

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ITTYKUNJU ABRAHAM, ET AL. : JULY TERM, 1999
: :
: :
v. : NO. 1244
: :
: :
SAMUEL MOYERMAN, ET AL. :

O P I N I O N

O’Keefe, J.

January 5, 2001

I. Overview

Ittykunju Abraham (“Plaintiff”) appeals an order entered on May 31, 2000, whereby this Court denied Plaintiff’s Petition to Vacate and Open Order of Nonsuit. A nonsuit was originally entered on March 9, 2000, as a result of the failure of Plaintiff to appear at an arbitration. On November 28, 2000, this Court granted Plaintiff’s unopposed motion for *nunc pro tunc* relief to file the present appeal within ten (10) days of that order. Plaintiff thereafter filed this timely appeal on December 4, 2000.

II. Facts and Procedural History

The present action was initiated by Plaintiff by way of a complaint on July 13, 1999. The action arose out of a motor vehicle accident that occurred on or around May 26, 1998. The accident occurred when a vehicle owned by Louis Moyerman or Kinfar Moyerman and operated by Samuel Moyerman (collectively, “Defendants”) came into forceful contact with a vehicle owned and operated by Plaintiff.

In the complaint, the Plaintiff did not allege damages in excess of \$50,000 (fifty thousand)

dollars. Therefore, the case was sent to the compulsory arbitration program. The arbitration in this matter was scheduled for March 9, 2000. On March 9, 2000, the Defendants appeared for the arbitration with their attorney, while neither Plaintiff nor Plaintiff's attorney appeared for the arbitration. As a result, Defendants were permitted to transfer this case to this Court and request an oral motion for nonsuit, which this Court granted. Thereafter, Plaintiff petitioned this Court to strike the nonsuit and relist this case. This Court denied Plaintiff's motion and due to circumstances described below in further detail, Plaintiff failed to take any action until the motion for *nunc pro tunc* relief was filed on October 17, 2000. On November 28, 2000, this Court granted Plaintiff's request for *nunc pro tunc* relief and Plaintiff was permitted to then file this timely appeal. Upon receiving notice of appeal, this Court sent Plaintiff a letter pursuant to Pennsylvania Rules of Appellate Procedure 1925(b) requesting a concise statement of the matters complained of on appeal.

IV. Argument

This opinion will address only those issues raised by Plaintiff in the response to the 1925(b) letter. The initial issue to be resolved in this appeal is the propriety of this Court's granting of Plaintiff's appeal *nunc pro tunc*. The order entered by this Court on May 31, 2000, is defined as a final order pursuant to Pennsylvania Rule of Appellate Procedure 341(b) because it disposed of all claims and all parties. When this Court denied the Petition to Vacate and Open Order of Nonsuit filed by Plaintiff, the case was effectively over. Therefore, according to Pennsylvania Rule of Appellate Procedure 903(a), Plaintiff had thirty (30) days from the entry of the final order to appeal that order. The statutorily prescribed time to file an appeal of this Court's order of May 31, 2000, would have

been June 30, 2000.¹

The Superior Court has repeatedly held that “the failure to file a timely appeal will divest this Court of jurisdiction.” Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195 (Pa. Super. Ct. 1997). Therefore, in these situations, the proper remedy for an untimely appeal is that “it must be quashed absent a showing of fraud or a breakdown in the court’s operation.” Thorn v. Newman, 113 Pa. Cmwlth. 642, 647, 528 A.2d 105, 107 (1988). With these principles in mind, the Plaintiff petitioned this Court for *nunc pro tunc* relief.

The guidelines for granting an appeal *nunc pro tunc* have been recently pronounced by the Pennsylvania Supreme Court. See Cook v. Unemployment Compenstation Bd. of Review, 543 Pa. 81, 671 A.2d 1130 (1996). The court stated that an appeal *nunc pro tunc* may be allowed “when a delay in filing the appeal is caused by extraordinary circumstances involving ‘fraud or some breakdown in the court’s operation through a default of its officers.’” Id. at 1131 (quoting Bass v. Commonwealth Bureau of Corrections, 485 Pa. 256, 259, 401 A.2d 1133, 135 (1979)). The court added that *nunc pro tunc* relief may be granted if there is evidence of the “the non-negligent conduct of the appellant’s attorney or his staff.” Cook, 671 A.2d at 1131. “Allowance of an appeal *nunc pro tunc* lies at the sound discretion of the Trial Judge.” McKeown v. Bailey, 731 A.2d 628, 630 (Pa. Super. Ct. 1999).

