

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HAAS PUBLISHING,)	
)	
Plaintiff/Appellant,)	
)	
v.)	C.A. No.: 06-08-132
)	
APARTMENT COMMUNITIES)	
d/b/a HARBOR HOUSE, ET AL.,)	
)	
Defendant/Appellee.)	

Submitted: September 25, 2007
Decided: October 26, 2007

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ORDER
ON PLAINTIFF/APPELLANT'S APPEAL FROM DENIAL
OF MOTION TO VACATE NON-SUIT

Plaintiff/Appellant Haas Publishing (hereinafter "Haas"), brings this appeal from a Justice of the Peace Court decision denying its motion to vacate a non-suit judgment entered against it, for failure of Haas to appear for trial.

FACTS

The facts indicate that Haas brought suit against Apartment Communities d/b/a Harbor House, *et al.* (hereinafter "Apartment Communities") on or about March 6, 2006, alleging a debt owed for advertising services. Apartment Communities timely responded to the complaint on April 4, 2006 and entered appearance on behalf of all defendants and

demand a Bill of Particulars. Trial was thereafter scheduled for May 3, 2006. Both parties were given both written and verbal notification of the trial date. Notwithstanding, on May 3, 2006, neither Haas nor his counsel appeared for trial. The Court entered a non-suit judgment against Haas. Haas thereafter on May 16, 2006 filed a motion to vacate the non-suit judgment, alleging excusable neglect. A hearing was held on the motion May 26, 2006.

At the hearing, counsel stated he was without a secretary to assist him in scheduling matters and he inadvertently left the trial date off his calendar. He further argued the parties in this matter were involved in negotiations to resolve the claims when he realized that the hearing had been missed and a non-suit judgment entered.

The Court observed at the hearing that Apartment Communities moved on the day of trial to dismiss the proceedings for failure of Haas to respond to the Bill of Particulars. Relying on the failure to respond to the Bill of Particulars and failure of Haas to appear for trial, the Court in a written opinion on July 21, 2006 denied the motion to vacate the non-suit.

DISCUSSION

An appeal from a denial of a motion to vacate a non-suit judgment, does not bring the matter to this court for a trial *de novo* but only brings for review the Magistrate's Order denying the motion to vacate. *Ney v. Polite*, Del. Supr., 399 A.2d. 527, 529 (1979). Therefore, this Court's review is limited to whether the Magistrate abused its discretion when denying the motion. When determining whether a Court has abused its discretion, the standard is as follows:

“The essence of judicial discretion is the existence of judgment by conscience and reason, as opposed to capricious arbitrary action and where a Court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law of practice, so as to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing Court agrees with the Court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could have reasonably reached the conclusion of which complaint is made.” *Pitts v. White*, 109 A.2d 786 (Del.Super. 1954).

The Justice of the Peace Court concluded in its order of July 12, 2006, that the failure of Haas’ counsel to place on his calendar the trial date after notice and failing to respond to Apartment Communities’ demand for a Bill of Particulars, did not rise to the level which could be considered excusable neglect. When considering a motion on the basis of excusable neglect, the Court must analyze the facts of the proceeding and the merits of the argument. In *Sanders v. CC&H, et al.*, 2006 WL 274337 (Del. Super.), Jurden, J. held:

“Excusable neglect is neglect which might have been the act of a reasonably prudent person under the circumstances. Carelessness and negligence are not necessarily excusable neglect . . . mere showing of negligence or carelessness without a valid reason may be deemed insufficient. Moreover, ‘negligence’ may be so gross as to amount to sheer indifference; to open and vacate judgment upon such excuse would cease to give meaning to the words excusable neglect.”

In these proceedings, the failure of counsel to have a secretary as a basis for failure to appear for trial cannot support a finding of excusable neglect. This goes to the issue of office and workload management. To merely argue that he failed to appear because he had no secretary, without more, shows indifference and failure to undertake

actions to prevent missed appointments. The record is void of any actions taken to ensure all matters were properly addressed. Thus, the question becomes, were his actions reasonable given the attendant circumstances. Surely, one cannot so conclude.

This case is distinguishable from *Tim & Associates v. Moller*, in which this Court vacated a non-suit judgment entered by the Justice of the Peace Court. In that case, the Magistrate entered a non-suit judgment where the corporate president did not appear for trial because he failed to place it on his calendar, but the corporation's attorney was present. On appeal, this Court held a non-suit judgment was not the appropriate remedy because the corporation's attorney could have presented the testimony of one of the Defendants, and thereby overcome any prejudice. In these proceedings Plaintiff *nor* Plaintiff's counsel appeared for trial.

These proceedings are more similar to those found in *B. Doherty, Inc. v. Chalfant*, C.A. No. 2004-01-274 Smalls, C.J., CCP (October 18, 2006). There, the Court denied a motion for retrial. The movant alleged he was late for trial because his electronic calendar had malfunctioned, which had begun occurring two weeks before trial. There, the Court concluded that a reasonable person would have taken additional steps to determine if there were pending matters. Here, Haas' counsel should have taken additional steps to ensure he was aware of all scheduled matters in light of his limited staff.

The Justice of the Peace Court in deciding the motion considered Haas' arguments when applying the standard under Justice of the Peace Court *Civil Rule 60*. The Court did not find persuasive Haas' argument that his office problems rose to the

level of excusable neglect. This conclusion was the product of an analysis based upon the facts and the Court Rules. Therefore, I find no abuse of discretion.

For the foregoing reasons, Plaintiff Haas' Motion to Vacate the Default Judgment is Denied and the judgment below is hereby AFFIRMED.

IT IS SO ORDERED this 26th Day of October

Alex J. Smalls
Chief Judge

Haas-OP Oct 07