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

JAMES MARANSKY, et al.,

Plaintiff,

v.

JOHN SCOTT,

Defendant.

March Term 2017

No. 79

Commerce Program

Control Number 24064442

DOCKETED

NOV 20 2024

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 20th day of November 2024, upon consideration of the motion for judgment of *non pros* filed by defendant John Scott, the opposition of plaintiffs James Maransky, Kevin Baird, Moyer Street Associates, LP, FT Holdings LP, Icehouse LLC and EPDG LLC and after a hearing on September 26, 2024, it is **ORDERED** that the motion is **GRANTED** and the complaint and counterclaims are dismissed with prejudice.

BY THE COURT:

ASse F. Fletman
ABBE F. FLETMAN, J.

ORDRF-Maransky Etal Vs Scott [RCP]



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

JAMES MARANSKY, et al.,	:	March Term 2017
	:	
Plaintiff,	:	No. 79
	:	
v.	:	Commerce Program
	:	
JOHN SCOTT,	:	
	:	Control Number 24064442
Defendant.	:	

OPINION

This is an action for wrongful use of civil process and tortious interference of contract brought by plaintiffs James Maransky, Kevin Baird, Moyer Street Associates, LP, FT Holdings LP, Icehouse LLC and EPDG LLC (the “Developers”) against defendant John Scott, a neighbor near a Fishtown development project, for allegedly abusing the legal system and obstructing the development. Before the Court is Mr. Scott’s motion for judgment of *non pros*. For the reasons discussed below, the motion is granted and the complaint and counterclaims are dismissed with prejudice.

BACKGROUND

On March 3, 2017, the Developers, represented by Paul Toner and Jared Klein¹ of Orphanides & Toner LLP, initiated a lawsuit against Mr. Scott by writ of summons. (Docket (“Dkt.”) 3-3-17, Writ of Summons).

¹ Mr. Klein, who filed the response to the motion for judgment of *non pros* was disbarred by consent on August 19, 2024, by order of the Supreme Court of Pennsylvania. On September 9, 2024, John Alexander Hamilton, Alan Nochumson, and Natalie Klyashtorny of Nochumson, P.C., entered their appearances on behalf of the Developers. (Dkt. 9-9-24 – Entry of Appearance). Mr. Toner has not withdrawn his appearance. (*See* Dkt. generally).

On June 27, 2017, an affidavit of service of the writ of summons on Mr. Scott was filed with the Court. (Dkt. 6-27-17, Affidavit of Service). On July 12, 2017, Mr. Scott filed a notice of management program dispute seeking to transfer the case to the Commerce Program. (Dkt. 7-12-17, Notice of Management Program Dispute). On July 25, 2017, the Court granted the notice of management program dispute, and the case was transferred to the Commerce Program. (Dkt. 7-25-17, Order).

In addition to filing a notice of management program dispute, on July 13, 2017, Mr. Scott filed a rule for the Developers to file a complaint. (Dkt. 7-13-17, Rule). On August 18, 2017, the Developers filed their complaint. (Dkt. 8-18-17, Complaint).

Between August 31, 2017, and December 19, 2017, the parties filed successive preliminary objections and complaints, culminating in a second amended complaint, which Mr. Scott answered with new matter and counterclaims on February 27, 2018. (Dkt. 2-27-18, Answer with New Matter and Counterclaim). On March 23, 2018, the Developers filed preliminary objections to the counterclaims. (Dkt. 3-23-18, Preliminary Objections). On May 15, 2018, the Court sustained the preliminary objections in part, striking Exhibit A to the counterclaims, and overruling the remainder of the preliminary objections. (Dkt. 5-15-18, Order).

On February 17, 2018, Mr. Scott filed a motion for determination of immunity under 27 PA. STAT. ANN. §§ 8301-8305 (West, Westlaw through 2024 Act 92). (Dkt. 2-17-18, Motion). The Court denied the motion on April 9, 2018. (Dkt. 4-13-18, Order). On April 13, 2018, Mr. Scott filed an appeal of the April 9 order to the Commonwealth Court of Pennsylvania. (Dkt. 4-13-18, Notice of Appeal). The Developers filed a motion to stay proceedings on May 29, 2018. (Dkt. 5-29-18, Motion). Mr. Scott filed a notice of no opposition to the motion to stay. (Dkt. 5-

