissal due to inactivity under Judicial Administration Rule 1901.

“Although the docket provides an empirical, easily verifiable criterion to trigger review of a case, it is too crude a mechanism to distinguish truly inactive, stale cases from active ones where activity is not reflected on the docket.”

Marino, supra at 1111. Rule 1901 allows the prothonotary to terminate a case when there is no activity for two years or more. The *Marino* case showed no activity on the docket for a period of two years and one day. *Marino* is relevant to the instant case because *Shope v. Eagle*, 710 A.2d 1140 (1998), determined that the standards that apply for terminating a case under a judgment of non pros and terminating a case pursuant to Rule 1901 are the same. Therefore, the ruling that non-docket activity should be considered when deciding if a suit should be terminated applies to cases being reviewed under a request for a judgment of non pros as well. The third prong of

the test requiring a showing of actual prejudice has not been met under the new standard in the instant case. Because all three prongs of the test have to be met for entry of a judgment of non pros, the lack of a showing of prejudice is enough to defeat and reverse the original judgment.

However, the court will complete its analysis by reviewing the other prongs of the test in light of the new case law. The second prong of the *James Brother* test is addressed by the *Marino* court, which held that non-docket activities should be considered in determining whether the plaintiff has set forth a compelling reason for delay in pursuing his suit. “[W]e find that non-docket activity can be examined in deciding whether a compelling reason exists.” *Marino, supra* at 1110-11. The *Marino* court stated that engaging in discovery and similar activities that are not recorded on the docket are valid reasons for delay in recorded docket activity. Plaintiffs in the instant case have shown that they were engaged in discovery matters during the two-year period when no activity was recorded on the docket. Therefore, plaintiffs had a compelling reason for the delay.

Additionally, the *Marino* case is also relevant to the due diligence prong of the *James Brothers* test. In the instant matter, the trial court originally relied on *State of the Art*, which allows discovery activity to be considered in determining due diligence, but had held that four discovery matters were not enough to show due diligence. This trial court then found that plaintiffs, by comparison, also had not shown enough activity to meet the due diligence prong.

The more recent case of *Marino*, however, held that non-docket activity consisting of entry of new counsel, depositions, correspondence seeking settlement, and several phone calls were enough to show that the suit was moving forward. The activity level in the instant case during the two years of non-docket action is more comparable to *Marino* than to *State of the Art*. In *Marino*, the court stated that “the total picture painted by this record is that of a case proceeding, albeit

slowly, towards disposition.” The same can be said for the current case. Here, the parties have conducted more than a few depositions, the basis of measurement in *State of the Art*. There was also correspondence activity, discovery, and a settlement request during the two-year time period, comparatively as much activity as was shown in *Marino*. Therefore, due diligence can be shown under the *Marino* standard.

Moreover, the record in this matter shows that plaintiffs were the last party to move, in that they sent a demand for settlement to defendant. Defendant did not respond to this demand, and when the two year period without docket activity had run, defendant filed the motion for entry of judgment of non pros. While it could be argued that it was plaintiffs’ obligation to follow up on their demand to settle, defendant did not appear totally innocent in this lapse of activity when it did not respond to plaintiffs, but instead waited two years and two days, then filed for the non pros judgment. These facts suggest that the unclean hands doctrine may be applicable here, but as this action can be weighed on its merits under the new case law, further discussion on that topic is unnecessary.

As a final matter, this court will address the issue of whether the petition to open was timely filed, although the original opinion of the trial court had stated that it was only *inclined* to dismiss plaintiffs’ petition to open on this basis, but had actually dismissed it on the merits, as discussed above.

The record shows that the judgment of non pros was entered on April 14, 1997, and plaintiffs did not file their petition to open until August 28, 1997, over four months later. However, plaintiffs said they did not receive a copy of the judgment until June 12, 1997. In less than a month after receiving notice of the judgment, plaintiffs filed a petition to appeal nunc pro tunc to the Superior Court. This petition was quashed, as plaintiffs were required to first request permission to appeal nunc pro tunc from the trial court. Plaintiffs redirected their request, then soon afterward filed a petition to

open the judgment of non pros with the trial court. Due to their late discovery of the judgment and initial misdirected appeal to the Superior Court, plaintiffs’ petition to open was not filed until August 28, 1997.

There is no definition of “timely filed” in Pa.R.C.P. 3051, which establishes the factors for opening a judgment of non pros.¹ Timeliness must be determined on case-by-case basis. Here, the equities of the case require that Plaintiffs’ petition to open be considered to have been timely filed.

“In balancing the equities of both sides, this Court finally must determine whether the defendants would be unjustly prejudiced or unfairly burdened by a decision to vacate the non pros.”

Sheaffer v. Bowman, C.P. Franklin County Branch, Civil Action-Law, No. 1997-253, J. Walker. It has already been determined in the instant case that defendant has made no showing that prejudice would result if the judgment of non pros was vacated. Furthermore, the trial court opinion had concluded that the allegations raised by plaintiffs in the pleadings were sufficient to establish a meritorious cause of action.

The attempt to appeal the judgment of non pros occurred just twenty-eight days after plaintiffs learned of the judgment from opposing counsel. The facts of the case do not appear to show this misdirected petition to be a delaying technique. It appears that the petition to appeal nunc pro tunc was brought in good faith, albeit the wrong action in the wrong court. Additionally, plaintiffs were prompt in filing further petitions directed by the court after their appeal to the Superior Court was quashed. The court finds, on reconsideration of the facts, that the petition to open was timely filed. As a result, plaintiffs

¹For a judgment of non pros to be opened, Pa. R.C.P. 3051(b) requires plaintiffs to establish three factors: 1) the petition must be timely filed; 2) the delay/default must be reasonably explained; 3) the facts of case must exhibit a meritorious cause of action.

preserved the issue for reversal of the judgment of non pros under the recently decided Supreme Court case law.

ORDER OF COURT

December 7, 1999, the court orders that the judgment of non pros be reversed. The court finds that the petition to open was timely filed.

The plaintiff may proceed in a timely fashion to prepare this case for trial.

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