

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

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|---------------------------|---|---------------------|
| JERRY DOMINO | : | MARCH TERM, 1999 |
| | : | |
| v. | : | NO. 176 |
| | : | |
| MEAGAN MITCHELL, ET AL. | : | |
| ----- | : | |
| JOHN OTTO | : | FEBRUARY TERM, 1999 |
| | : | |
| v. | : | NO. 3279 |
| | : | |
| STEVEN MAGNISALIS, ET AL. | : | |
| ----- | : | |
| STEVEN MAGNISALIS | : | FEBRUARY TERM, 1999 |
| | : | |
| v. | : | NO. 3513 |
| | : | |
| MEAGAN MITCHELL | : | |

O P I N I O N

O’Keefe, J.

November 27, 2000

I. Overview

Jerry Domino and John Otto appeal an order entered on September 19, 2000, whereby this Court denied Jerry Domino’s Motion to Strike Judgment of Non Pros. The actual judgment entered in this matter was a nonsuit, not a non pros. A nonsuit was originally entered on July 7, 2000, as

a result of the failure of Jerry Domino and John Otto to appear at an arbitration.

II. Facts and Procedural History

The present action is the result of a consolidation motion which merged the original three cases. All three actions arose out of a motor vehicle accident that occurred on February 28, 1997. The accident occurred when a vehicle owned and operated by Meagan Mitchell (“Mitchell”) with John Otto (“Otto”) as a passenger, came into forceful contact with a vehicle owned by Jerry Domino (“Domino”) and being operated by Steven Magnisalis (“Magnisalis”). Therefore, from a procedural standpoint, the easiest way to break down the appellants and appellees is examine each individual case with extra attention paid to the lead case, Domino v. Mitchell, et al.

A. John Otto v. Steven Magnisalis, et al.

John Otto commenced this action by way of a complaint on February 23, 1999. In his complaint, Otto named Magnisalis, Mitchell and Domino as co-defendants. At the time he filed his complaint, Otto perfected a jury and his case was placed in the major jury program. After several months of motions and cross claims, this case was consolidated by way of a motion for purposes of discovery and trial by the Honorable Albert Sheppard of the Philadelphia Court of Common Pleas. The parties involved in the three lawsuits were instructed that Domino v. Mitchell, et al. was the lead case for case management purposes. After a review of the damages alleged, the case was then sent to the compulsory arbitration program by the Honorable Allan L. Tereshko of the Philadelphia Court of Common Pleas. The arbitration in this matter was scheduled for July 6, 2000.

B. Magnisalis v. Mitchell

Steven Magnisalis commenced this action by way of a complaint on February 24, 1999. In his

complaint, Magnisalis named only Mitchell as a defendant. At the time he filed his complaint, Magnisalis perfected a jury and his case was placed in the major jury program. This case was consolidated by way of a motion for purposes of discovery and trial by the Honorable Albert Sheppard of the Philadelphia Court of Common Pleas. The parties involved in the three lawsuits were instructed that Domino v. Mitchell, et al. was the lead case for case management purposes. All other events in this specific case were canceled and this specific case was eventually discontinued and ended on February 22, 2000.

C. Domino v. Mitchell, et al.

Jerry Domino commenced this action on March 1, 1999, and filed a complaint on March 2, 1999. In his complaint, Domino named Magnisalis, Mitchell and Otto as co-defendants. At the time he filed his complaint, Domino perfected a jury and his case was placed in the major jury program. This case was consolidated by way of a motion for purposes of discovery and trial by the Honorable Albert Sheppard of the Philadelphia Court of Common Pleas. The parties involved in the three lawsuits were instructed that Domino v. Mitchell, et al. was the lead case for case management purposes.

D. Consolidation

A settlement conference of these consolidated matters was held on March 3, 2000. Most of the claims involved in this case were resolved at the conference. The unresolved claims were Otto's injury claims against Domino and Domino's property damage claims. After a review of the damages alleged following the conference, the case was sent to the compulsory arbitration program by the Honorable Allan L. Tereshko of the Philadelphia Court of Common Pleas. The arbitration in this matter was scheduled for July 6, 2000. On July 6, 2000, Magnisalis and Mitchell appeared for the arbitration, while Domino and Otto did not. As a result, Magnisalis and Mitchell were

permitted to transfer this case to this Court and request an oral motion for non suit, which this Court granted. Thereafter, Domino petitioned this Court to strike the non suit and relist this case. This Court denied Domino's motion and he then filed this timely appeal. Upon receiving notice of appeal, this Court sent Domino and Otto a letter pursuant to Pennsylvania Rules of Appellate Procedure 1925(b) requesting a concise statement of the matters complained of on appeal. Both Domino and Otto responded and submitted several issues for review on appeal.