29-2018, Notice of No Opposition). On June 21, 2018, the Court granted the motion to stay proceedings pending resolution of the appeal to the Commonwealth Court. (Dkt. 6-21-18, Order). The order granting the stay stated that if the matter was remanded, a new Case Management Order would be issued. (*Id.*)

On June 4, 2019, the Commonwealth Court denied the appeal. (Dkt. 6-4-19, Order of the Appellate Court). Mr. Scott then filed a petition for review to the Supreme Court of Pennsylvania. (Dkt. 7-18-19, Petition for Allowance of Appeal to the Supreme Court of Pennsylvania). On February 25, 2020, the Supreme Court of Pennsylvania denied the petition for review. (Dkt. 2-25-20, Order of the Appellate Court). From February 25, 2020, the date the Supreme Court of Pennsylvania denied the petition for review, to January 1, 2023, there was no docket activity. (*See* Dkt. generally).

On January 1, 2023, the Court issued a notice of docket inactivity. (Dkt. 1-1-23, Notice). On February 23, 2023, the Developers filed a Statement of Intention to Proceed with this action and requested that the case be removed from deferred/stayed status and requested a scheduling conference to reestablish deadlines for the completion of discovery and adjudication of the matter. (Dkt. 2-23-23, Statement). On April 19, 2024, the case was removed from deferred status and a Case Management Conference was scheduled for May 17, 2024. (Dkt. 4-19-24, Docket Entry). On May 17, 2024, a Case Management Order was issued placing the case on a Standard Track with a discovery deadline of April 7, 2025. (Dkt. 5-17-24, Order). Both the Developers and Mr. Scott attended the conference. On June 21, 2024, Mr. Scott filed the pending motion for judgment of *non pros*. (Dkt. 6-21-24, Motion). The Court held a hearing on the motion on September 26, 2024.

DISCUSSION

1. Applicable legal standards

A *non pros* is a judgment the trial court enters that terminates a plaintiff's action due to the failure to properly and/or promptly prosecute a case. *Dombrowski v. Cherkassky*, 691 A.2d 976, 977 (Pa. Super. 1997). The Pennsylvania Supreme Court set forth a three-part test for entering a judgment of *non pros* in *James Brothers Company v. Union Banking and Trust Company of Du Bois*, 247 A.2d 587 (Pa. 1968). Under *James*, a court must enter a judgment of *non pros* when a party to the proceeding has shown a want of due diligence in proceeding with reasonable promptitude, there has been no compelling reason for the delay, and the delay has caused some prejudice to the adverse party, such as the death or unexplained absence of material witnesses.² *Id.* at 589.

The decision whether to enter a judgment of *non pros* is committed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Jacobs*, 710 A.2d at 1101.

2. The Developers and Mr. Scott failed to proceed with reasonable promptitude.

From February 25, 2020, the date the Supreme Court of Pennsylvania denied Mr. Scott's petition for review, to February 23, 2023, the date the Developers responded to the Court's notice

² Subsequently, in *Penn Piping, Inc. v. Insurance Company of North America*, 603 A.2d 1006 (Pa. 1992), the Pennsylvania Supreme Court refined the prejudice element of the *James* test by creating a presumption of prejudice in any case where there was a lack of docket activity for two years or more. This presumption of prejudice was abandoned in *Jacobs v. Halloran*, 710 A.2d 1098 (Pa. 1998), and the three-part test enunciated in *James* was reinstated. Therefore, to dismiss a case for inactivity, there must be a lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude, the plaintiff must have no compelling reason for the delay and the delay must cause *actual* prejudice to the defendant. *Intech Metals, Inc. v. Meyer, Wagner & Jacobs*, 153 A.3d 406, 410 (Pa. Super. 2016).

of docket inactivity, no docket activity occurred. (*See* Dkt. generally). The docket remained dormant for three years as the Developers and Mr. Scott took no action to move the case forward.

For an additional 14 months, from February 23, 2023, the date the Developers responded to the Court's notice of inactivity, to April 19, 2024, the date of the Case Management Conference, there was no docket activity by the Developers nor Mr. Scott. (*See* Dkt. generally). The only docket activity was the Developers' filing of a statement of intent to proceed, the filing of which does not establish due diligence and does not preclude the entry of *non pros* based on inactivity. *See, Hughes v. Fink, Fink and Associates*, 718 A.2d 316, 319 (Pa. Super. 1998)(filing a certificate of active status and paying the attendant nominal fee were insufficient to establish due diligence and preclude the entry of a judgment of *non pros*). Based on the foregoing, this case did not proceed with reasonable promptitude.

