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

NORTH PHILADELPHIA FINANCIAL PARTNERS, INC.	:	AUGUST TERM, 1999
v.	:	NO. 3303
DENISE BOWEN	:	
v.	:	
JAMEL CATO	:	

O P I N I O N

O'Keefe, J. **December 4, 2000**

I. Overview

Jamel Cato ("Cato") appeals an order entered on September 27, 2000, whereby this Court denied Cato's Petition For Relief Of A Default Judgment entered by this Court on July, 13, 2000. In the original order of July 13, 2000, this Court found in favor of North Philadelphia Financial Partnership, Inc. ("Partnership"). In that order, this Court set a date for an assessment of damages hearing at which there was a finding in favor of the Partnership in the amount of three hundred fifty three thousand, five hundred eighty seven dollars and no cents ($353,587.00). This current appeal does not include Denise Bowen ("Bowen"), who, while found to be liable along with Jamel Cato, was assessed liability in the amount of zero dollars.

Jamel Cato was not made a party to this matter until he was joined by Denise Bowen on December 22, 1999, when Ms. Bowen received a Praecipe to Issue a Writ to Join the Defendant

as an additional defendant. Cato was not joined by a Joinder Complaint until February 2, 2000. There was a series of preliminary objections, answers to new matter and discovery orders filed by all parties following the joinder of Mr. Cato. On July 12, 2000, both Denise Bowen and Jamel Cato (collectively, "Defendants") failed to appear at the mandatory settlement conference in this matter. Their failure to appear at the settlement conference was the culmination of a series of actions by the Defendants which obstructed this Court's ability to administer and oversee the case. As a result, a default judgment was entered against Denise Bowen and Jamel Cato and an assessment of damages hearing was scheduled for July 24, 2000. Following oral argument on September 20, 2000, this Court denied Cato's Petition To Open Default Judgment. Cato thereafter filed this timely appeal.

II. Background Facts and Procedural History

This case was originally commenced by the Partnership against Denise Bowen on August 24, 1999. Among other allegations, the complaint alleged that Bowen and Cato conspired to and engaged in a series of fraudulent activities including embezzling funds intended for use by the Partnership as part of the United States Government's Empowerment Zone project. The Empowerment Zone project was designed to distribute federal money to encourage social and economic development in poorer inner-city neighborhoods by offering low interest loans to local businesses. The North Philadelphia Empowerment Zone, covering approximately 2 1/2 square miles, running North-South between Poplar and Montgomery Streets and running East-West between Sixth and Twenty-Second Streets in Philadelphia, was one of six in the country targeted for federal funds in 1994. The City of Philadelphia received $79 million which it then was supposed to distribute to lenders who would issue loans to local corporations and businesses that

qualified for the loans and were approved for the loans by the lenders' Boards of Directors. The Plaintiff in this case, North Philadelphia Financial Partnership, was the largest lender in the North Philadelphia Empowerment Zone. Jamel Cato was the Partnership's Executive Director and Chief Loan Officer during the time of the alleged fraudulent transactions. Denise Bowen was Mr. Cato's secretary during much of this same time period.

In late 1998 and the early months of 1999, the North Philadelphia Financial Partnership came under fire in response to newspaper articles which alleged that the Partnership's board members had approved numerous loans to both themselves personally and their close personal acquaintances. In fact, following the controversy over these "inside" loans, the Partnership amended its bylaws to prohibit members and employees from receiving inside loans.

After uncovering several suspect financial transactions and expenses on their books, the Partnership released Bowen and Cato from their employment positions. What was uncovered after further investigation served as the basis for the present lawsuit by the Partnership against Bowen and Cato. In addition to monetary damages, the Partnership sought to restore its reputation with the City of Philadelphia. Following the disclosure of the several questionable financial transactions, the City sharply reduced the disbursements to the Partnership which in turn reduced the loans the Partnership was able to make and the interest the Partnership was able to earn on the loans.

