

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GWENDOLYN RICHARDSON,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 98-708
v.	:	
	:	
COMCAST SPECTACOR, L.P. and	:	
PHILADELPHIA 76ers, L.P.,	:	
formerly known as PHILADELPHIA	:	
76ers BASKETBALL CLUB, INC.,	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

November 18, 1999

On November 16, 1999, the time scheduled for trial of this case, plaintiff's counsel announced he was not ready to proceed with trial. In response, defense counsel stated that she was prepared for trial and moved for involuntary dismissal under Federal Rule of Civil Procedure 41(b) "for failure of plaintiff to prosecute or to comply with these rules or any order of court."

**I. BACKGROUND**

The complaint in this case was filed on February 11, 1998. On May 20, 1998, Judge Gawthrop signed an order directing that discovery be completed by August 14, 1998; any summary judgment motion be filed within 10 days thereafter; and the case be placed in the October 2, 1998 trial pool. On the same date, Judge Gawthrop

referred the case to Chief Magistrate Judge James R. Melinson “to explore the possibility of settlement.” Such conferences were held on May 18, 1998 and on June 24, 1998, but the parties were unable to reach an agreement.

Thereafter, on August 14, 1998, upon defendants’ motion to compel answers to discovery and extend deadlines, Judge Gawthrop amended the May 20, 1998 order by, *inter alia*, extending the discovery deadline to October 20, 1998 and the trial pool date until December 2, 1998.

On September 25, 1998, Stacy L. Schwartz, Esquire and Philip L. Blackman, Esquire, entered their appearance on behalf of plaintiff, ultimately replacing Nancy L. Goldstein, Esquire of Anapol, Schwartz, Weiss & Cohan, P.C., who had filed the complaint on behalf of plaintiff.

Subsequently, Judge Gawthrop by order filed October 8, 1998, pursuant to a stipulation of the parties, extended the discovery deadline until December 21, 1998 and the trial pool date to February 1, 1999. That order also provided that summary judgment motions shall be filed within 10 days of the end of the discovery period. Defendants filed its motion for summary judgment on December 31, 1998.

On January 14, 1999, upon motion of plaintiff, Judge Gawthrop granted plaintiff a seven-day extension until January 26, 1999 to file her brief in opposition. Plaintiff timely filed her brief and defendants filed a reply to it on February 4, 1999.

The docket reflects that on January 15, 1999 trial was set for March 8, 1999 and that on February 8, 1999, trial was rescheduled for May 3, 1999, both times by Christopher Campoli, Courtroom Deputy for Judge Gawthrop. Trial was not held on these dates.

On April 16, 1999, Judge Gawthrop denied in part and granted in part defendants' motion for summary judgment. The case was clearly ready for trial at this point, except for the disposition of defendants' second motion for sanctions filed April 15, 1999 requesting that plaintiff's claims be dismissed because her pretrial memorandum, due on or before December 31, 1998, had not yet been filed although defendants had timely filed its pretrial memorandum on January 8, 1999. In response, plaintiff's counsel admitted his inadvertent failure to timely file the pretrial memorandum and immediately did so on April 20, 1999.

In classic Gawthropian style, the following order was issued by the good judge:

AND NOW, this 21st day of May, 1999, upon consideration of Defendants' Second Motion for Sanctions and supporting memorandum, Defendants' Motion is DENIED, as paranoid overkill. To toss a case because a pre-trial memorandum has not been filed, while still months in advance of the trial date, would really be to stand justice on its head, a Pecksniffian exaltation of form over substance. Another motion like this, and I will award sanctions -- the other way.

It is not clear from the record, but it appears that plaintiff's counsel was of the belief that the new trial date was August 8, 1999. In any event, on July 9, 1999,

plaintiff's counsel, Schwartz & Blackman, filed a petition to withdraw as counsel, stating that counsel and client had reached an impasse as to the handling of the case and that plaintiff wanted to obtain new counsel.<sup>1</sup> This petition was granted by order of Judge Padova on July 21, 1999. On the day prior to that, plaintiff's counsel requested a continuance of the trial scheduled for August 8, 1999 because of his pending motion to withdraw.

In an order filed on July 30, 1999 and inaccurately dated August 29, 1999, Judge Robert Kelly, as emergency judge for Judge Gawthrop, denied the motion as moot, "the case not yet having been scheduled for trial."

Judge Gawthrop died on August 1, 1999, and the case was assigned to my calendar on August 9, 1999. On September 9, 1999, the case was scheduled for trial for November 16, 1999.

On October 28, 1999, Frank Finch, III, Esquire, entered his appearance on behalf of plaintiff, and the following day, filed a motion for continuance of the trial and for order reopening discovery and granting leave to file an amended pretrial memorandum.

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1. The petition also included the following representations by counsel:

3. Further, irreconcilable differences have arisen between petitioners and plaintiff concerning the merits of plaintiff's case and how to best proceed which has made it necessary for petitioners to seek leave from the Court to withdraw as counsel.

4. Plaintiff insists upon pursuing objectives that petitioners consider imprudent.

5. Plaintiff has indicated that she wants to obtain new counsel and is in the process of seeking new counsel who will proceed in the manner that plaintiff wishes, as opposed to the manner in which petitioners would proceed.

