

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

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| JAMES MARANSKY, et al., | : | March Term 2017 |
| | : | |
| Plaintiff, | : | No. 79 |
| | : | |
| v. | : | Commerce Program |
| | : | |
| JOHN SCOTT, | : | Control Number 24124729 |
| | : | |
| Defendant. | : | 854 EDA 2025 |
| | : | 855 EDA 2025 |

OPINION

Erdos, J.¹

June 3, 2025

This appeal and cross appeal arise from this Court's Order dated and docketed on February 28, 2025, denying a petition to open a judgment of *non pros* entered against the counterclaims of Defendant John Scott.²

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 entry judgment of *non pros* for inactivity against the

¹ The Honorable Judge Abbe F. Fletman retired on April 30, 2025 and all cases in her inventory including appeals have been reassigned to the undersigned.

² Mr. Scott is proceeding *pro se* in this matter. While *pro se* litigants may be afforded leniency, they are still bound by the Rules of Civil Procedure and cannot be afforded any advantages. *Smathers v. Smathers*, 670 A.2d 1159, 1160 (Pa. Super. 1996).



Developers complaint. The Court granted the motion for judgment of *non pros* not only against the complaint but also against the counterclaims. Mr. Scott filed a petition to open the judgment of *non pros* against the counterclaims. The motion was denied. The Court requests that the Superior Court affirm this decision.

BACKGROUND

Procedural History

On March 3, 2017, the Developers, represented by Paul Toner and Jared Klein³ 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 for 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).

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 subsequently withdrew his appearance. (Dkt. 9-3-24, Withdraw of Appearance).

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 Counterclaims). 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 a 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 dismissed the complaint and also the counterclaims.

The Appeal of the Court's Order and Opinion dated November 20, 2024, 5 EDA 2025.

On December 18, 2024, the Developers filed an appeal, 5 EDA 2025, of this Court's November 20, 2024, Order. (Dkt. 12-18-24, notice of appeal). On December 23, 2024, the Court ordered Developers to file a Concise Statement of Errors Complained of on Appeal pursuant to Pa. R. A. P. 1925 (b). (Dkt., 12-23-24, Order). On January 13, 2025, the Developers complied with the order and filed their statement of matters complained of on appeal. (Dkt., 1-13-25, Statement). On February 10, 2024, the Court filed an appeal opinion and the Court's record was submitted to the Superior Court for consideration.

On February 21, 2025, the Superior Court issued a Rule upon Developers to show cause why the appeal should not be dismissed because Developers did not file a proper petition to open or strike the judgment of *non pros* pursuant to Pa. R. Civ. P. 3051 (a). (Superior Court Dkt., 2-21-25). On March 28, 2025, after reviewing Developers' response, the Superior Court quashed the appeal finding the response not legally sufficient to sustain the appeal. (Superior Court Dkt., 3-28-25). Developers filed an application for reconsideration of the Order quashing the appeal which was denied on April 17, 2025. (Superior Court Dkt., 4-17-25). Subsequently, on May 15, 2025, Developers filed a petition requesting *allocatur* with the Pennsylvania Supreme Court, 180 EAL 2025 which as of the writing of this Opinion is still pending.

Appeal and Cross Appeal of this Court's Order dated February 28, 2025, 854 EDA 2025 and 855 EDA 2025.

On December 20, 2024, Mr. Scott filed a petition to open the judgment of *non pros* with respect to his counterclaims only. (Dkt. 12-20-24, Petition). On January 13, 2025, the Developers filed a response to the petition asking the Court to deny the petition or in the alternative to open the judgment of *non pros* not only against the counterclaims but also the complaint. (Dkt. 1-13-25, Response). On January 15, 2025, Mr. Scott filed a reply. (Dkt. 1-15-25, Reply). The petition was assigned to the Court for consideration on January 15, 2025. (Dkt. generally). On February 28, 2025, the Court denied Developers petition. (Dkt. 2-28-25, Order). On March 28, 2025, the parties respectively appealed the February 28, 2025 Order. (Dkt. 3-38-25, Notices of Appeal). Statements of Matters Complained of on Appeal were filed on April 23, 2025 and April 24, 2025, respectively. (Dkt. 4-23-25 and 4-24-25, Statements).