This Court entered a default judgment against Bowen and Cato for their continuous demonstration of lack of respect for the judicial process. As a result, an assessment of damages hearing was held in this matter before this Court. At the assessment of damages hearing, this Court heard two days worth of testimony. The reality of the situation that is to be gleaned from this testimony is that several million dollars of taxpayer money was misappropriated and misused to

extents of which it is doubtful that anyone will ever truly know. The Partnership did present exhibits and witnesses that implicated Cato on numerous occasions of misusing federal funds for his own personal use.

At the assessment of damages hearing, the Partnership was awarded more than $353,000 against Jamel Cato and an award of zero dollars against Denise Bowen. It was not this Court's role at the assessment of damages hearing to weigh the merits of the actions of either party in this case. If that was the role of this Court, it would appear as though it is the taxpayers of this country who ultimately lost. Instead, it was simply the responsibility of this Court to weigh the facts before it and determine a reasonable figure for which the Plaintiffs should be compensated in light of the default judgment entered against Jamel Cato and Denise Bowen.[1]

III. Argument

This Court offers several different justifications for entering the default judgment against Bowen and Cato in this matter. The failure to answer the complaint, the failure to comply with discovery orders and the failure to attend a mandatory pre-trial settlement conference all provide courts with independent statutory bases for entering a default judgment against the offending party. In this case, the Defendants' conduct has violated all three requirements of a litigant in a civil action.

In this case, original defendant Denise Bowen filed a Praecipe for Writ to Join Additional Defendant on December 22, 1999, and a Joinder Complaint, dated February 2, 2000, against

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It is not relevant to the current disposition of this matter to reiterate and rehash the testimony from the assessment of damages hearing. This Court found in favor of the Partnership based on the testimony and exhibits presented by the Partnership. The detailed yet limited evidence presented at the assessment of damages hearing and the ongoing federal investigation into the activities of the Partnership raises the strong possibility that full scope of the misappropriation and corruption that has plagued the Partnership has not yet been revealed.

Defendant. Attached to each and every valid Civil Cover Sheet is a clearly printed notice in both English and Spanish which alerts the party or parties named in the complaint that they have been sued in court. The notice instructs the named party that if they wish to defend the claims set forth in the complaint, that they must take action within in twenty (20) days of receipt of notice of the complaint. Contained in the notice is a clear warning that failure to respond within the allotted time period either personally or through an attorney can result in a default judgment being entered against the named party in the complaint. The Joinder Complaint in this case was no exception; it contained the proper notice. A review of the Civil Docket Report for this case shows that the first action taken by Cato was not the filing of a timely answer to the Joinder Complaint, but a series of Preliminary Objections protesting the Joinder Complaint, dated March 20, 2000. Cato's first acknowledgment of the case instituted against him in the form of preliminary objections, occurred some forty (40) days after the complaint was first filed.

The Pennsylvania Rules of Civil Procedure instruct that a court may enter a default judgment against a defendant who fails to plead in response to a complaint. Pa. R. Civ. Pro. 237.1, 1037(b). Specifically, Rule 1037(b) provides:

> The prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend or for any relief admitted to be due by the defendant's pleading.

The principles embodied by the Pennsylvania Rules of Civil Procedure, allowing the entry of a default judgment against a party which fails to respond to a complaint in a timely fashion, have been consistently acknowledged by Pennsylvania appellate courts. See, e.g., Bannar v. Miller, 701 A.2d 232, 236 (Pa. Super. Ct. 1997) (mentioning entry of default judgment due to failure of defendant to answer complaint). In this case, Cato not only failed to respond to the complaint in a timely fashion in the form of a later answer, but no answer to the joinder complaint has ever been filed by Cato in

this action. As indicated, the only acknowledgment on the part of Cato that the joinder complaint was ever received was the filing of preliminary objections to the joinder complaint.

The Pretrial Status Conference for this case was held on January 3, 2000, at 2:00 pm. At the Pretrial Status Conference, a Pretrial Order was issued which outlined the case management schedule for this case. Notice of the date, time and location of the Pretrial Status Conferences are published in the *Legal Intelligencer* for the week preceding the conference. Without replicating the entire pretrial order, it is safe to make the general assertion that Defendants failed to comply with every date listed in the Pretrial Order.