IV. Argument

At the outset, there are issues raised by Domino and Otto for review on appeal which are simply out of this Court's jurisdiction to address. Both Otto and Domino's responses to this Court's letter pursuant to 1925(b) complain of the order entered on March 3, 2000, by Judge Tereshko, that remanded the remaining issues in these cases to the compulsory arbitration program. This Court has no jurisdiction to question that order nor answer to why Judge Tereshko entered the order. Any order entered by a Judge should be appealed within the time allowed by the statutory time frame, thus providing that Judge an opportunity to explain his motivation for his actions. The proper time to appeal the March 3rd order would have been within 30 days of the entry of that order. However, the current appeal is an appeal of an order entered by *this Court* on July 7, 2000, whereby *this Court* entered a non suit in this matter. Therefore, any discussion will be limited to an explanation of the order of July 7, 2000, and no other order which the parties may have taken exception to at some point in this litigation.

The outcome of this case and appeal is controlled by the recent Superior Court decision in Jamison v. Johnson, 2000 WL 1521628 (Pa. Super. Ct. 2000). The facts in the present case are very similar to those in Jamison. In Jamison, a matter was scheduled for arbitration, but before the

arbitration took place, counsel for the Jamisons informed Johnson's counsel that he would be seeking a continuance because the Jamisons were away on vacation. 2000 WL 1521628, at * 1. The continuance was denied and the attorneys were informed that the case must be tried. Id. Immediately before the arbitration hearing was to take place, counsel for the Jamisons informed Johnson's counsel that he would not be able to attend the arbitration due to a family illness. Id. Johnson's counsel appeared at the arbitration hearing but neither the Jamisons nor their counsel appeared at the arbitration hearing. Id. After waiting approximately one hour, the arbitration board ordered Johnson's counsel to proceed to Common Pleas Court where a judge would hold a non-jury trial pursuant to Pa.R.Civ.P. § 1303. Id. Johnson's counsel motioned the court for a nonsuit and the nonsuit was granted. Id.

The Superior Court upheld the granting of the nonsuit by relying on the plain language of Rule 1303 and the 1998 amendments to the rule. Id. at 1-2. The court held that as long as the following notice was present in a notice for arbitration, then the trial court can hear the action:

This matter will be heard by a board of arbitrators at the time, date and place specified, but if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial de novo on appeal from a decision entered by a judge.

Pa.R.Civ.P. § 1303(a)(2). Both Domino and Otto contend that they never received notices from Civil Administration bearing the above notice. However, this allegation is incorrect. While it is true that the notice sent to the parties by Judge Tereshko when he remanded the case to arbitration did not contain this notice, the Civil Docket Report in this matter shows that a separate notice was sent by Civil Administration to all parties involved on March 7, 2000. The notice sent by Civil Administration contains the date, time and location of the arbitration hearing and the above notice. That Domino and Otto may not have actually received this notice is possible, but the proper notices

were sent to the addresses of Domino's counsel and Otto's counsel that are listed with the Prothonotary.

The court further explained in Jamison that once a case is transferred to a trial court and taken off the arbitration list, the action can be governed by Rule 218, which is inapplicable to arbitrations.

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).

The Jamison court concluded that the final inquiry was to determine whether the trial court's decision to grant a nonsuit was a "proper exercise of discretion." Jamison, 2000 WL 1521628, at *2. The court suggested that a satisfactory excuse under Rule 218 is an excuse that would constitute a valid ground for a continuance. Id. The court proceeded to list examples such as agreement of counsel, illness of counsel or another party involved, or any other ground allowed by the court. Id.

In the case before this Court, Domino and Otto argue that they did not attend the arbitration because a continuance application had been filed by Otto because both he and his attorney were out of town on vacation or otherwise unavailable at the time of the arbitration. Domino further argues that he relied on the continuance application filed by Otto and the representations of Otto and his attorney. Therefore, their argument follows, they had a satisfactory excuse under rule 218(c) for missing the arbitration. The Superior Court has held that the burden for knowing the date and time of trial related events 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 Titmar, to whom counsel for Domino and counsel for Otto are 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 a trial related event, failure on the part of counsel to actually receive notice cannot be a satisfactory excuse as contemplated in Rule 218(c). Id. As previously discussed, all counsel in this matter received proper notice of the arbitration from Civil Administration.

The rules for requesting a continuance of an arbitration in Philadelphia County are clear and unambiguous. In Philadelphia, the rules governing emergency and non-emergency requests alike can be found in Philadelphia County Local Rule 1303(3), 1303(4) and 1303(5). There is an obligation on the part of counsel to be familiar with the local rules of civil procedure in the jurisdictions in which they practice. Without going into detail as to the filing procedures, it is clear that in the present case, a continuance was never granted by the Arbitration Center. Both counsel for Domino and counsel for Otto should certainly not have relied upon a pending application for a continuance. Without any ruling or indication by the Arbitration Center, attorneys should not assume that a continuance will be granted. Without a satisfactory excuse for the failure of Domino and Otto to appear, this Court did not abuse its discretion and this case is controlled by the outcome in Jamison.

Thus, since notice of the arbitration was properly sent to all parties involved and because Domino and Otto failed to appear at the arbitration, the entry of nonsuit was properly entered by

this Court.

IV. Conclusion

For the reasons stated, this Court respectfully submits that the entry of a nonsuit for the failure of parties to appear at an arbitration hearing was proper.

BY THE COURT,

J.