

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

LIPIECKI : DECEMBER TERM, 1998  
: :  
: :  
v. : NO. 1859  
: :  
: :  
WAL-MART STORES, INC. :

O P I N I O N

O’Keefe, J.

November 27, 2000

**I. Overview**

Wal-Mart Stores, Inc. (“Defendant”) appeals an order entered July 21, 2000, whereby this Court dismissed Defendant’s appeal from arbitration due to Defendant’s failure to appear for trial, scheduled for July 21, 2000, at 10:45 a.m.

**II. Facts and Procedural History**

Rita and Leon Lipiecki, husband and wife (“Plaintiffs”), commenced this civil action on December 21, 1998, against Defendant to recover damages arising from an alleged slip and fall which Rita Lipiecki incurred while on the premises of Defendant’s store located at 1601 South Columbus Boulevard, Philadelphia, PA 19148. The case was assigned to the compulsory arbitration program. On October 8, 1999, the arbitrators found in favor of the Plaintiff and against the Defendant in the amount of \$20,000. The Defendant filed timely notice of appeal of the arbitrators award in favor of the Plaintiff. On the notice of appeal was stamped the date and time the parties were required to appear for the status conference in this matter.

The status conference was held on November 29, 1999 at 3:00 p.m. At the status conference, the parties were given a date for the mandatory settlement conference and a trial pool month. The

settlement conference in this matter was scheduled for on or about July 5, 2000, and a pre-trial conference with this Court was scheduled for July 12, 2000. Ultimately, Defendants failed to appear for trial on July 21, 2000, at 10:45 a.m. As a result of Defendant's failure to appear, Plaintiffs filed a motion to enter judgment in the amount of \$20,000 in their favor on July 24, 2000. Thereafter, Defendant filed this timely appeal. Upon receiving notice of appeal, this Court sent Defendant a letter pursuant to Pennsylvania Rules of Appellate Procedure 1925(b) requesting a concise statement of the matters complained of on appeal. Defendant responded and submitted four issues for review on appeal.

### **III. Review of Hearing for Sanctions, July 14, 2000**

At the outset of the Court's discussion, it is worthwhile to discuss in detail the events on or around July 12 through July 14. It is in the course of these events which Defendants allege gave rise to this Court's abuse of its discretion and the eventual dismissal of Defendant's appeal.

On July 14, a hearing for sanctions was held by this Court to evaluate the actions of Defendant's counsel, Courtney A. Seda, Esquire ("Seda"). The notes of testimony from this hearing recount the events of July 12, when, on that date, this Court arranged for the above captioned matter to be tried after this Court determined that it was unlikely that the parties to this matter would reach a mutual settlement. "Notes, Hearing For Sanctions 7/14/2000", at 2-7. Apparently, during a discussion in the robing room, counsel for Plaintiffs, David J. Gorberg, Esquire ("Gorberg") and Seda both outlined the components of their respective cases. Id. In all, aside from the Plaintiffs themselves, they agreed before this Court that there was only one witness to be called at the trial. Id. at 4. Therefore, the parties further agreed that there would be, at most,

two hours of testimony in this case. Id. The parties were then placed on “one-hour call.”<sup>1</sup> Id.

After placing the parties on one-hour call, this Court made an effort to find a judge who could try the case. Id. In the end, the Honorable Judge Richard Klein of the Philadelphia Court of Common Pleas, who, because his case in the major jury program had settled, had the day free, agreed to try the case. Id. However, later in the day, this Court received a telephone call from Judge Klein who suggested that based on what he had heard from the attorneys, the case was a two day case as opposed to the shorter case which they had originally represented to this Court. Id. at 5.

In an effort to figure why the parties had originally agreed that the case was a shorter case, yet conveyed to Judge Klein that it would take two days, this Court issued an order for the attorneys involved to appear before this Court to explain the circumstances. Id. at 6. An oral order over the telephone was issued by Mary McGovern (“McGovern”), the manager of the Complex Litigation Center, for the parties to appear before this Court at 9:00 a.m. the following day, July 13, 2000. Id. The notes of testimony relate that McGovern’s order was directly on behalf of this Court and the order was clear -- both attorneys were required to appear. Id. While Plaintiff’s attorney, Gorberg, acquiesced and agreed to appear, Seda objected, explaining that she had an arbitration the