This Court was persuaded by the representations of Plaintiff’s attorney and the lack of any objection raised by Defendant that *nunc pro tunc* relief was appropriate in this situation. Plaintiff was originally represented by Jack Bernstein, Esq. (“Bernstein”) of the law firm Haymond and

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Under Pennsylvania Rules of Appellate Procedure 108(b), the 30 day time period commences on the date the prothonotary makes a notation on the civil docket and notice of the entry of the order is given pursuant to Pennsylvania Rule of Civil Procedure 236. See also Gomory v. Department of Transportation, 704 A.2d 202, 204 (Pa. Commw. Ct. 1998). A review of the Civil Docket Report for this case shows that the order on appeal was entered against on May 31, 2000. Plaintiff is under the erroneous assumption that the order was entered on May 25, 2000.

Lundy (“Haymond”). Pl. Mot. for Appeal *Nunc Pro Tunc*, at 1. Clearly stamped on the original complaint (filed July 12, 1999) was the date and time for the scheduled arbitration. On October 7, 1999, Lundy disbanded resulting in the creation of two new law firms, Haymond, Napoli and Diamond (“Diamond”) and the Law Offices of Marvin Lundy (“Lundy”). Id. at 1-2. The attorney of record, Bernstein, associated himself with Diamond. However, during the fall of 1999, many of Haymond’s clients apparently elected, independent of which firm their attorney had associated, either Diamond or Lundy to continue to represent them. Id. at 2. The Plaintiff selected Lundy to represent him. As a result, Joel A. Greenberg, Esq. (“Greenberg”) was assigned to represent Plaintiff. Id.

During the ensuing months, Greenberg continued to work on the case and was in contact with Defendants’ attorney, Stephanie Squires, Esq. (“Squires”). However, Bernstein never withdrew his appearance and Greenberg never entered his appearance on behalf of Plaintiffs. The scheduled arbitration was on the calendar of Bernstein but was not transferred to Greenberg’s calendar. Id. During the course of preparing the case, Greenberg apparently never learned of the date of the arbitration. Ultimately, no attorney for the Plaintiff appeared at the arbitration and a nonsuit was entered by this Court in favor of Defendants. Id. at 3.

According to Greenberg, the Diamond firm did not notify the Lundy firm of the non suit (entered on March 9, 2000) until March 29, 2000. Id. It was also around this time, on April 5, 2000, that the Civil Docket Report shows that Bernstein withdrew his appearance and Greenberg entered his appearance on behalf of the Plaintiff. On April 6, 2000, Plaintiff, upon learning of the nonsuit, filed a Petition to Vacate and Open Order of Nonsuit. Id. A timely response was filed by Defendants and this Court denied Plaintiff’s petition by way of an order entered on May 31, 2000. Greenberg avers that he did not learn of this Court’s order until on or around September 22, 2000.

The motion for *nunc pro tunc* relief was filed on October 17, 2000.

The circumstances surrounding the dissolution of the Haymond firm and the subsequent creation of two new firms are shaky at best as justifications for the confusion that led to the failure of Plaintiff to file a timely appeal. Nevertheless, it seems from the facts of this case that the Plaintiff himself would ultimately lose out in the end if he was not permitted to appeal and allow his attorney an opportunity to explain to the Superior Court the reasons for the failure of Plaintiff to appear at the arbitration.²

After Plaintiff and/or Plaintiff's counsel failed to appear at the arbitration, Defendant proceeded to Common Pleas Court where this Court held a non-jury trial pursuant to Pa.R.Civ.P. § 1303. Defendant's counsel motioned the court for a nonsuit and the nonsuit was granted.

