NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MIGDALIA AND LUIS SANTIAGO, W/H FOR THE USE OF CHRISTINE C. SHUBERT, TRUSTEE BANKRUPTCY COURT ESTATE OF MIGDALIA AND LUIS SANTIAGO Appellants v. DSWA, INC., INDIVIDUALLY AND T/A WARFEL CONSTRUCTION COMPANY, WARCON, INC, INDIVIDUALLY AND T/A WARFEL CONSTRUCTION COMPANY, EDWIN L. HEIM COMPANY Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 817 MDA 2012

Appeal from the Judgment Entered June 28, 2012
In the Court of Common Pleas of Lancaster County
Civil Division at No(s): CI-08-01618

BEFORE: BOWES, J., OLSON, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED MAY 06, 2013**

Christine C. Schubert, Trustee of the bankruptcy estate of Migdalia and Luis Santiago, and original plaintiffs Migdalia and Luis Santiago (collectively "Appellants") appeal from the March 30, 2012 order denying their motion for post-trial relief.[1] That order affirmed the nonsuit entered against Appellants

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[1] While Appellants purport to appeal from the order denying their post-trial motions, their appeals actually lie from the entry of judgment. ***Billig v. Skvarla***, 853 A.2d 1042, 1048 (Pa. Super. 2004) ("[I]n a case where nonsuit was entered, the appeal properly lies from the judgment entered after denial of a motion to remove nonsuit."). Here, judgment was entered
(Footnote Continued Next Page)

upon the motion of DSWA, Inc., Warcon, Inc., and Edwin L. Heim Company (collectively "Appellees"). We affirm.

The trial court summarized the factual and procedural history as follows:

> The original Plaintiff Migdalia Santiago slipped on a wet area at her place of employment, QVC, and was injured. She did receive workers' compensation but brought this action against [Appellees,] who were involved in a construction project at QVC. The allegation is that workmen from one or more of the [Appellees] tracked in snow and ice and it melted inside causing Plaintiff to slip and fall.
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> There was considerable pre-trial litigation prior to the [trial court's] decision on February 6, 2012. The first was the granting of a Motion for Partial Summary Judgment by [Appellees] on March 8, 2010 limiting damages to be sought by barring the Plaintiff from seeking damages for any claims that manifested after August 6, 2007.
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> The next significant issue arose just before trial was about to commence in December of 2010. The original Plaintiffs had recently been discharged in bankruptcy and had failed to list this lawsuit as an asset in their petition. Consequently, [Appellees] filed a Motion for Summary Judgment on the grounds of judicial estoppel.
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> On January 20, 2011, the [trial court] issued an order staying the disposition of the Summary Judgment Motion at Plaintiff's attorney[']s request so he could petition the Bankruptcy Court to reopen the estate so that the trustee would [be] substituted as Plaintiff and counsel would be special counsel to the trustee.

(Footnote Continued) ———————————

on June 28, 2012. When judgment is entered during the pendency of the appeal, it is sufficient to perfect our jurisdiction. ***Hart v. Arnold***, 884 A.2d 316, 325 n.2 (Pa. Super. 2005).

> This was done and on June 11, 2011[, the trial court] issued an order substituting the trustee, Christine C. Shubert as Plaintiff.
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> At the same time the [trial court] ordered the parties to brief the judicial estoppel issue raised in [Appellees'] Motion for Summary Judgment. On October 2, 2011, [the trial court] denied the Motion without prejudice and ruled [t]hat in the event that the Plaintiff's recovery money damages from [Appellees] in excess of the amount necessary to satisfy all of the creditors[, Appellees] may invoke judicial estoppel at that time to limit the recovery to only that amount.
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> During this entire period the Plaintiffs were represented by Craig Robinson, Esquire of the law firm of Weinstein, Schifler [*sic*], & Kupersmith, P.C. On February 6, 2012, the case was called for trial, and a panel of jurors was called in for the case. Craig Robinson did not appear, instead Dary [*sic*] L[.] Sater of the firm appeared. Mr. Sater requested a continuance stating he was unprepared and explaining that there were problems regarding Craig Robinson. [Appellees] opposed the request for continuance.

Trial Court Opinion ("T.C.O."), 6/25/2012, at 1-2 (unpaginated).

Appellees moved for a nonsuit, which the trial court granted. Appellants filed a motion for post-trial relief, which was denied. This appeal followed.

On May 18, 2012, Appellants filed their concise statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b). The trial court filed its opinion on June 25, 2012, pursuant to Pa.R.A.P. 1925(a).

Appellants raise one issue for our review:

> Did the trial court abuse its discretion and err as a matter of law entering a non-suit and in denying plaintiff's motion for post-trial relief to vacate the entry of non-suit on the basis that plaintiff's counsel was present at the call of trial with witnesses and ready, willing and able to proceed despite counsel's request for a continuance?

Appellants' Brief at 4.