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As a way of facilitating more efficient case management, the Arbitration Appeals program utilizes one hour call for the benefit of both the courts and the attorneys involved. In accordance with Philadelphia County Local Rule 215, all cases appealed from compulsory arbitration are assigned a Trial Pool Month. All cases assigned to a specific month are then called chronologically by their court term and number. When a case is set to be called, attorneys are initially notified that they are on one hour call. This allows the attorneys to tend to other tasks instead of waiting at the Courthouse for their case to be called. When another case is completed and a judge is free, the attorneys are then notified that their case is set to begin in approximately one hour. If, at the time the attorneys are initially notified that they are on hour call, they communicate to the court that they require more time (e.g. travel purposes), the court will accommodate the attorney. In this case, this Court reiterated to the parties following the hearing for sanctions that they were on one hour call and that they should be on alert that their case could be called. The offices of both attorneys in the present case are within a few blocks of the Courthouse. Therefore, Defendant’s argument that providing less than two hours notice does not comport with due process must fail. Parties always have the option of waiting at the Courthouse for their case to be called instead of being on one hour call. The one hour call procedure is designed for the convenience of the attorneys.

following morning. Id. McGovern instructed to Seda to obtain a continuance on the arbitration and appear before this Court. Id.

On July 13, 2000, at 9:00. a.m., Gorberg appeared but Seda sent another representative from her firm to appear on her behalf. Id. This Court instructed the representative to call the firm and request Ms. Seda's appearance. Id. at 6-7. However, after waiting until 11:00 a.m., this Court ordered a hearing for sanctions, scheduled for July 14, against Ms. Seda for her failure to appear and her willful noncompliance with a direct order from this Court. Id.

At the hearing for sanctions, Patrick J. McDonnell, Esquire ("McDonnell"), the managing partner at Ms. Seda's law firm, defended her actions. McDonnell disputed the facts as recited by this Court and essentially doubted the accuracy of this Court's recounting of the events of the prior two days. Id. at 8-17. In addition, McDonnell related that it was his decision for Ms. Seda to skip her appearance before this Court on July 13, 2000, and instead appear at an arbitration. Id. at 20. McDonnell contested that, "[t]here was no order" requiring Ms. Seda to appear. Id. at 24. In fact, although Ms. McGovern called both attorneys on July 12, 2000, and requested that they appear before this Court the following morning, McDonnell repeatedly stressed that he believed that no order had been issued. Id. at 21, 22, 24, 36, 38, 39, 40, 41. Plaintiff's attorney Gorberg did appear for all scheduled events in this matter. In fact, most of what McDonnell suggested and alleged on Ms. Seda's behalf at the hearing for sanctions revolved around the lack of a written order issued by this Court to appear on the morning of July 13, 2000.

This Court is of the opinion, and experience has demonstrated that this opinion is correct, that when a representative of this Court calls on behalf of this Court and identifies him or herself as a representative of this Court, that any order or request issued as a result of the telephone conversation has the full force of this Court as if this Court had made the telephone call and issued

the verbal order itself. However, McDonnell continuously emphasized that the order was not in writing, it was not on record and was not specifically placed by this Court. Id. As a result, Mr. McDonnell argued that the order was not binding and should not have been enforced. In fact, McDonnell conceded that had the order been in writing, he would have instructed Seda to appear before this Court on July 13, 2000, instead of the arbitration. Id. at 36.

Following an exchange between this Court and McDonnell, this Court agreed that a facsimile written order was technically the correct procedure to follow. Id. at 41-42. Experience and practice have demonstrated to this Court that a telephone call on behalf of this Court suffices to convey that it is this Court speaking and not this Court's representative in his or her own personal capacity. However, in order to appease McDonnell, this Court stipulated that all further communications with McDonnell's firm would be in the form of written transmissions. At the conclusion of the hearing, this Court reiterated to McDonnell and Mr. Gorberg that they were still on one hour call and that their case would be called as soon as a Judge had free time. Id. at 46.

#### **IV. Argument**

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

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

The principles embodied in Rule 218 have been consistently reaffirmed by Pennsylvania courts. Recent amendments to the rule have further clarified it to clearly provide that the mere failure of

a party to appear at a trial permits a trial court to invoke the rule and apply one of the remedies discussed in the rule. Previously, there had been some confusion over whether a trial court was required to hold a hearing before enforcing the rule to determine if the excuse offered by the party that failed to appear was satisfactory. However, as the Explanatory Comment-1993 to the rule notes, this intermediate procedural step is no longer necessary. In the context of a failure of a defendant to appear at a trial following an arbitration appeal, the Commonwealth Court explained, “failure of a party to appear at a trial is grounds for a court to reinstate an arbitration award entered in favor of the plaintiff. The Supreme Court amended Pa. R.C.P. No. 218, removing the requirement for a court to make a preliminary finding that the party did not have a satisfactory excuse for the failure to appear.” Masthope Rapids Property Owners Council v. Ury, 687 A.2d 70, 72 (Pa. Commw. Ct. 1996). See also Anderson v. Pennsylvania Financial Responsibility Assigned Claims Plan, 432 Pa. Super. 54, 637 A.2d 659 (1994).