3. The Developers and Mr. Scott identified no compelling reason for the delay.

The Developers have identified no compelling reason for the delay. Lack of due diligence is determined on a case-by-case basis; and there is no presumptive amount of time required to establish inactivity. *See Jacobs*, 710 A.2d at 1102–03 (holding that two-year presumption proved to be unworkable). Failure to provide a satisfactory explanation for a prolonged period of inactivity supports the finding of lack of diligence. *James*, 247 A.2d at 590.

In addition to the docket, trial courts also may consider non-docket activity to decide whether a compelling reason for the delay exists. *Marino v. Hackman*, 710 A.2d 1108, 1111 (Pa. 1998). In *Marino*, the Supreme Court recognized that an unusual amount of non-docket activity occurred, including the taking of depositions. *Id.* at 1111. As a result, the Supreme Court held that the case did not fall into “the category of stale cases that the rules of judicial administration are designed to eliminate from the system.” *Id.*

In this case, the Developers claim that COVID-19 and an illness suffered by plaintiff Maransky explain any apparent inactivity.³ COVID-19 may have shuttered the courthouse for a short period of time, but it did not prevent the Developers from moving this case along. Discovery could have been issued, and depositions could have been noticed and taken via Zoom. Similarly, Mr. Maransky's illness is not a compelling reason for the delay. While the illness may have incapacitated Mr. Maransky for a period of time, there is no evidence that he was completely incapacitated from February 2020 to February 2023. Indeed, Mr. Maransky testified that he was able to conduct business from his bedside.⁴ Mr. Maransky also managed to file another lawsuit on behalf of one of his other companies, E-Built, LLC, during the period of time he was allegedly unable to participate in litigation. *See Ebuilt, LLC v. Wissahickon Interested Citizens Association, Ltd., et al.*, 2203-1422. (Dkt. 2203-1422- 8-4-22 Verification).⁵ Finally, the Developers' attempt to blame their lawyer for the delay in prosecuting this matter is not persuasive. Casting blame on one's attorney for mistake or oversight alone is not a compelling reason to justify a delay in prosecution without a reasonable explanation. *See, Moore v. George Heebner, Inc.*, 467 A.2d 1336, 1339 (Pa. Super. 1983)(fact that four different counsel represented plaintiff during various periods of litigation did not obviate need for reasonable explanation of long-term lack of progress in action); *Corcoran v. Fiorentino*, 419 A.2d 759, 762

³ As of the writing of this opinion, the transcript of the hearing is unavailable.

⁴ *Id.*

⁵ This Court may take "judicial notice of other proceedings involving the same parties." *Hvizdak v. Linn*, 190 A.3d 1213, 1218 n.1 (Pa. Super. 2018) (citing *Estate of Schulz*, 139 A.2d 560, 563 (Pa. 1958)).

(Pa. Super. 1980)(explanation of plaintiffs' counsel that he was involved in other extensive litigation for a period of several years and that the case was not properly processed by his associates unbeknownst to him was insufficient to justify the failure to proceed for almost 30 months).

The docket shows Paul Toner and Jared Klein entered their appearances on behalf of the Developers in this matter. Mr. Klein may have been disbarred from the practice of law but that disbarment occurred only three months ago and consequently cannot explain the more than four years of delay. Moreover, Mr. Klein was not the only lawyer who represented the Developers during the relevant time; Mr. Toner also entered his appearance for the Developers and indeed is still an attorney of record and was the attorney of record until recently. Consequently, the Developers did not provide a compelling reason for the delay.

4. Mr. Scott has suffered actual prejudice.

Prejudice has been defined as "any substantial diminution of a party's ability to properly present its case at trial." *Jacobs*, 710 A.2d at 1103; *Intech Metals*, 153 A.3d at 413. Such prejudice "could be established by the death or absence of a material witness." *Intech Metals*, 153 A.3d at 412. For example, in *Intech Metals*, the Superior Court of Pennsylvania held actual prejudice to exist since the plaintiffs' "failure to take a proactive role in moving the case forward divested [defendants] of an opportunity to depose and cross-examine several, essential witnesses, prior to their deaths, on the specific allegations made in the amended complaint in th[at] case." *Intech Metals*, 153 A.3d at 413.

