

MELISSA A. HAYDEN,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 96-01,130
	:	
MILLVILLE MUTUAL INSURANCE	:	
COMPANY,	:	
	:	
Defendant	:	MOTION FOR NON-PROS

OPINION AND ORDER

The issue before this Court is whether to grant the Motion for *Non Pros* filed by Defendant Millville Mutual Insurance Company (“Defendant”) March 8, 1999.¹

This case was initiated by Complaint filed July 30, 1996, by Melissa A. Hayden (“Plaintiff”). Defendant filed Preliminary Objections August 28, 1996. By Order of Court dated November 27, 1996, the Honorable Kenneth D. Brown, Judge, sustained the Preliminary Objections, but gave Plaintiff thirty (30) days to file an amended Complaint. However, Plaintiff never filed an amended Complaint and Defendant has filed for *non pros*. Defendant seeks the entry of *non pros* with prejudice to preclude Plaintiff from re-filing the action. Defendant asserts this case must be dismissed because of Plaintiff’s failure to comply with

¹ The Motion, when originally filed, requested issuance of a Rule to Show Cause but did not have attached a Rule to Show Cause Order, required by Pa. R.C.P. 206.5, nor a scheduling Order as required by Lycoming County Rule of Civil Procedure L206. Therefore, an Order dated 3/17/99, was entered on 3/18/99 indicating that no action would be taken by the Court until an appropriate scheduling Order and Rule to Show Cause Order in proper form were presented. These were subsequently filed by Defendant on or about June 21, 1999. A Rule to Show Cause was issued on that date. A response to the Motion was filed 6/25/99. Defendant’s brief was filed 8/24/99. Plaintiff’s brief was filed 8/30/99 at the time argument was held. Neither party offered any testimony or other evidence in support of their respective positions.

Judge Brown's Order and also for Plaintiff's failure to pursue the matter for well over two years.

In her response to the Motion, Plaintiff admits no Amended Complaint was filed. However, Plaintiff attached an "Amended Complaint" to the response and requests leave of Court to file it, pursuant to Pa.R.C.P. No. 1033.²

Plaintiff argues that to grant a motion for *non pros*, there must first be a lack of due diligence on the plaintiff's part for failing to proceed with reasonable promptitude. Second, the plaintiff must have no compelling reason for the delay. Third, the delay must cause actual, rather than presumed, prejudice to the defendant. *Jacobs v. Halloran*, 710 A.2d 1098, 1103 (Pa. 1998) (emphasis in original). In *Jacobs*, the Pennsylvania Supreme Court announced a return to the use of these three requirements, originally set forth in *James Brothers Lumber Co. v. Union Banking and Trust Co.*, 247 A.2d 587 (Pa. 1968) and its progeny.

Plaintiff points out that the instant action concerns a breach of contract and the Statute of Limitations regarding contract actions is four (4) years. Plaintiff argues there is no prejudice to Defendant in allowing the late filing and as the action would simply be re-filed, leave to file the Amended Complaint should be granted "in the interest of the efficient administration of justice." Plaintiff's Response to Defendant's Motion for *Non Pros* paragraph 4.

In response to this argument, Defendant asserts that the first two of the *James Brothers/Jacobs* requirements are not established through Plaintiff's admissions without any

² Pa.R.C.P. No. 1033 states, in relevant part, that any party, by leave of court, may at any time amend a pleading.

explanation as to why an amended complaint was not filed within the time set by Judge Brown's Order. As to prejudice, the Defendant asserts either that prejudice does exist or that this third requirement is met as Plaintiff failed to comply with a Court Order. *See*, Brief of Defendant, 8/24/99, at pages 2 and 3. To assert prejudice, at oral argument Defendant stated a general prejudice would result because of the "general knowledge" that witnesses forget and witnesses today may be hard to find.

This latter assertion, concerning the matter of general prejudice because of difficulty in having witnesses remember and/or locating witnesses, is rejected outright by this Court. It is clear that actual prejudice must be suffered to warrant dismissal of an action. prejudice. No evidence or testimony supporting any specific, verifiable prejudice has been presented to this Court and this Court will not make any presumption in favor of Defendant in this regard. *Jacobs, supra* at 1102.

Defendant, however, also advances the contention that prejudice is demonstrated because Plaintiff has failed to comply with the Court Order of November 27, 1996, which allowed Plaintiff thirty days in which to file an amended complaint. Defendant relies upon the case of *Broglie v. Union Township*, 465 A.2d 2169 (Pa.Super. 1983). In *Broglie*, the Superior Court upheld a judgment of *non pros* where the plaintiff had failed to file an amended complaint by the date specified in a court order. The trial court had permitted the amended complaint to be filed after sustaining preliminary objections to the original complaint. The fact situation cannot be distinguished from the case before us. Here, the original complaint was filed on July 30, 1996 and Defendant's preliminary objections in the nature of a demurrer were filed on August 28, 1996. Judge Brown's Order sustaining the preliminary objections on

November 27, 1996 provided as follows: “. . . Defendant’s preliminary objections are GRANTED. However, Plaintiff is given thirty (30) days in which to file an amended complaint. . . .”