In the present case, the Defendant properly filed post-trial motions with this Court. Prior case law and the Pennsylvania Rules of Civil Procedure are in agreement that after the dismissal of a defendant’s appeal due to the defendant’s failure to appear at a trial, the proper course of action is for that defendant to file a post-trial motion with the trial court requesting a new trial based on the ground that the defendant had a satisfactory excuse for failing to appear at the trial. See, e.g., Pa. R.C.P. 218 “Note”; First Union Mortgage Corp. v. Frempong, 744 A.2d 327, 335 (Pa. Super. Ct. 1999); Masthope, 687 A.2d at 72.

The facts of the present case are unique in that counsel for Defendant took this Court specifically to task regarding this Court’s interaction with counsel’s law firm personnel. Defendant’s argument that it was unfamiliar with this Court’s Arbitration Appeal program simply does hold merit. In Masthope, the Commonwealth Court specifically stated that, “[c]ounsel who

choose to practice law in a particular county are obliged to follow the rules and procedures of that county.” Id. At 72. This Court follows the same exact procedure for every Arbitration Appeal. Mr. McDonnell’s firm should be familiar with the rules and procedures which this Court follows. A survey of Mr. McDonnell’s history on the Civil Docket Program shows that in the year 2000 alone, he handled well over one dozen Arbitration Appeals on behalf of Wal-Mart Stores. In fact, over 50 percent of all Mr. McDonnell’s cases since 1993 have been arbitration appeals handled as part of Philadelphia’s Arbitration Appeal program.

Despite the fact that Mr. McDonnell and his firm, McDonnell and Associates, should have been familiar with the procedures of the Arbitration Appeal program, this Court, as a result of the hearing for sanctions and the apparent disagreement Mr. McDonnell had with the procedures, singled out Mr. McDonnell’s firm and decreed that all future dealings with Mr. McDonnell’s firm would be formal and in writing.

While it is the normal procedure for this Court to telephone attorneys who are one on hour call to tell them that a judge is available and that their case is set to be tried within a short time, on July 21, 2000, this Court instead faxed a written order to Mr. McDonnell’s firm at approximately 9:00 a.m. The return receipt was kept as part of the regular record keeping of the Arbitration Appeal program. Attorney for the Plaintiffs, Mr. Gorberg, appeared before this Court promptly and was prepared to try the case. The case was to be heard before the Honorable Judge Thomas D. Watkins of the Philadelphia Court of Common Pleas at 10:45 a.m. A jury panel was placed in the courtroom in anticipation of the trial. The official court record from that date indicate that while Mr. Gorberg was present, this Court waited until 12:00 p.m. to allow a member of Mr. McDonnell’s firm to appear before granting Mr. Gorberg’s oral motion to dismiss the appeal of the Defendant and reinstate the original arbitration award.

The Defendant, by and through Mr. McDonnell, submitted that it never received notice of the trial and Philadelphia's Arbitration Appeals program is violative of due process because of the manner in which it notifies counsel of trial dates and times. This argument simply is unsupportable when the facts of this case are applied to the weight of authority in this jurisdiction.

In the case before this Court, Defendant's attorney, Mr. McDonnell, argues that his firm never received notice of the trial on July 21, 2000. Therefore, his argument follows, the Defendant had a satisfactory excuse under rule 218(c) for missing the trial. The Superior Court has held that the burden for knowing the date and time of trial must not be shifted to the trial court. See Titmar, Inc. v. Sulka, 402 Pa. Super. 319, 321, 586 A.2d 1372, 1373 (1991). The court added that counsel for defendant in that case, to whom Mr. McDonnell is similarly situated, was:

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

Titmar, Inc., 402 Pa. Super. at 331-32, 586 A.2d at 1373-74. In upholding and complementing the decision of the Superior Court, the Commonwealth Court proffered, "[i]t is well established that counsel is under an obligation to keep abreast of the publications to the bar and local rules of court." Township of South Fayette v. Grady, 145 Pa. Cmwlth. 129, 132, 602 A.2d 482, 483 (1992) (citing Toczykowski v. General Bindery Co., 359 Pa. Super. 572, 519 A.2d 500 (1986)). The Commonwealth Court further agreed that when court procedures raise a presumption that counsel for the parties involved have legal notice of the time and place of the trial, "the court is required to do no more." Id. When counsel is deemed to have notice of the trial, failure on the part of

counsel to actually receive notice cannot be a satisfactory excuse as contemplated in Rule 218(c).

Id.