DISCUSSION

1. Applicable legal standards

A *non pros* is a judgment the trial court enters that terminates an 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 entry of a judgment of *non pros* for docket inactivity and a subsequent request for relief from such a judgment are governed by different tests. *Intech Metals, Inc. v. Meyer, Wagner & Jacobs*, 153 A.3d 406, 411 (Pa. Super. 2016), citing *Stephens v. Messick*, 799 A.2d 793 (Pa. Super. 2002). In order to open a judgment of *non pros* entered for inactivity, a petitioner may file a petition to open the judgment alleging facts showing that:

- (1) the petition is timely filed,
- (2) there is a meritorious cause of action, and
- (3) the record of the proceedings granting the judgment of *non pros* does not support a finding that the following requirements for entry of a judgment of *non pros* for inactivity have been satisfied:
 - (i) there has been a lack of due diligence on the part of the plaintiff for failure to proceed with reasonable promptitude,
 - (ii) the plaintiff has failed to show a compelling reason for the delay, and
 - (iii) the delay has caused actual prejudice to the defendant.*Pa. R. Civ. P. 3051(c)(1-3).*

The petition to open the judgment of *non pros* filed by Mr. Scott was timely as it was filed within 30 days from the date judgment of *non pros* was entered. (See, Dkt. generally). However, as will be discussed below, Mr. Scott did not allege facts showing a meritorious cause of action and that the record did not support the granting of the petition for entry of judgment of *non pros* for inactivity against the counterclaims.

2. The Court did not err in denying the petition to open the judgment of *non pros* against the counterclaims because Mr. Scott did not allege facts showing a meritorious cause of action.

In order to show that a cause of action is meritorious, under Rule 3051(c)(2), facts must be shown to exist which support a cause of action. A petition that merely repeats the averments from the complaint or counterclaims in this case does not satisfy the meritorious cause of action

requirement in Rule 3051(c)(2). *Intech Metals, Inc. v. Meyer, Wagner & Jacobs*, 153 A.3d 406, 411(Pa. Super. 2016).

In this case, Mr. Scott averred that the meritorious cause of action prong of Pa. R. Civ. P. section 3051 (c)(2) was “satisfied if the claim as pleaded and proved at trial would entitle [the plaintiff] to relief” and cited to *Simmons v. Luallen*, 763 A.2d 810, 813 (Pa. 2000) as authority for this proposition. Mr. Scott’s reliance on *Simmons* was misplaced. The standard for a meritorious cause of action in *Simmons v. Luallen*, 763 A.2d 810, 813 (Pa. 2000) applies to petitions to open judgments of *non pros* based on a failure to file a complaint, and not a petition to open judgments of *non pros* based on inactivity, as in this case. Rule 3051 affords relief from a judgment of *non pros* based on docket inactivity. *See generally* Pa.R.C.P. No. 3051 Note (referring to Rule 237.3 for relief where a party has failed to file a complaint pursuant to Rule 1037(a)). Unlike Rule 237.3, Rule 3051 requires more than reliance upon averments in pleadings to assert a meritorious cause of action. *Intech Metals, Inc. v. Meyer, Wagner & Jacobs*, 153 A.3d 406, 411(Pa. Super. 2016). Relying upon the averments in the counterclaims without facts is not sufficient.