After receipt of defendants' reply motion and consideration of both parties' argument, by order dated November 10, 1999, I denied plaintiff's motion.

Counsel for both parties in response to a question of the court on November 16, 1999, said that the briefs already submitted with respect to the motion to continue constitute their respective reasons for or against the granting of defendants' motion to dismiss.

## **II. LAW**

The six factors stated in Poulis v. State Farm Fire and Casualty Company, 747 F.2d 863 (1984) must be balanced by a trial court in determining whether the drastic sanction of dismissal with prejudice should be granted or denied.

### **1. The extent of the party's personal responsibility.**

The record supports my conclusion that the present predicament plaintiff finds herself in has resulted from her own personal decisions. She may indeed have been dissatisfied with her prior attorney for his failure, in her mind, to effectively pursue the case. She had the absolute right to dismiss counsel, but it does not follow that she can then necessarily avoid the consequences of her prior counsels' conduct. Poulis at 868, *citing* Link v. Wabash, 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962).

At the time of making an affidavit in connection with her opposition to defendants' summary judgment motion, plaintiff was 29 years old. She had earned a bachelor's degree in sociology from Messiah College in May of 1992 and earned some

graduate credits at Temple University. She was previously employed by the Philadelphia Zoological Society and worked for defendants for approximately three years (October 1993 to October, 1996). Since her termination, she has worked as a marketing consultant for Christian Research and Development, and Janoion, Inc., an Internet constructing company. She has held sales or promotion positions with New Vision International (health products) and General Mills in addition to working in numerous television commercials and industrial videos. As of January, 1999, she was employed as an advertising executive for Christian Research and Development. In short, though relatively young, plaintiff has a high level of formal education and career experience which certainly has equipped her to make decisions of importance in her own life in a knowledgeable and meaningful way.

To suggest that somehow she is not responsible for what has transpired to date in this litigation because her lawyers' performance was not to her satisfaction overlooks the fact that she was free to select, retain or release counsel at any time. The longer she waited to make that decision the greater the impact on the second Poullis factor.

## **2. Prejudice to the adversary.**

In this case, the scheduling orders of Judge Gawthrop as amended ultimately reached the point where discovery was closed, pretrial memorandums filed and a lengthy dispositive motion briefed and decided. The next step, normally, is the trial itself. But now, plaintiff wants still another opportunity for more discovery which could generate more pretrial motions and require new pretrial memorandums. This will be very expensive for defendant who has complied with all deadlines timely, has prepared for trial, and now will face significant expense if discovery was reopened.

## **3. A history of dilatoriness.**

There is no pattern of dilatoriness that would reflect adversely on plaintiff in this case.

## **4. Whether conduct of the party was willful or in bad faith.**

Certainly the conduct of plaintiff in placing herself in a position where she had no counsel representing her was willful on her part. Whether there was bad faith in her waiting until three weeks before a trial date she had known about at least two months before the trial date is hard to evaluate. Because of her background and obvious attention to this case as witnessed, for example, by her extensive affidavit in opposition to defendants' summary judgment motion, I believe she could have acted sooner in attending to this case. While she acted willfully, I cannot find bad faith on her part.

## **5. Alternate sanction.**

The alternate sanction which I thought was appropriate was for plaintiff to proceed to trial without additional discovery. She had a lot of evidence to present and it was clear that she could have put defendant to the burden of going forward with evidence to attempt to show that its stated reason for dismissing her was not a mere pretext. Instead of taking this course of action, and of course preserving the right to appeal all pretrial decisions including my order denying the continuance and reopening of discovery, plaintiff elected simply not to proceed. My sanction would have struck a fair balance between the two choices, each of which had elements of unfairness; i.e., it is unfair to the diligent defendant to in effect start all over again with discovery and pretrial motion practice. It is also unfair to plaintiff to deny her a trial. I thought my alternate solution, based on what had already taken place in this case, was a fair compromise.

Upon consideration of other alternative sanctions, there are ones certainly that are less drastic than dismissal. They include monetary sanctions in an amount to pay in part the extra fees to be incurred by the defendants, or the reopening of discovery in a limited way both as to time and scope, or a combination of those two. It is probable that in light of plaintiff's present salary, significant monetary sanctions is not an option. Limited discovery, then, still results in a loss to the diligent party.

## **6. Meritoriousness of the claim.**

In Poulis, it was stated that a claim would be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by the plaintiff. By that standard, the claim here is meritorious.

## **III. CONCLUSION**

Balancing the Poulis factors, which come out close to 50-50, as well as the totality of circumstances, which includes the passing of our greatly admired colleague, Judge Gawthrop, and the unknown effect his last illness might have had on the processing of this case, I conclude that the motion to dismiss must be denied.

An order follows.

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formerly known as PHILADELPHIA	:	
76ers BASKETBALL CLUB, INC.,	:	
Defendants.	:	

**ORDER**

AND NOW, this 18th day of November, 1999, it is hereby ORDERED that defendants' Motion to Dismiss Under 41(b) is DENIED.

A STATUS CONFERENCE is scheduled for Wednesday, December 1, 1999 at 9:00 a.m. in the chambers of the undersigned.

Topics to be discussed will be the scope and timing of discovery and the appropriateness and amount of monetary sanctions.

BY THE COURT:

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RONALD L. BUCKWALTER, J.