COLONIAL SURETY COMPANY,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 95-00,614
	:	
MALLALIEU-GOLDER INSURANCE	:	CIVIL ACTION - LAW
AGENCY, INC. and MARCIA BUTTERS	:	
CONFER,	:	1925(a) OPINION

OPINION IN SUPPORT OF THE ORDER OF MAY 10, 1999, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Appellant Colonial Surety Company (hereinafter "Appellant") appeals this Court's Order of May 10, 1999, in which we ordered *non pros* judgment against Appellant for failure to appear timely for trial without appropriate excuse. We have reviewed Appellant's Statement of Matters Complained of on Appeal, filed June 14, 1999, as well as the transcript of the May 10, 1999, proceedings, filed July 8, 1999. Support for our decision can be found in the transcript, as amplified and clarified in this Opinion, with reference to certain documents in the record.

> 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.

Pa.R.C.P. 218(a), 42 Pa.C.S. Therefore, Appellant's first contention that this Court erred because no motion for *non pros* was made is incorrect for two reasons: (1) the Court had the authority, provided under the Pennsylvania Rules of Civil Procedure, to enter a *non pros* on its own motion; and (2) defense counsel jointly moved for non pros. May 10, 1999, N.T. 11.

Appellant's second contention is that its counsel had consented to the continuance request of its sole adversary. Apparently, Appellant's counsel mistakenly believes he has the

power to grant a continuance, rather than the Court. Further, the defense "request" for continuance was never filed of record and in any event was withdrawn on the record by defense counsel May 10, 1999. May 10, 1999, N.T. 7.

Next, Appellant asserts:

> Colonial's counsel was not available for the conference that was deliberately scheduled on inadequate notice, on a moot motion, when the Court knew Colonial's counsel was unavailable; and, the Court's finding that Plaintiff's counsel had failed to "provide requested discovery opportunities" was entirely baseless and erroneous.

See Appellant's Statement of Matters Complained of on Appeal. These assertions are simply untrue. First, counsel was "not available" only because he chose to make himself unavailable, by committing to other matters, despite being aware of his prior commitment to this case. Second, the matter was scheduled for argument and jury selection/trial on May 10, 1999, not a conference. Third, although we notified counsel by Order dated Friday, May 7, 1999, which was faxed to Appellant's counsel, that argument on all outstanding motions would be held the following Monday, to be followed by trial depending upon the outcome of the motions, this was hardly the first notice counsel received that he was to be available that date, as discussed *infra*. Fourth, in addition to written notice, there were telephone calls between the Court's secretary and Appellant counsel's office, in which counsel was advised no continuance would be granted and counsel, or at least an attorney from his office, was required to appear. Fifth, Appellant's counsel has in fact repeatedly refused to provide discovery information to other counsel, as requested and as directed by this Court.

Appellant's initial Complaint, filed May 28, 1997, asserted that it was the surety of a mechanic's lien indemnity bond and the original Defendants had improperly notarized the

signature of one of the bond's principals. As a result, when Appellant was required to make payment on the bond, the principal successfully defended the obligation to reimburse Appellant as surety, since the principal's signature was not genuine. Initially, the Complaint asserted strict liability on a theory of the improper notarization. During the course of the litigation, it became apparent to Appellant and this Court that, while Appellant might recover a judgment, it would be difficult, if not impossible, to collect the judgment. At a July 30, 1998, pretrial conference (being held in conjunction with the anticipated trial list case in the Court's September 1998 trial term), Appellant sought leave to amend the Complaint to add a count of negligent notarization, so as to involve Defendants' insurers under their general liability policy. *See* Order of July 31, 1998. The Court permitted the late amendment, and an Amended Complaint was filed August 10, 1998. However, at that July 30, 1998, pretrial conference, the Court made it very clear that it expected this case to be tried at the next trial term. We received a commitment from Appellant's counsel, Mr. Miller, and Defendants' counsel Mr. Zicolello, that if the insurance company agreed to defend and chose to be represented by independent counsel, they would cooperate with that counsel in order to make the case trial ready at the next term.

