

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

FIA CARD SERVICES, N.A.,
Plaintiff

vs.

DARLENE L. KUNKEL,
Defendant

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:
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No. 11-2754

David J. Apothaker, Esquire
Lisa Cincilla, Esquire
Seth E. Miller, Esquire

Counsel for Plaintiff
Counsel for Plaintiff
Counsel for Defendant

BY:

CARBON COUNTY
PROTHONOTARY

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FILED

Matika, J. - September 28, 2012

MEMORANDUM OPINION

When a party and its attorney fails to show for their day in Court, are they entitled to another day in Court where their failure to appear the first time was due to a claim of an inadvertent mis-calendaring of that event? That is the question posed to this Court by the Plaintiff, FIA Card Services, N.A.

FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2011, Plaintiff, FIA Card Services, N.A. (hereinafter "FIA"), filed an action against the Defendant, Darlene L. Kunkel (hereinafter "Kunkel"), alleging that Defendant owed monies as a result of a default in the payment of a credit card debt.

On March 15, 2012, the Prothonotary's Office mailed a Notice of Arbitration to the Arbitrators and Attorneys of record, including David J. Apothaker, Esquire, counsel of record for FIA.¹ This notice set aside May 1, 2012, as the date for the Arbitration. This notice also included the following:

Pursuant to Local Rule 1303:

1. The matter will be heard by a board of arbitrators at the time, date and place specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to trial de novo on appeal from a decision entered by the judge.

On that day, May 1, 2012, the Arbitrators along with counsel for Kunkel appeared. Neither counsel for FIA nor a representative of FIA appeared. Appropriately, and in accordance with Local Rule 1303, Kunkel's counsel requested that this matter be heard before this Court. A non-jury trial was commenced, where, upon the motion of Kunkel's counsel, a judgment of compulsory nonsuit was granted.

On May 2, 2012, the Prothonotary's Office mailed a copy of the Order for compulsory nonsuit to the attorneys for the respective parties, including Attorney Apothaker's Office.² Notice of the nonsuit was received in Attorney Apothaker's

¹ FIA Card Services, N.A., v. Kunkel, No. 11-2754 (Pa.Com.Pl. filed Nov. 17, 2011).

² FIA Card Services, N.A., v. Kunkel, No. 11-2754 (Pa.Com.Pl. filed Nov. 17, 2011).

Office on May 7, 2012.³ Subsequently on May 16, 2012, FIA's counsel filed a "Motion to Remove Nonsuit." The basis for this request was the fact that FIA believes that it "pleaded a clear cause of action in its Complaint and provided supporting documentation pursuant to Pa.R.C.P. 1305," and accordingly, removal of the nonsuit is appropriate. Argument was heard on September 18, 2012, and this matter is now ripe for disposition.

LEGAL DISCUSSION

Pa.R.C.P. 227.1 outlines the procedure to follow for the filing of post-trial relief. Included in the possible filings of a party is a motion to remove a nonsuit.⁴ As with any post-trial relief sought by a party, there are preservation and timeliness issues, each of which need to be discussed here first.

Pa.R.C.P. 227.1(b) states that post-trial relief may not be granted if the grounds therefore were neither raised nor preserved pretrial or during trial unless the grounds are not available. The Court finds that the grounds upon which Plaintiff's post-trial motion is based were not available at the non-jury trial due to the absence of FIA's counsel, as said

³ While the record itself does not provide any evidentiary support for this claim of when FIA's counsel received the notice of nonsuit, this Court has no reason to doubt counsel's representations in this regard.

⁴ Pa.R.C.P. 227.1(a).

absence caused the nonsuit to be entered in the first instance.

Pa.R.C.P. 227.1(c) states in relevant part:

(c) Post-trial motions shall be filed within ten days after:

(2) notice of nonsuit or the filing of the decision in the case of a trial without jury.

Pa.R.C.P. 227.1(c)(2).

The next issue before the Court is whether a post-trial motion is timely filed where the Court entered a motion for nonsuit on May 1, 2012, notice of nonsuit was mailed by the Prothonotary on May 2, 2012, and "received" by FIA's counsel on May 7, 2012, but the post-trial motion was not filed until May 16, 2012, some fourteen (14) days after Prothonotary mailed notice of nonsuit to counsel. The Court must first determine what date, May 2, 2012, or May 7, 2012, triggers the ten (10) day period that counsel has to file post-trial motions.

In *Carr v. Downing*, 565 A.2d 181 (Pa. Super. 1989), appeal denied, 592 A.2d 1296 (Pa. 1991), the Superior Court recognized that Pa.R.C.P. 227.1(a)(2) requires that post-trial motions be filed within ten days following "the filing of the decision or adjudication in the case of a trial without jury." *Id.* at 182. In the case at bar, the filing of the decision, namely the entry of nonsuit, is time stamped with the same date it was mailed to FIA's counsel, that being May 2, 2012. This date, not the date of May 7, 2012 when notice of the nonsuit was received by FIA's

counsel, is the date the Court must utilize in determining when the ten (10) day period to file post-trial motions began to run. Therefore, May 12, 2012, would be the tenth day Plaintiff had to file any post-trial motions; however, since that date was a Saturday, FIA would have until May 14, 2012, the following Monday, to file any motions. Since Plaintiff's post-trial motion was not filed until May 16, 2012, it is deemed untimely. Consequently, the post-trial motion must be DENIED.⁵

⁵ Notwithstanding the Court's denial of the post-trial motion on the timeliness issue, had the motion in fact been timely, the Court would be constrained to deny it on other grounds. The reason given for failing to appear at the Arbitration and Non-Jury Trial was due to the "inadvertent mis-calendaring" of this matter on FIA's counsel's calendar. This cannot be considered a satisfactory excuse for purposes of explaining counsel's absence and thus justifying the removal of the nonsuit. A satisfactory excuse is one which would constitute a valid ground for continuance. See, *Reyer v. Marvin E. Kanze, Inc.*, 70 Pa. D. & C.4th 170 (Com.Pl. 2005); *Dublin Sportswear v. Charlett*, 403 A.2d 568 (Pa. 1979); *Sheppard Corporation v. City of Philadelphia*, 509 A.2d 1371 (Pa. 1986). An "after the fact" excuse, such as mis-calendaring, is not a valid ground for a continuance.

Additionally, FIA argues that it has a clear cause of action as outlined in the Complaint and accompanying Pa.R.C.P. 1305 documentation forwarded to Kunkel's counsel and therefore, the nonsuit should be removed for this reason as well. FIA relies upon *Wu v. Spence*, 605 A.2d 395 (Pa. Super. 1992), to support the argument that the Court is required to remove the nonsuit where the evidence supports the claim. FIA's reliance on this case is misplaced. Since FIA did not appear, no "evidence" was presented at the Non-Jury Trial and therefore, the nonsuit is justified, as without any evidence presented, a clear cause of action has not been established.

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Counsel for Plaintiff
Counsel for Plaintiff
Counsel for Defendant

CARBON COUNTY
PROTHONOTARY

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ORDER

AND NOW, this 28th day of September, 2012, upon consideration of Plaintiff's Post-Trial Motion, and the briefs and arguments of both parties, it is hereby ORDERED and DECREED that the Post-Trial Motion is DENIED and DISMISSED for the reasons stated in the accompanying Opinion.

BY THE COURT:


Joseph J. Matika, Judge