As previously mentioned, Mr. McDonnell and representatives from his firm have appeared on business with this Court on countless other occasions as part of the Arbitration Appeal program. It is without question that based on Mr. McDonnell past experiences, he was aware of and was in fact familiar with the notice procedures employed by the Arbitration Appeal program. However, Defendant, by and through Mr. McDonnell, further argues that it never received the facsimile transmission containing the order for the parties to appear at the Complex Litigation Center to try their case. Included in Defendant's Petition to Reinstate their Appeal, is an affidavit of a receptionist at Silverman Bernheim and Vogel, a firm at which Mr. McDonnell was a former partner. In this affidavit, the receptionist alleges that the facsimile transmission was sent by this Court to Mr. McDonnell's old firm and not his current place of practice.

It is worthy to note that Defendant was initially represented in this matter by Mr. McDonnell and Marc D. Weinberg, Esquire ("Weinberg") of the firm Silverman Coopersmith and Frimmer. The names of both Mr. McDonnell and Mr. Weinberg were on the Entry of Appearance request. The address of this firm was Two Penn Center Plaza, Suite 910 in Philadelphia. On July 12, 2000, a Withdraw of Appearance and simultaneous Entry of Appearance form was filed with the Prothonotary. Such transactions are common practice and do not require leave of court. Pa. R. Civ. Pro. 1012(b). On the form, Mr. Weinberg withdrew his representation and Mr. McDonnell and J. Michael Kvetan, Esquire ("Kvetan") entered their joint appearances. The name of the "new" firm representing the Defendant was McDonnell and Associates with an address of Two Penn Center Plaza, Suite 910 in Philadelphia. From the above discussion, it would seem apparent to any layperson reviewing the record in this case that Mr. McDonnell remained at the same location and

it was only his firm name which changed name and personnel.

The preceding review of the attorneys of record for the Defendant was necessitated by Mr. McDonnell's claim that this Court faxed its order to appear for trial to the incorrect law firm or fax number. On the morning of July 21, 2000, this Court notified both parties in this case that they were to go to trial later that same morning. At approximately 9:00 a.m., a fax was sent to the fax number listed for Mr. McDonnell in the 2000 Philadelphia Area Legal Directory. The address listed for Mr. McDonnell in the Directory is Two Penn Center Plaza, Suite 910 in Philadelphia. The fax number which is listed under Mr. McDonnell's entry is (215) 636-3999. Consequently, this Court faxed the order to appear for trial to (215) 636-3999. Apparently, and as the affidavit of the receptionist at Silverman Bernheim and Vogel reveals, Mr. McDonnell is no longer associated with that firm and does not have access to the fax machine located in that firm's offices.

This Court will concede that Mr. McDonnell's address as it appears on the Civil Docket Report is Two Penn Center Plaza, Suite 910 in Philadelphia. The entry on the Civil Docket Report does contain a fax number different from the one contained in the Legal Directory. However, Mr. McDonnell was notified well in advance that he and his firm were on one hour call and that because he had taken earlier exception to this Court's use of a telephone call as a way of communicating an order, this Court would fax or mail all future orders to his firm so that they may be in writing. Therefore, Mr. McDonnell should have, at the least, clarified to this Court his proper fax number so as to avoid any future confusion. It is not, nor has it ever been, the burden of the courts to keep tabs on the whereabouts of attorneys. The Superior Court squarely rejected the imposition of such a duty on the courts in Titmar when it stated that the duty of courts extends to only the presumption that an attorney has notice and not whether the attorney has actual notice. 482 Pa. Super. at 321-22, 586 A.2d at 1373-74.

The courts in this jurisdiction are uniform in the position that the proper scope of review for appellate courts when reviewing a trial court's dismissal of an appeal is whether the trial abused its discretion. Pennsylvania courts are equally unified in the view that this standard can be satisfied if the trial court addressed the merits of defendant's motion. In this case, this Court examined Defendant's Petition to Reinstate the Appeal and determined that the excuse offered by the Defendants for their failure to appear for trial was not satisfactory in light of the previous discussion. Therefore, this Court did not abused its discretion in dismissing Defendant's appeal. Instead, this Court merely followed the clear language of Rule 218(b) and dismissed the appeal from the arbitration and reinstated the arbitration award. Thus, since notice of the trial was properly available to Defendant and because Defendant failed to appear, the dismissal of the arbitration appeal and reinstatement of the arbitration award in favor of the Plaintiff, was properly entered against Defendant by this Court.

#### **IV. Conclusion**

For the reasons stated, this Court respectfully submits that the dismissal of the appeal from arbitration and reinstatement of the arbitration award in favor of the Plaintiff, entered against Defendant for failing to appear at trial was proper.

**BY THE COURT,**

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**J.**