In accordance with the Court's Pretrial Conference Order of July 30, 1998, this case was to be again pre-tried in December of 1998 and tried in the January 1999 trial term. Unfortunately, this case was further unavoidably delayed by the filing of a Declaratory Judgment action under Docket Number 98-01,573. Defendants in the instant case, Mallallieu-Golder Insurance Agency, Inc. and Marcia Butters Confer, sought declaratory judgment on the question of whether their insurer, Utica Mutual Insurance Company, had a duty to defend them. Upon the filing of that action, counsel involved in this litigation consulted with this Court concerning their need to be

prepared for a January 1999 trial term, since this declaratory judgment action would not yet have been determined by that time. After conference with counsel, it was agreed the case would be tried in the May 1999 trial term of this Court. An appropriate Scheduling Order dated November 23, 1998 and filed of record November 30, 1998, was entered reflecting that the trial dates for the case would be from May 3-21, 1999. Pretrial conference would be held between April 5th and April 9th. The Court also set discovery deadlines in that Order. By order dated March 1, 1999, the Honorable Clinton W. Smith, President Judge, determined Utica mutual Insurance Company were obligated to defend their insured, the Defendants in this action.[1]

On April 7, 1999, a Pretrial Conference was held in this matter. Marla Miller, Esquire, appeared in place of Larry Miller, Esquire, on behalf of Appellant. As one of the attorneys, Gary Weber, Esquire, had recently entered an appearance for the defense (having been retained by the insurance companies subsequent to Judge Smith's determination), we scheduled another pretrial conference and advised Ms. Miller to make available to Mr. Weber the information to which he was entitled, in order to properly and fairly advise his client. Counsel were advised this case would be tried during the May 3-21, 1999, trial term. *See* Civil Pretrial Conference Order filed April 12, 1999.

Counsel attended a second Pretrial Conference April 28, 1999. Mr. Miller appeared on behalf of Appellant. Mr. Weber indicated that he had not received the information requested from Mr. Miller, despite this Court's Order. Mr. Miller insisted he had provided all documentation to the defense. After further discussion, it seemed apparent that although some of

[1] The case was further complicated by Utica Mutual Insurance Company's Petition for Intervention, filed April 27, 1999. Although the initial interpretation of this filing is that it was in keeping with Judge Smith's determination, it was made clear by the representation of Petitioner that the objective of intervention was not to defend Defendants, but to once again contest their obligation in this matter. The Petition was denied May 5, 1999.

the requested information may have been provided to defense counsel Michael Zicolello, Esquire, it had not been provided to Mr. Weber. Moreover, not all of the information Mr. Weber was seeking was in the possession of Mr. Zicolello. This Court indicated perhaps we had not made ourselves clear at the previous conference. We candidly stated we believed that once Mr. Weber received and reviewed the documents sought, he would be in a position to advise his client that the facts of the case militated against his client and settlement was the wisest course of action. However, Mr. Weber obviously could not rely on this Court's assessment and needed to satisfy himself as to the merits of Appellant's case before being in any position to make a reasoned recommendation to his client. We instructed Mr. Miller to make available to Mr. Weber the information he requested no later than May 4, 1999. *See* Order of Court dated April 29, 1999. Mr. Miller assured the Court he would cooperate.

As is clear from Attorney Weber's Motion for Contempt and for Sanctions, filed May 5, 1999, Mr. Miller instead ignored the Court's directive. Moreover, as of May 10, 1999, nothing had been provided to Mr. Weber. May 10, 1999, N.T. 7, 10. It is clear to this Court that the Motions before the Court were anything but "moot," notwithstanding Appellant's May 4, 1999, Praecipe to Discontinue Count III of the Amended Complaint.

In every pretrial memorandum, Appellant's counsel has requested a "firm date" for trial. While this Court cannot remember every word of every conference with counsel, we do not have dates certain for trials in Lycoming County and are certain Mr. Miller is aware and was made aware at each pretrial conference of this fact. We make every effort to notify counsel as early as possible when it is most likely their case will be reached during a given trial term, but they understand that they are on twenty-four hour stand-by notice if considered a back-up case.

We try to indicate which week the trial is likely to be called. As the trial term unfolds, we update counsel.

Mr. Miller knew, by Scheduling Order filed November 30, 1998, that this case would be tried during the May 3-21, 1999, trial term. During the April 28, 1999, pretrial conference, we asked counsel to advise us of scheduling conflicts for the term. As is indicated by the Civil Pretrial Conference Order filed April 29, 1999, Attorneys Weber and Zicolello both indicated dates they were unavailable; Mr. Miller furnished no dates for our consideration. As indicated in the transcript, we were first advised Mr. Miller was unavailable in a letter from him May 7, 1999. He indicated he was unavailable on the 10th of May through the 14th of May and also May 18th and 21st due to depositions, case management conferences and arguments. He graciously allowed us May 17th, 19th or 20th. Unfortunately, counsel had been advised at the pretrial conference, the week of the 17th was reserved for two outstanding medical malpractice cases which had not yet settled; this case and others were back-ups to those. We had further discussed that, since by April 29th, Mr. Miller had still not furnished Mr. Weber the discovery information he needed, more work would be necessary by counsel before trial and this case should probably not be scheduled in the first week. It was anticipated the case would be called in the second or third week as a back-up case; more likely than not, it would be called in the second week.