In this case, three potential witnesses are deceased: Jordan Rushie, the Fishtown Neighbors Association president at the time the Developers' project was introduced at the community group meeting in April 2013; John Maransky, an alleged owner in the Developers'

companies; and Stanley Krakower, an attorney who represented Mr. Scott. Consequently, Mr. Scott is now deprived of questioning these witnesses and using any testimony for his defense. Mr. Scott also identified additional witnesses who allegedly had knowledge and opposed the project and are either unavailable for health reasons or have left the area. The passage of time has changed the landscape for the case due to the death of witnesses, the incapacitation of witnesses and faded memories which does prejudice Mr. Scott's ability to defend himself against the Developers claims.

5. Mr. Scott did not waive his right to a *non pros*.

The defendant may waive the right to a judgment of *non pros* if his conduct demonstrates a willingness to try the case on the merits notwithstanding the delay, or if he is a party to, or caused the delay. *Kennedy v. Bulletin Co.*, 346 A.2d 343, 346 (Pa. Super. 1975). Where the defendant takes steps to advance the case, such as filing an answer, entering a plea, or taking a rule on the plaintiff to take some action in the case, it constitutes a waiver of the right to a *non pros* judgment. *Id.* (citing *Pennsylvania Railroad Company v. Pittsburgh*, 6 A.2d 907 (1939)).

The Developers argue that Mr. Scott waived his right to a judgment of *non pros* by participating in the Case Management Conference in April 2024 and then filing this motion for judgment of *non pros*. (Dkt. 7-11-24, Response ¶ 10). Mr. Scott's participation in the Case Management Conference does not waive his right to file this motion for judgment of *non pros*. Mr. Scott did not voluntarily attend the Case Management Conference. Instead, the Court ordered his appearance. (Dkt. 4-19-24, Case Management Order). Nor does his appearance at the conference show a willingness to try the case on its merits. *See Moraski v. Thermo-Twin Industries, Inc.*, No. 9 WDA 2024, 2024 WL 3812472, at * 5 (Pa. Super. Aug. 14,

2024)(unpublished nonprecedential decision)⁶ (Thermo-Twin's brief participation in discovery exchange did not waive its right to seek entry of *non pros*); cf. *DeSiato v. Shahboz*, 419 A.2d 798 (Pa. Super. 1980)(defendants waived their right to seek entry of *non pros* when they participated in the pretrial conference, agreed to have the case submitted to arbitration, participated in an arbitration hearing, placed the case on a trial list, picked a jury and proceeded to trial). It was the Developers' duty as the plaintiffs to proceed with their action within a reasonable period of time. *Kennedy v. Bulletin Co.*, 346 A.2d 343, 346 (Pa. Super. 1975). Accordingly, Mr. Scott did not waive his right to a *non pros*.

6. Mr. Scott's counterclaims are also *non prossed*.

Mr. Scott asserted counterclaims in this action against the Developers. As a counterclaim plaintiff, Mr. Scott also had a duty to move the case forward. He did not do so as evidenced by the docket inactivity. Mr. Scott also did not provide any compelling reasons for his delay in prosecuting the counterclaims. Failing to take any action to move the case forward, apparently waiting for the Developers to act first, made him complicit in the delay. The Developers suffer the same prejudice Mr. Scott suffers. Important testimony was lost as evidenced by the death and incapacitation of witnesses as well as the fading memories of the witnesses. Based on the foregoing, a judgment of *non pros* also is granted on the counterclaims.⁷

⁶ This unpublished non precedential opinion is cited for its persuasive value. See 210 Pa. Code § 65.37(B).

⁷ A court may enter a judgment of *non pros sua sponte* if the plaintiff, in this case the counterclaim plaintiff, fails to take any steps that would constitute docket activity in the previous two years. Pa. R. J. A. 1901 (a).

CONCLUSION

For this reason, the motion for judgment of *non pros* is granted and the complaint as well as the counterclaim is dismissed.

BY THE COURT:

ASse F. R
ABBE F. FLETMAN, J.