The Pretrial Order instructs a defendant to submit a response to plaintiff's proposed findings of fact, conclusions of law and legal issues for trial. Defendants are also obligated to submit a list of witnesses and exhibits to the court. The deadlines for the submission of the aforementioned materials in the present matter were established in the Pretrial Order as June 24, 2000. The parties were warned in the Pretrial Order that an unjustified refusal to comply with the Order would result in sanctions. Neither Mr. Cato nor Ms. Bowen ever complied with one of the dates listed in the Order.

Significant to the discussion of the failure of the Defendants to comply with the Pretrial Order is that they missed the mandatory settlement conference scheduled for July 12, 2000. Pennsylvania courts treat the failure of a litigant to appear at a pre-trial settlement conference the same as a failure to appear at the actual trial. Anderson v. Pennsylvania Financial Responsibility Assigned Claims Plan, 342 Pa. Super. 54, 637 A.2d 659, (1994) (quoting Lee v. Cel-Pek Industries, Inc., 251 Pa. Super. 568, 380 A.2d 1243, 1244 (1977)). See also First Union Mortgage Corp. v. Frempong, 744 A.2d 327, 335 (Pa. Super. Ct. 1999). The consequences for failing to appear at a trial are found in Pennsylvania Rule of Civil Procedure Rule 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 primary purpose of Rule 218 has 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, supra. In the present case, this Court viewed the failure of the Defendants to appear at the settlement conference in conjunction with their other violations of court authority and entered a default judgment in favor of the Plaintiff.

The Defendants' failure to appear must be analyzed in light of the Superior Court's recent decision, Kalantary v. Mention, 756 A.2d 671 (Pa. Super. Ct. 2000). The Superior Court held that

a trial court may not "summarily enter judgment against a defendant who fails to appear for a settlement conference." Id. at 675. The facts in Kalantary are clearly distinguishable from the events which occurred in the present case. In Kalantary, a defendant failed to appear at a pretrial settlement conference. Id. at 673. The judge proceeded to enter a default judgment against the defendant and immediately assessed liability against the defendant in his absence. Id. The court found that the entry of such a judgment in the absence of the defendant and without any formal proceedings to constitute a record was beyond the authority of a trial court. Id. at 674. In the present case, while it is true that a default judgment was entered against the Defendants, this Court did not asses damages against them in their absence. Instead, this Court scheduled an assessment of damages hearing at which all parties appeared. Liability on the part of the Defendants was not simply assumed. The Plaintiffs were required to actually put on a case and present witnesses and evidence in order to support their claims of damages which they believed they suffered. The Defendants were permitted to cross-examine Plaintiff witnesses. Furthermore, a record of the proceedings was recorded and filed. In other words, there was no summary disposition in this matter, as was the case in Kalantary.

To the extent that the Superior Court's decision in Kalantary may affect the ultimate outcome in this matter, it should be noted that this Court did not rely merely upon the Defendants' failure to appear for the settlement conference in entering a default judgment against the Defendants or denying Jamel Cato's Petition to Open Judgment. Instead, this Court relied upon the cumulative affect of the Defendants' failure to follow and abide by the case management schedule entered in this matter.

The inability or unwillingness of the Defendants to comply with the Pretrial Order and case management dates led to numerous discovery motions by the Plaintiffs. It is most significant to

emphasize two important results of the Defendants' failure to comply with any discovery motions. As a preliminary issue, however, it should be noted that the only discovery order to which the Defendants complied was the deposition of Jamel Cato. During the deposition, Mr. Cato frequently asserted his rights under the Fifth Amendment of the United States Constitution in his answers to questions, as there is an ongoing federal investigation into the matters involving Mr. Cato and the North Philadelphia Financial Partnership. However, this Court did not and is not permitted to draw any negative inferences from Mr. Cato's assertion of his constitutional rights. It is relevant to note simply because the only discovery order that Cato chose to obey was one in which he either could not or would not answer most of the questions asked to him.