In reviewing the trial court's decision to enter a nonsuit, "our inquiry must focus on whether the trial court's decision to grant a nonsuit was a proper exercise of discretion based on all facts of the case." ***Jamison v. Johnson***, 762 A.2d 1094, 1097 (Pa. Super. 2000).

At issue is the trial court's entry of nonsuit pursuant to Rule 218. That rule 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.
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> * * *
>
> (c) A party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse.

Pa.R.C.P. No. 218.

In the instant case, the Trustee was not present at trial. "[A] party is 'ready for trial' if counsel representing that party is in court ready to proceed, even if the party is not present in person." ***Freidhoff v. Bd. of Sch. Directors of Conemaugh Valley Sch. Dist.***, 586 A.2d 1038, 1042 (Pa. Cmwlth. 1991). Therefore, the absence of the Trustee is not determinative as to whether the Appellants were "ready for trial," particularly because Migdalia and Luis Santiago and counsel for Appellants were present. The issue under Rule 218(a) is whether Appellants were ready for trial, or provided a satisfactory excuse as to why they were not prepared.

"The law is clear that a satisfactory excuse must be an excuse that would constitute a valid ground for a continuance. Examples of valid grounds are an 'agreement of counsel; illness of counsel, a party, or a material witness; inability to maintain the testimony of an absent witness by means of discovery; or such other grounds as may be allowed by the court.'" ***Manack v. Sandlin***, 812 A.2d 676, 681 (Pa. Super. 2002) (citations omitted).

Appellants argue that, because counsel appeared, the trial court erred in entering a nonsuit. Appellants contend that, despite requesting a continuance, counsel was prepared to proceed to trial and had witnesses and documentary evidence available. Appellants' Brief at 9-10.

Each of the Appellees filed a separate brief. Each of them makes essentially the same argument: that the record does not support Appellants' claim of readiness. Appellees maintain that Appellants' counsel never stated that he was prepared to proceed on the day of trial, nor did he provide a satisfactory excuse and, that the trial court properly granted Appellees' motion for nonsuit pursuant to Rule 218.

The trial court granted the nonsuit because Appellants were not prepared to proceed. It found that the delay was caused by Appellants, and that this was the second time that the trial was unduly delayed by Appellants' actions. T.C.O. at 3. The trial court also found that Appellants should have been aware of a problem with Attorney Robinson, since one of Appellees' lawyers repeatedly had called Attorney Robinson's law office in

the week leading up to the trial and had spoken with a staff member approximately fourteen times during that week. ***Id.*** The trial court explicitly found that the firm should have known that there was an issue and simply did not act upon that knowledge promptly. T.C.O. at 4.

The record supports the trial court's decision. It does not support Appellants' claim that counsel was ready and willing to proceed to trial. As he had just inherited the case and had just met Appellants, Mr. Sater requested a continuance. Notes of Testimony ("N.T."), 2/6/2012, at 3. Attorney Sater specifically requested the continuance so he could "properly prepare the case, to try it properly and confer with Ms. Santiago." ***Id.*** Attorney Sater also averred that, from the case file, "nothing has been done in the file in what looks to be like a year." ***Id.*** The trial judge then asked if Ms. Santiago was present for the trial. Attorney Sater replied:

> The actual plaintiff isn't here, the trustee of the bankruptcy. That, and considering there are multiple depositions in this case, and the first time I'd spoken to Mrs. Santiago was Sunday night around 3:30, 4:00, and this morning was the first time I met her, in order for me to effectively represent her interests and the interests of the bankruptcy trustees, I feel that I need more time then [*sic*] what I have.

N.T. at 4. After counsel for Appellees opposed the continuance and moved for nonsuit, Attorney Sater requested a rule to show cause hearing "as to why the case should not be non-suited. At that point, I would have a better understanding of the case and be able to oppose that or do something with the case." N.T. at 6. He also stated that "to go forward or to grant a

nonsuit, would not be in the interests of justice." ***Id.*** In denying Appellants' motion for a continuance, the trial judge stated, "everybody here is ready to go except for you. You don't have the plaintiff here. I know you are not prepared to try this case." N.T. at 7.

From the record, it is clear that Appellants' counsel was not prepared to proceed. Attorney Sater never once said he would or could proceed. The fact that he averred "nothing has been done in the file in what looks to be like a year" belies Appellants' claim in their brief that witnesses and documentary evidence were ready on the date of trial. When the trial court denied the motion for continuance and granted nonsuit, Attorney Sater did not claim that he could proceed to trial. There simply is no indication in the record that Appellants were ready and willing to proceed to trial.

The trial court considered that this was the second time Appellants caused the trial to be delayed, that Appellants were unable to proceed, and that the law firm representing Appellants should have been aware that there were potential problems with Attorney Robinson's representation. These considerations are supported by the record. We are unable to find an abuse of discretion in the trial court's decision to grant Appellees' motion for nonsuit.

Judgment affirmed. Jurisdiction relinquished.

Judgment Entered.

Mary A. Hrabell

Deputy Prothonotary

Date: 5/6/2013