The outcome of this case and appeal is controlled by the recent Superior Court decision in Jamison v. Johnson, 2000 WL 1521628 (Pa. Super. Ct. 2000). The Superior Court upheld the granting of the nonsuit by relying on the plain language of Rule 1303 and the 1998 amendments to the rule. Id. at 1-2. The court held that as long as the following notice was present in a notice for arbitration, then the trial court can hear the action:

This matter will be heard by a board of arbitrators at the time, date and place specified, but if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial de novo on appeal from a decision entered by a judge.

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In light of recent pronouncements by the Superior Court, this Court has determined that the dismissal of an entire case or controversy due to the failure of a party to appear a settlement conference, absent a pattern of conduct or egregious behavior by counsel, is improper. Recent decisions by the Superior Court that have influenced this Court's position on Pennsylvania Rule of Civil Procedure 218 include a memorandum opinion in Jones v. Odame, No. 595 EDA 2000, on October 26, 2000, Shappell v. Kubert, No. 266 EDA 2000, on November 30, 2000, and most recently Bennett v. Home Depot U.S.A., Inc., No. 1075 EDA 2000 and Ho In Shin v. Brenan, No. 1322 EDA 2000, both decided on December 14, 2000. Taken collectively and with Kalantary v. Mention 756 A.2d 671 (Pa. Super. Ct. 2000), these opinions provide a guide for how the trial courts should handle similar situations. Although the present case involves the failure of a plaintiff to appear at an arbitration, in an abundance of caution, this Court gave the Plaintiff the benefit of the doubt and granted the appeal *nunc pro tunc*.

Pa.R.Civ.P. § 1303(a)(2).

The court further explained in Jamison that once a case is transferred to a trial court and taken off the arbitration list, the action can be governed by Rule 218, which is inapplicable to arbitrations.

The consequences for failing to appear for a trial are found in Pennsylvania Rule of Civil Procedure 218, which provides:

- (a) *Where a case is called for trial, if without satisfactory excuse a plaintiff is not ready, the court may enter a nonsuit on motion of the defendant or a non pros on the court's own motion.*
- (b) If without satisfactory excuse, a defendant is not ready, the plaintiff may
 - (1) proceed to trial, or,
 - (2) if the case called for trial is an appeal from compulsory arbitration, either proceed to trial or request the court to dismiss the appeal and reinstate the arbitration award.
- (c) A party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse. (emphasis added)

The principles embodied in Rule 218 have been consistently reaffirmed by Pennsylvania courts. Recent amendments to the rule have further clarified it to clearly provide that the mere failure of a party to appear at a trial permits a trial court to invoke the rule and apply one of the remedies discussed in the rule. Previously, there had been some confusion over whether a trial court was required to hold a hearing before enforcing the rule to determine if the excuse offered by the party that failed to appear was satisfactory. However, as the Explanatory Comment-1993 to the rule notes, this intermediate procedural step is no longer necessary. In the context of a failure of a defendant to appear at a trial following an arbitration appeal, the Commonwealth Court explained, “failure of a party to appear at a trial is grounds for a court to reinstate an arbitration award entered in favor of the plaintiff. The Supreme Court amended Pa. R.C.P. No. 218, removing the requirement for a court to make a preliminary finding that the party did not have a satisfactory excuse for the failure to appear.” Masthope Rapids Property Owners Council v. Ury, 687 A.2d 70, 72 (Pa. Commw. Ct. 1996). See also Anderson v. Pennsylvania Financial Responsibility Assigned

Claims Plan, 432 Pa. Super. 54, 637 A.2d 659 (1994).

The Jamison court concluded that the final inquiry was to determine whether the trial court's decision to grant a nonsuit was a "proper exercise of discretion." Jamison, 2000 WL 1521628, at *2. The court suggested that a satisfactory excuse under Rule 218 is an excuse that would constitute a valid ground for a continuance. Id. The court proceeded to list examples such as agreement of counsel, illness of counsel or another party involved, or any other ground allowed by the court. Id.