"The entry of a non pros judgment depends upon a proper balancing of equitable considerations in the discretion of the trial court." ***Valley Peat & Humus v. Sunnylands, Inc.***, 581 A.2d 193, 196 (Pa.Super. 1990). Before entering such judgment, this Court must apply a three-part test as determined by our appellate courts. First, we must determine, as a factual

matter, whether there is a want of due diligence or, in other words, whether the plaintiff is "not ready" for trial. Second, the court must determine whether there is a compelling reason or "satisfactory excuse" for the delay. Finally, although somewhat less important, the Court must determine the element of prejudice to the defendant. *Id.* at 196-197.

Appellant's counsel not only failed to timely provide discovery as required, he failed to appear for trial. We believe Appellant was not ready for trial. "If counsel fails to appear…when the case is called for trial, the trial court, at that point, may properly enter a judgment of non pros under the authority of Rule 218." ***Gendrachi v. Cassidy***, 688 A.2d 1215 (Pa.Super. 1997).

Appellant failed to properly request a continuance, ignoring our local rules which require a continuance request be made in writing. In fact, no request at all was made until the last business day before trial. Counsel then decided to equate his request, in a letter, with the granting of a continuance. In essence, the reason given for not appearing when called for trial was that he was otherwise engaged.[2] Counsel was aware of his obligations with respect to this case as early as November of 1998. Counsel was advised in no uncertain terms, in response to his letter, that no continuance would be granted. In the case of ***Debroff v. Corretti***, 645 A.2d 859 (Pa.Super. 1994), the Superior Court stated a plaintiff simply has no right to assume that he can just ignore, for whatever reason, an order of court setting a specific date and time for court proceeding (in that case, an arbitration hearing). *Id.* at 864. The Court found the

[2] We question whether those jurisdictions in which he was otherwise engaged allow Mr. Miller to choose his own court dates.

plaintiff/appellant had made a conscious choice which could not be excused as an innocent or even negligent mistake and held he therefore did not have a satisfactory excuse. *Ibid.* Similarly, Appellant's counsel assumed he could ignore the May 7, 1999, Order of Court. We find Appellant did not present a satisfactory excuse to prevent the entry of a *non pros* judgment.

Finally, defense counsel appeared and were ready for trial. Mr. Zicolello stated he went to great lengths to rearrange his schedule. May 10, 1999, N.T. 11. Mr. Weber participated by telephone, but his presence was not necessary for the commencement of trial. May 10, 1999, N.T. 3. The defense was entitled to expect the trial would begin as scheduled. Defendant was prejudiced by Appellant's failure to appear.

This case has been on the docket since April 13, 1995. It was first praeciped for jury trial by Appellant August 5, 1997. Through the years, this Court has made every reasonable effort to accommodate counsels' schedules. Continuances have been granted to both sides. Plaintiff has been allowed to extend the discovery deadline and was given additional time to file an Amended Complaint. This case was first scheduled for the January, 1998 trial term. It was then continued to the May, 1998, term, then the September, 1998, term, then the January, 1999, term and finally the May, 1999 term.

As documented by the November 30, 1998, Scheduling Order, Mr. Miller had more than five months' notice this case would be tried in during the May, 1999 term. At no time between November 30, 1998 and May 7, 1999, did Mr. Miller advise this Court of any other commitment which would interfere with the trial schedule. Mr. Miller never represented that he was attached for any other proceeding. He never fully explained to the Court his necessity to be at these other proceedings. None of the other proceedings to which he referred were so

significant a matter, in this Court's view, as a trial. Nor was any reason expressed why any other counsel, either from his own office or through special arrangement with another office, could cover these other proceedings in his behalf.

While Mr. Miller's industriousness, as demonstrated by his many commitments, is admirable, it does not give him license to determine which court proceedings he will attend and which he will not, without permission of the Court. His actions affect not only himself and his clients, but also the other parties, their counsel, and Court personnel. Under the circumstances which counsel himself created, this Court had no choice but to assume Mr. Miller blatantly ignored our directive to appear for trial of this case. The entry of a *non pros* judgment was appropriate.

BY THE COURT,

Date: July 30, 1999

William S. Kieser, Judge

cc: Eileen A. Grimes, Court Scheduling Technician
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Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)