Consequently, Mr. Scott’s reliance upon this Court’s Order overruling the Developers’ preliminary objections in part and the Developer’s subsequent failure to file an answer to the counterclaims as evidence of a meritorious cause of action was not enough to show that a meritorious cause of action exists. (Dkt. 12-20-24, Petition ¶¶ 33-35). Mr. Scott did not allege any facts nor did he attach any documents to support his counterclaims to his petition. Without any facts to support the counterclaims, this Court concluded that he failed to show his cause of action was meritorious. *See, Stephens v. Messick*, 799 A.2d 793 (Pa. Super. 2002)(concluding the appellant did not sufficiently establish she had a meritorious cause of action where “[s]he did

not aver any specific facts elicited during discovery” or attach deposition testimony or expert reports to support her claims).

3. The Court did not err in denying the petition to open judgment of *non pros* against the counterclaims because the record in the proceeding for the motion to enter judgment of *non pros* supports the judgment of *non pros* for inactivity.

Notwithstanding Mr. Scott’s failure to allege facts showing a meritorious cause of action, Mr. Scott also did not show that the entry of the judgment of *non pros* against the counterclaims was improper under the test set forth in *Jacobs v. Halloran*, 551 Pa. 250, 710 A.2d 1098 (1998).⁴ *See, Rule 3051 (c)* (Note: The “inactivity” covered by this subdivision is governed by and subject to *Jacobs v. Halloran*, 551 Pa. 250, 710 A.2d 1098 (1998)). To dismiss a case for inactivity pursuant to a motion for *non pros* there must first be a lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude. *Jacobs v. Halloran*, 710 A.2d 1098, 1103 (Pa. 1998). Second, the plaintiff must have no compelling reason for the delay. *Id.* Finally, the delay must cause actual prejudice to the defendant. *Id.* As always, this determination is to be made by the trial court, whose decision will not be disturbed absent abuse of discretion. *Id.* In this case, the second and third prong were not satisfied.

a. Mr. Scott and the Developers did not proceed with reasonable promptitude.

⁴ The Developers have filed a cross appeal of this Court’s Order denying the petition to open the *non pros*. Developers aver that the Court erred when it denied the petition to open and disregarded their arguments, that if the Court granted the petition to open for Mr. Scott, that the judgment of *non pros* should also have been opened as to them. (Dkt. 4-24-25, Statement of Matters Complained of on Appeal). Developers did not file a petition to open but chose instead to file an appeal of this Court’s Order granting the judgment of *non pros* which was quashed. Consequently, Developers have only a derivative interest in this appeal- that is if the petition to open was granted as to the counterclaims, it should also have been granted as to the complaint.

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 parties took no action to move this case forward. (See, Dkt. generally). The only docket activity by Mr. Scott was the filing of the petition for entry of judgment of *non pros* against Developers. (See Dkt. generally). Mr. Scott testified during the hearing that he did nothing to prosecute the counterclaims. (N.T. 9-26-24, 32:12-15). He did not file a motion to remove the case from deferred status nor list the case for case management. As a counterclaim plaintiff, Mr. Scott also had a duty to move his claims forward and serve Developers with a ten-day notice of intent to take a default judgment on his counterclaims. While Mr. Scott recognized the possibility that his counterclaims could be *non pros*ed for his inactivity, (N.T. 9-26-25, 35:12-20), he nonetheless did nothing but strategically wait to file the motion to *non pros* the Developers' complaint.

Similarly, the Developers also 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 judgment of *non pros*).

Moreover, the Court ordered Case Management Conference in May 2024 did not preclude the entry of *non pros*. (See Dkt. generally). It is not the Court's responsibility to move a case forward; it is the responsibility of the Developers as plaintiffs and Mr. Scott as counterclaim plaintiff to prosecute a case with reasonable promptitude. *Pine Tp. Water Co., Inc. v. Felmont Oil Corp.*, 625 A.2d 703, 706 (Pa. Super. 1993).

