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.	:	5 EDA 2025

OPINION

Fletman, J. **February 10, 2024**

This is an appeal from this Court's order and opinion dated and docketed on November 20, 2024, granting a motion for a judgment of *non pros* dismissing the complaint and the counterclaims.[1]

Plaintiffs James Maransky, Kevin Baird, Moyer Street Associates, LP, FT Holdings LP, Icehouse LLC and EPDG LLC (the "Developers") brought this action for wrongful use of civil process and tortious interference of contract against defendant John Scott, a neighbor near a Fishtown development project, for allegedly abusing the legal system and obstructing the development. Mr. Scott filed a motion for judgment of *non pros*.[2] For the reasons discussed below, the motion was granted and the complaint and counterclaims were dismissed with prejudice. The Court requests that Superior Court affirm this decision.

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[1] This opinion supplants this Court's opinion dated November 20, 2024, which did not include citations to the notes of testimony for the motion hearing because they were unavailable at the time the opinion was written. This opinion also addresses the additional alleged errors identified in the Statement of Matters Complained of on Appeal that the earlier opinion did not address.

[2] Mr. Scott is unrepresented by counsel.

BACKGROUND

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

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

[3] 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 withdrawn his appearance. (Dkt. 9-3-24, Withdraw of Appearance).

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. On November 20, 2024, the Court issued an order and opinion granting the motion for judgment of *non pros* and dismissing the complaint and the counterclaims.

On December 18, 2024, the Developers filed a timely appeal of this Court's November 20, 2024, order. (Dkt. 12-18-24, notice of appeal). On December 20, 2024, Mr. Scott filed a petition to open the judgment. The petition was assigned to the Court for consideration on January 15, 2025. (Dkt. 12-20-24, petition; Dkt. generally). On December 23, 2024, the Court issued an order for the Developers to file a Concise Statement of Errors Complained of on Appeal pursuant to Pa. R. Civ. P. 1925 (b). (Dkt., 12-23-24, Order). On January 13, 2025, the Developers filed their statement of matters complained of on appeal. (Dkt., 1-13-25, Statement)

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 may 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.[4] *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 of docket inactivity, the Developers took no action to move this case forward and no docket activity occurred. (*See* Dkt. generally). The Developers attempt to cast blame on the Court for failing to remove the case from deferred status and issue a case management order once it was notified that Scott's Petition for Allowance of Appeal was denied. (Dkt. 1-13-25, Statement ¶ 1). It is not the Court's responsibility, however, to move a case forward; it is the of responsibility of the Developers as plaintiffs. *Pine Tp. Water Co., Inc. v. Felmont Oil Corp.*, 625 A.2d 703, 706 (Pa. Super. 1993). To avoid a judgment of *non pros*, during the almost three years of inactivity after the Supreme Court's denial of the petition for review, the Developers could have taken

[4] 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 in which there was no 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).

some action to advance the case such as filing a motion to remove the case from deferred status. Instead, Developers did nothing except file a statement of intent to proceed, 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*).

Moreover, the Court ordered Case Management Conference in May 2024 does not preclude the entry of *non pros* based on inactivity as there is no evidence of docket activity before or after the Case Management Conference. (*See* Dkt. generally). In fact, the Developers have yet to file an answer to Mr. Scott's new matter and counterclaim. (*Id.*) Additionally, the Developers presented no evidence in their response to the motion for *non pros* or at the hearing on the motion of any non-docket activity such as discovery, depositions, or communications with Mr. Scott's counsel after the intention to proceed was filed and before the motion for non pros was filed. The activity level in this case, both on the docket and outside the docket, was nonexistent. 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. (N.T. 9-26-24, 12:19-25, 13:17-25, 14:1-25, 15:1-15, 25:14-19, 26:1-7)(Maransky testimony). COVID-19 may have shuttered the courthouse for a short period of time, but it did not prevent the Developers from issuing discovery or taking depositions 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 unable to participate in the case from February 2020 to February 2023. Indeed, when the Court questioned Mr. Maransky and asked, "So at what point did you start running your business again?", Mr. Maranksy testified "Well, I was running it the whole time. It's just that I was running it from a bedside." (N.T. 9-26-24, 26:8-12)(Maransky testimony) Mr. Maransky also managed to file another lawsuit, with a verification he signed, on behalf of one of his other companies, E-Built, LLC, during the period of time he was allegedly unable to participate in this litigation. *See Ebuilt, LLC v. Wissahichon 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 unpersuasive. Casting blame on one's attorney for mistake or oversight alone is not a

[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)).

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 (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).[6]

The docket shows that Paul Toner entered his appearance as co-counsel on behalf of the Developers in this matter along with Mr. Klein. (Dkt. 8-18-17, Entry of Appearance). Mr. Klein may have been disbarred from the practice of law but that disbarment occurred in August 2024 and consequently cannot explain almost three years of delay that occurred well before his disbarment. 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 was the

[6] The Developers aver that plaintiff James Maransky "repeatedly contacted his prior counsel about the status of the case and was repeatedly assured by the prior attorney that the case was proceeding." (Dkt. 1-13-25, Statement ¶ 4). Mr. Maranksy's reliance on his counsel's assurances is not a compelling reason for the delay. Mr. Maransky testified that he contacted counsel in 2023, after he had recovered from his illness, to push forward with the case. (N.T. 9-26-24, 14:24-25- 15:1; 16:19-25, 17:1) (Maransky testimony). Mr. Maransky also testified in the same hearing that he began speaking to his counsel in 2022 about getting the case moving again (*id.* 26:19-21), which would have been during his illness. While Mr. Maransky may have a legitimate claim against his prior counsel, a lawyer's failure to appropriately prosecute a case is not a valid excuse for not proceeding with the case. *Corcoran v. Fiorentino*, 419 A.2d 759, 762 (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).

attorney of record until recently. (Dkt. 9-2-24, Withdraw of Appearance). 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. (Dkt. 6-21-24, Petition). 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. (*Id.*)

Mr. Scott testified that the witnesses were essential to his defense and counterclaims. (N.T. 9-26-24, 38:4-12)(Scott testimony). Mr. Scott planned to interview them so that he could defend himself against the claims in the complaint, specifically the claims for tortious interference and wrongful use of process. (N.T. 9-26-24, 36:23-25- 37:1-3, 47 1-25- 48 1-5)(Scott testimony). Mr. Scott did hire an investigator to interview witnesses but after the case was stayed and due to the Developers' failure to act with reasonable promptitude to litigate this

case, further efforts to interview witnesses halted. (*Id.* at 48:6-10). Consequently, after three years of delay, Mr. Scott is now deprived of questioning these witnesses and using any testimony for his defense. 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 opinion)[7](Thermo-Twin's brief participation in discovery

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

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 provided no 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* was also properly granted on the counterclaims.[8]

[8] 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:

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ABBE F. FLETMAN, J.