In the case before this Court, Plaintiff's new attorney contends that the arbitration date assigned to this case was never placed in his calendar because of the Haymond firm's dissolution. Therefore, his argument follows, the Plaintiff had a satisfactory excuse under rule 218(c) for missing the arbitration. The Superior Court has held that the burden for knowing the date and time of trial related events must not be shifted to the trial court. See Titmar, Inc. v. Sulka, 402 Pa. Super. 319, 321, 586 A.2d 1372, 1373 (1991). The court added that counsel for defendant in Titmar, to whom counsel for Plaintiff is similarly situated, was:

[A] member of the Pennsylvania Bar and thus has successfully completed those rigorous requirements necessary for admission to the Bar. The duties, responsibilities and obligations attendant to this profession are to be undertaken with the utmost degree of care. If counsel chooses to accept a case and practice in a particular forum, then he must master notice requirements of local rules and procedures of that forum. This is not a case where notice could be posted on a tree to bind all interested parties. Counsel attacks the very process by which every responsible member of the Bar ... is bound to follow Counsel is under a high duty of care to learn and familiarize himself with the local rules of all forums in which he chooses to practice law

Titmar, Inc., 402 Pa. Super. at 331-32, 586 A.2d at 1373-74. In upholding and complementing the decision of the Superior Court, the Commonwealth Court proffered, "[i]t is well established that counsel is under an obligation to keep abreast of the publications to the bar and local rules of court." Township of South Fayette v. Grady, 145 Pa. Cmwlth. 129, 132, 602 A.2d 482, 483 (1992)

(citing Toczykowski v. General Bindery Co., 359 Pa. Super. 572, 519 A.2d 500 (1986)). The Commonwealth Court further agreed that when court procedures raise a presumption that counsel for the parties involved have legal notice of the time and place of the trial, “the court is required to do no more.” Id. When counsel is deemed to have notice of a trial related event, failure on the part of counsel to actually receive notice cannot be a satisfactory excuse as contemplated in Rule 218(c). Id. The stamping of the arbitration date and time on the front page of the complaint raises the presumption that the parties have legal notice under this rule.

The present case illustrates a model example of an attorney attempting to pass the buck for the failure of the attorney to appear for a trial related event. Even though this Court granted the appeal *nunc pro tunc* to give Plaintiff an opportunity to explain the failure to appear based on the confusion that ensued following the dissolution of the Haymond firm, the dissolution of the Haymond firm merely serves as a smoke and mirrors justification for the failure of Plaintiff’s counsel to appear at the arbitration. Following the dissolution of the Haymond firm into two separate and distinct firms, it should certainly have been a priority of all the lawyers involved in the situation to clarify the Civil Docket Reports and properly withdraw and enter appearances.

In this case, even though Plaintiff’s old attorney associated himself with the Diamond firm and the Plaintiff sought the services of the Lundy firm, there was no withdraw/entry of appearance of old and new attorneys. Instead, the parties simply proceeded without notifying the courts of any change. Therefore, all correspondence in this matter would have been sent to the Diamond firm because that is where Bernstein, the only attorney of record for the Plaintiff, worked. It is absolutely implausible to think that Greenberg, Plaintiff’s new attorney associated with the Lundy firm, in all of his settlement discussions with Defendants’ attorney, never once inquired as to the date of the arbitration. Plaintiff’s attorney Greenberg attempts to place the burden on Defendants’

counsel for failing to tell him the date of the arbitration during their settlement negotiations. Such an attempt to shift this burden is ridiculous.

The clear fault for failing to appear at the arbitration in this case falls squarely on Plaintiff's attorney Greeneberg and no one else. Following the dissolution of the Haymond firm, Greenberg should have immediately entered his appearance on the record on behalf of the Plaintiff. Greenberg should have obtained and reviewed Plaintiff's file to discover the date and time clearly printed on the front of the original complaint. A check of the Civil Docket Report would have corroborated this information as well. Finally, as a last resort, Greenberg could have simply asked Defendants' counsel the date and time of the arbitration. Without a satisfactory excuse for the failure of Plaintiff to appear, this Court did not abuse its discretion and this case is controlled by the outcome in Jamison.

Thus, since notice of the arbitration was properly sent to all parties involved and because Plaintiff failed to appear at the arbitration, the entry of nonsuit was properly entered by this Court.

IV. Conclusion

For the reasons stated, this Court respectfully submits that the entry of a nonsuit for the failure of Plaintiff to appear at an arbitration hearing was proper.

BY THE COURT,

J.