Also compelling was the lack of non-docket activity. Trial courts also may consider non-docket activity to decide whether a compelling reason for delay exists. *Marino v. Hackman*, 710 A.2d 1108, 1111 (Pa. 1998). In this case, Developers and Mr. Scott presented no evidence at the hearing of any non-docket activity to preclude the entry of *non pros* such as discovery, depositions, or communications between the parties 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, the Court concluded that the case did not proceed with reasonable promptitude.

b. Mr. Scott identified no compelling reason for the delay.

Mr. Scott did not identify any compelling reason for his delay in prosecuting his counterclaims. 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 Bros. Lumber Co. v. Union Banking & Trust Co. of DuBois PA*, 247 A.2d 587, 590 (Pa. 1968).

Mr. Scott admitted he did nothing to move his claims forward. He testified that he was waiting for Developers to file an answer to the counterclaims as he believed “it was not my turn, so to speak, to do that”. (N.T. 9-26-24 36:3-5). He understood the possibility that his inaction could also lead to the entry of judgment of *non pros* against his counterclaims. (Id. 35:12-20). Failing to take any action to move the case forward, apparently waiting for the Developers to act first, made him complicit in the delay.⁵

⁵ The Court also found that the Developers did not have a compelling reason for the delay. The Court found that COVID – 19 was not a compelling reason for the delay. COVID-19 may have shuttered the courthouse for a short period of time, but it did not prevent the

c. There is evidence of actual prejudice.

Contrary to Mr. Scott's contention, there is evidence of 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 existed because 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, the Court in granting Mr. Scott's motion for the entry of judgment of *non pros* against Developers' complaint, found that Mr. Scott suffered actual prejudice in defending

Developers from issuing discovery or taking depositions via Zoom. Similarly, while 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. Maransky 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).

Also, the Developers attempt to blame their lawyer for the delay in prosecuting this matter was not convincing. The docket showed that Paul Toner, Esquire 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 attorney of record until recently. (Dkt. 9-2-24, Withdraw of Appearance). Consequently, the Court found that the Developers also did not provide a compelling reason for the delay.

himself from Developers' claims. 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 were either unavailable for health reasons or have left the area. (*Id.*)

Mr. Scott testified that the witnesses were essential, and he planned to interview them, 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. (N.T. 9-26-24, 36:23-25- 37:1-3, 47:1-25- 48:1-10)(Scott testimony). While Mr. Scott testified as to the prejudice he suffered with respect to the lost witness testimony⁶, the Court found that the Developers also suffered the same prejudice as Mr. Scott. The Developers similarly lost the ability due to death and incapacitation to question the same witnesses. Additionally, the Developers were also faced with the same dilemma of fading memories as Mr. Scott. (N.T. 9-26-24, 38: 21-24, 39:18-22)(Scott Testimony). Consequently, the Court found that Mr. Scott and the Developers were deprived of questioning these witnesses and using their testimony in defending themselves against the claims in the complaint and the counterclaims.

The passage of time has changed the landscape for this case due to the death of witnesses, the incapacitation of witnesses and faded memories which does prejudice the parties. While the Developers did not file a motion seeking a judgment of *non pros* against the counterclaims for

⁶ (N.T. 9-26-24, 38: 21-24, "...And in this case I've given examples of one of the other plaintiffs, plaintiff Kevin Baird, not recalling something earlier in discovery that was specifically averred in their complaint", (Scott Testimony), N.T. 39:18-22 "I'm faced with a significant number of responses where the plaintiffs do not recall. And that's back in 2018. And I don't believe that that will have been improved since then.")(Scott Testimony).

docket inactivity, Mr. Scott was given the opportunity to address the possibility of the Court entering such judgment and was aware that the possibility existed.⁷ Considering the evidence presented, the Court found that the parties were actually prejudiced.

CONCLUSION

For this reason, this Court submits that the Order dated February 28, 2025 denying the petition to open the judgment of *non pros* against the counterclaims should be affirmed.

Date: June 3, 2025

Respectfully Submitted,

BY THE COURT:



MICHAEL E. ERDOS, J.

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