Pennsylvania law permits a court to enter a default judgment against a party that fails to comply with discovery orders. Pa. R. Civ. Pro. 4019(c)(3).[2] Cases applying this rule have usually reserved this severe sanction to only the most egregious violations of discovery orders. See, e.g., Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating, 698 A.2d 625, 629 (Pa. Super. Ct. 1997) (suggesting dismissal of action is most severe sanction trial court can impose). However, the Superior Court has stated that Rule 4019 permits the trial court to use its discretion in imposing sanctions for failure to comply with discovery orders. Luszczynski v. Bradley, 729 A.2d 83 (Pa. Super. Ct. 1999). In Luszczynski, the Superior Court specifically left sanctions for failure to comply with discovery orders to the discretion of the trial court. Id. at 87. Similarly, in Walker v. Pugliese, 317 Pa. Super. 595, 602, 464 A.2d 482, 486 (1983), the Superior Court discussed and analyzed several other cases in determining what exactly constituted conduct extreme enough to

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It should be noted that this Court did not enter the discovery orders which serve as the basis for this discussion. However, the entry of the default judgment against the Defendants in this matter was the result of the cumulative affect of their numerous violations of court orders and procedures. The failure of the Defendants to comply with the numerous discovery orders is only of one of several potential grounds for the entry of a default judgment and the discussion is intended for illustrative purposes of said cumulative conduct and not intended as the sole basis for the entry of the default judgment.

justify the granting of a judgment of non pros against a plaintiff. Id. at 603-604, 486-487. While the court determined that the partial failure to respond to interrogatories was not conduct rising to such an extreme level, the court did indicate that a failure altogether to respond to interrogatories may rise to the level where a court would be justified in granting a judgment of non pros against a plaintiff. Id. (citing Jones v. Walker, 275 Pa. Super. 524, 419 A.2d 24 (1980)).

The conduct of the Defendants in this case takes disobeying court orders to a new level. On April 14, 2000, the Honorable Judge Gary S. Glazer of the Philadelphia Court of Common Pleas granted Plaintiffs uncontested discovery order to compel Denise Bowen and Jamel Cato to answer sets of interrogatories within twenty (20) days at the risk of further sanctions. The Defendants never complied with these orders. On May 26, 2000, Judge Glazer issued a further order with two instructions for each Defendant. First, the order sanctioned both Defendants in the form of a monetary penalty for their failure to comply with his April 14, 2000 order. Second, the order required that the Defendants answer Plaintiff's interrogatories and request for documents and things within ten (10) days "or, upon further application to this Court, *shall be precluded from offering any evidence and/or testimony at the time of trial*" (emphasis added). Needless to say, neither Defendant ever complied with this order, save for Jamel Cato appearing for the above-mentioned deposition on June 9, 2000. On June 2, 2000, the Honorable Flora B. Wolf of the Philadelphia Court of Common Pleas entered an order compelling Ms. Bowen to appear for her deposition on June 7, 2000. Ms. Bowen never complied with Judge Wolf's order. On three (3) subsequent occasions, the Defendants were sanctioned in the form of monetary penalties in escalating sums by Judge Glazer. Eventually, on July 7, 2000, Judge Glazer signed an order requiring Jamel Cato to comply with his order of May 26, 2000, within five (5) days. This order, too, fell on Cato's apparently deaf ears. The eventual result of the series of discovery orders issued

by these honorable judges was that Mr. Cato was completely precluded from offering any evidence or testimony at trial and Ms. Bowen was similarly precluded from offering any testimony related to her deposition, which never took place. It follows logically from the preclusion orders that, because the Defendants were not permitted to offer any testimony or evidence at a trial, the trial would simply have amounted to an assessment of damages hearing. Essentially, the assessment of damages hearing conducted by this Court was the only type of proceeding permitted under the restrictions imposed as the end result of the series of discovery orders entered in this case.

The procedure for opening a judgment of default can be found in Pennsylvania Rule of Civil Procedure 237.3. The Superior Court has articulated the standard:

> [A] petition to open judgment is an appeal to the equitable powers of the court, and absent an error of law or a clear, manifest abuse of discretion, it will not be disturbed on appeal. Prior to granting a petition to open judgment, the petitioner must establish that (1) the petition was promptly filed [within 10 days after entry of judgment on the docket] after the judgment was entered; (2) a legitimate explanation exists; and (3) a meritorious defense to the underlying substantive claim is advanced.