This Court must note that it questions whether the *Broglie* decision would still be followed by our appellate courts in light of the language of *Jacobs, supra*. In *Jacobs*, the Pennsylvania Supreme Court concluded that the presumption of prejudice due to a two-year time lapse of docket inactivity, established in *Penn Piping, Inc. v. Insurance Company of North America*, 529 Pa. 350, 603 A.2d 1006 (1992), must be abandoned because the presumption was “inconsistent with the well-established notion that the adversary must suffer harm before a case is dismissed for lack of prosecution.” *Jacobs* at 1102. The Supreme Court recognized that granting a judgment of *non pros* was based upon the equitable principle of *laches* and that *laches* does not involve the passage of a specific amount of time. Rather it is based upon prejudice. *See, Jacobs* at 1100-1102. The Court continued:

However, the rules concerning the dismissal of cases for inactivity reflect policy concerns which implicate the interest of both plaintiffs and defendants. It is unnecessary to presume prejudice because the defendant is free to present evidence of actual prejudice.

In cases where no activity has occurred for a period of two years, but *the defendant has not lost his ability to adequately prepare a defense, it serves no equitable purpose to dismiss the plaintiff’s case solely due to the passage of time.* There is no logical distinction between the harm caused to a defendant by the plaintiff’s delay of two years and the harm caused to a defendant by a delay of two years less one day.

Id. at 1102. This Court believes our appellate courts might well find the *Broglie* decision is not in keeping with the spirit of the *Jacobs* Opinion. However, in the instant Motion, Defendant

does request dismissal because of the Plaintiff's failure to comply with Judge Brown's Order setting a thirty-day time limit in which to file an amended complaint. Given the controlling nature of *Broglie*, upon which Defendant relies in its brief, we must reluctantly grant the request to issue a judgment of *non pros*, despite their being a lack of evidence establishing actual prejudice to the Defendant, because of Plaintiff's failure to comply with the time limits of Judge Brown's Order.³

While under *Broglie* we must enter a judgment of *non pros*, we decline to issue this judgment of *non pros* "with prejudice," as requested by Defendant. This decision, we believe, is in keeping with the principles established in *James Brothers* and *Jacobs*, which favor disputes being decided based on their merits in the absence of actual prejudice resulting from one party's omission in procedure.

It is also premature for this Court to determine whether this *non pros* is to the legal effect of making all matters between these parties *res judicata*. That issue of *res judicata*

³ The *Broglie* Court also specifically said:

If this case presented a situation where appellees had moved for a judgment of *non pros* on the theory that appellant had failed to prosecute the action with reasonable promptitude, we would concede the applicability of the criteria found in *James Brothers Lumber Co., supra. ...*

In the instant case, appellees did not seek a judgment of *non pros* on the ground that appellant had been dilatory in proceeding with the action but on the ground that appellant had failed to timely obey an order of court. *The distinction is significant.*

Broglie, supra, at 1271 (emphasis supplied). Here, Defendant has also raised at argument in its brief (at p. 2) that *non pros* is warranted because of Plaintiff's failure to proceed for over two years. Defendant sets forth the three conditions under *James Brothers, supra*, states the first two are present in this case, then relies on Plaintiff's non-compliance with an Order of Court to supply the third. Defendant's Brief in Support of Motion for *Non Pros* p. 2-3. As the Superior Court *Broglie* indicated, a party's noncompliance with an Order of Court is a consideration separate and distinct from a consideration whether the *James/Jacobs* criteria has been met. We do not hold that failure to comply with a Court Order is a fair substitute for actual prejudice.

has not been argued by Defendant. However, Plaintiff's brief cites cases which would seem to establish that this Order, being entered without designating that it is with prejudice, does not bar Plaintiff from instituting a new action. *See*, Brief of Plaintiff, p. 5.

Although that issue is not before the Court, what is before the Court at this time is whether there is any reason to warrant this Court stating the *non pros* is entered "with prejudice." In order to issue a judgment of *non pros* with prejudice, this Court believes it would have to apply the same equitable standards and principles as were applied by the *James Brothers* Court and approved recently by the Supreme Court in *Jacobs*. However, the parties have failed to introduce any evidence regarding these principles in this case. No evidence whatsoever has been introduced by either party to show why the amended complaint was not timely filed. This Court will not speculate as to whether there was due diligence, any reasonable or compelling excuse for the delay, or whether the Defendant is actually prejudiced. We will not make any presumptions, nor issue an Order dismissing the case with prejudice, without an appropriate supporting evidentiary record.⁴ Accordingly, the following Order is entered.

⁴ Plaintiff raises the argument that as Plaintiff is entitled to file a new action because the Statute of Limitations has not expired, dismissal of the current action would not be efficient judicial administration. This matter has been on the dockets and not disposed of for over three years. It is, in fact, still at the pleading stage, with no trial dates having been set. This Court's enunciated case processing guidelines would have brought this case to trial within 12-18 months of the time of filing of the complaint. *See*, Lyc. Co. C.R. L1007.A.8.b. There is a need for this Court to maintain current and appropriate docket activity. In addition, it is not clear that dismissal of this current action will necessarily result in a new suit being filed. The parties at this time recognize that each is interested in the disposition of Plaintiff's underlying insurance claim. Perhaps new and appropriate investigation, given Plaintiff's new counsel, may result in the claim being settled, or referred to arbitration or mediation rather than a new lawsuit. Regardless, any new case that is filed will be processed under this Court's rules, assuring timely disposition of actions of this type.

ORDER

AND NOW, this 25th day of October 1999, Defendant's Motion for *Non Pros* is
GRANTED.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
Richard A. Gahr, Esquire
Charles L. Yost, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)