Rounsley v. D.C. Ventre & Sons, Inc., 361 Pa. Super. 253, 256, 522 A.2d 569, 571 (1987). In the present case, the default judgment was entered on July 13, 2000, after the Defendants failed to appear for the mandatory settlement conference. On the order entering the default judgment, an assessment of damages hearing was scheduled for July 24, 2000. Technically, in order for a Petition to Open Judgment to be timely, it would have to have been filed within ten (10) days of this Court's July 13th order originally entering the default judgment, not within ten (10) days of the assessment of damages hearing. Cato's petition was filed on July 27, 2000, or four (4) days past the deadline for filing a Petition to Open Judgment. However, assuming *arguendo*, that Cato's Petition to Open Judgment is found to be timely, the Petition clearly does not meet the next two prongs of the standard.

At the oral argument for the Petition to Open Judgment, Jamel Cato failed to offer anything

close to resembling a satisfactory excuse which would cause this Court to rethink it's original entry of a default judgment. In response to a direct question from the Court as to the failure of Cato to answer the complaint, Cato responded "I transmitted my responses to my attorney and I understood that he transmitted them to counsel." "Notes, Oral Argument September 20, 2000", at 4. At the oral argument for the Petition to Open Judgment, Mr. Cato appeared without his attorney and reiterated his argument that all of his actions were authorized by the Partnership's board, either implicitly or implied by his authority as Executive Director. Mr. Cato insisted that the incompetence of his attorney was the reason that evidence of this never surfaced and the incompetence of his attorney was also to blame for Mr. Cato's consistent failure to comply with court orders. These arguments simply do hold merit under the circumstances. The requirements for the third prong of the standard is that the moving party must assert a meritorious defense to the underlying claim. "The defense must amount to more than bald assertions or accusations. Rather, it 'must be presented in precise, specific, clear and unmistakable terms.'" Rounsley, 361 Pa. Super. at 259, 522 A.2d at 572 (quoting Sines v. Packer, 316 Pa. Super. 500, 463 A.2d 475, 477 (1983).

It is reasonable to assume that a person involved in lawsuit would question their attorney as to the status of that case at least once over the course of the eight to nine month period in which Mr. Cato alleges that it was his attorney who was constantly disobeying court orders. This Court is simply unpersuaded by Mr. Cato's contention that he would have followed court orders had he known of them. It is more plausible to assume that Mr. Cato started taking an interest in the lawsuit when he realized the gravity of his situation. No evidence nor any other material found in the record amounts points to any effort on the part of Mr. Cato to assert a factually based meritorious defense. This Court has presented Mr. Cato with several open court opportunities to support his rebuttals and allegations with actual facts, yet he has failed to do so on every occasion.

Therefore, even it were successfully argued that the first two prongs of the standard were met, there is absolutely no evidence in the record that would suggest that Mr. Cato can meet his burden under the third prong.

It should finally be noted that Mr. Cato appeared at the oral argument related to the Petition to Open Judgment *pro se*. However, he still had an attorney of record who did not appear with him.

If each incident of Defendants disobeying this Court's orders was viewed in isolation, this Court might have been compelled to open the default judgment to further examine the bizarre and complex events which have plagued the North Philadelphia Empowerment Zone. However, it is not the role of this Court to view each incident in this manner and give the Defendants the benefit of the doubt time after time and time again. Instead, the conduct of the Defendants ought to be viewed in one way, and that is they consistently and constantly flouted the authority and province of this Court to set case management dates and keep the civil case docket running smoothly. The repeated violations of court orders by the Defendants lead this Court to only one logical and sensible disposition.

IV. Conclusion

For the reasons stated, this Court respectfully submits that the order denying Defendant Jamel Cato's Petition to Open Default Judgment entered on September 27, 2000, was proper.

BY THE COURT,

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J.