

4/2/2005

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 02-01159-A

MARCIA RHODES, HAROLD RHODES,
INDIVIDUALLY, HAROLD RHODES,
ON BEHALF OF HIS MINOR CHILD
AND NEXT FRIEND, REBECCA RHODES,

Plaintiffs,

v.

CARLO ZALEWSKI, DRIVER LOGISTICS,
PENSKE TRUCK LEASING CORP., and
GAF BUILDING MATERIALS CORP.

Defendants.

MOTION TO DISMISS APPEAL FOR LACK OF PROSECUTION

Plaintiff Marcia Rhodes suffered catastrophic injuries and is permanently paralyzed as the result of a rear end collision that occurred over three years ago. Defendants refused to settle the case despite stipulating to liability, forced the plaintiffs to go to trial, and now are dragging their feet in prosecuting the appeal. Therefore, pursuant to Mass. R. App. P. 10(c), the Plaintiffs move to dismiss the appeal for lack of prosecution.

I. Relevant Background

On January 9, 2002, the Plaintiff, Marcia Rhodes was injured in a rear-end collision. Mrs. Rhodes suffered catastrophic injuries and is permanently paralyzed. On July 12, 2002, Plaintiffs filed this suit. For the next two years, the Plaintiffs were forced to vigorously litigate this matter. The week before trial, the Defendants, with the exception of Penske Truck Leasing

Corporation (“Penske”), admitted to liability. Trial commenced on September 7, 2004 on the issue of damages. The plaintiffs ultimately dismissed their claims against Penske. On September 15, 2004, Plaintiffs received a jury verdict against the remaining defendants for \$9,412,000 with \$7,412,000 awarded to Marcia Rhodes, \$1,500,000 awarded to Harold Rhodes, and \$500,000 awarded to Rebecca Rhodes.

On October 26, 2004, Defendants Carlo Zalewski and Driver Logistics filed their notice of appeal and requested a transcript of the proceedings on November 9, 2004. On November 22, 2004, almost a month after Defendants’ notice of appeal, Defendants Zalewski and Driver Logistics filed a certified statement indicating that they had ordered the relevant portions from the court reporter. Defendant GAF Building Materials Corp. (“GAF”) also filed a notice for appeal and filed a certification statement. More than six months later, the transcript has not been prepared. The failure of the Defendants to produce the transcript within a reasonable time has been caused by their inexcusable neglect.

II. Argument

Pursuant to Mass. R. App. P. 9(c)(2), Defendants Zalewski and Driver Logistics were required to deliver to the clerk of the lower court, within 10 days of the Notice of Appeal, a signed statement certifying that they had ordered such portions of the transcript necessary for the appeal. Defendants Zalewski and Driver Logistics did file such a certification, but did so approximately twenty days after the deadline established by the rules. Noncompliance with Rule 9(c) is “to be regarded as a serious misstep not a relatively innocuous one, the appropriate remedy or penalty for which is presumptively dismissal of the appeal.” Vyskocil v. Vyskocil, 376 Mass. 137, 140 (1978) (internal quotations omitted).

The trial transcript was requested by Defendants in November 2004. Since that time, not one of the Defendants have attempted to facilitate or expedite the preparation of the transcript. The actions of Defendants amount to inexcusable neglect. It has been more than six months since the Court denied the defendants' motion for new trial, and the Rhodes family is no closer to achieving finality on their judgment than they were six months ago.

Pursuant to Mass. R. App. P. 10(c), "if any appellant in a civil case shall fail to comply with Rule 9(c) or Rule 10(a)(1) or (3), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect." Defendants Zalewski and Driver Logistics failed to comply with Rule 9(c) and are thus subject to dismissal. The lack of attention to the preparation of the transcript on the part of Zalewski, Driver Logistics and GAF presents an additional ground to find inexcusable neglect. Therefore, Plaintiffs move this Court to dismiss the appeal filed on behalf of each defendant.

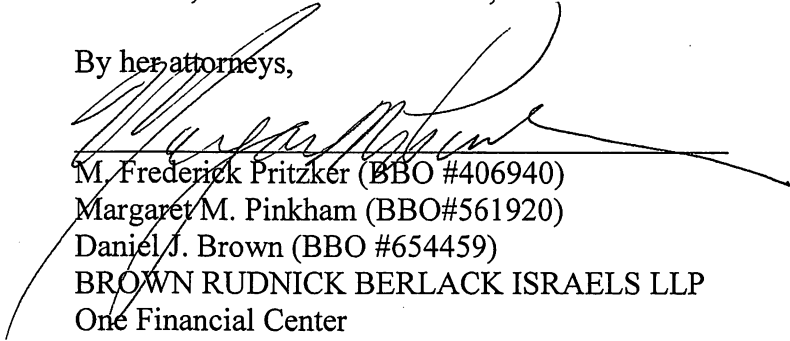
Further, "courts have the inherent power to dismiss an action which the [appellant] has not prosecuted diligently." See Maciuca v. Papit, 31 Mass. App. Ct. 540, 544 (1991). Although due process considerations may set the outer limits to that exercise of discretion, those limitations are not as applicable in a situation, as here, where a full and fair hearing on the merits has occurred. See Dickerson v. Attorney Gen., 396 Mass. 740, 743 n.3 (1986) ("The due process clause does not require a State to afford any appellate process whatsoever."). Therefore, this Court may properly exercise its discretion to dismiss the appeal where the defendants have not produced the trial transcript, especially where it is not even clear if any of their bases for appeal require the transcript as part of the record.

WHEREFORE, Plaintiffs ask this Court to exercise that discretion and dismiss the appeals of each defendant for failure to prosecute.

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES,
INDIVIDUALLY, HAROLD RHODES, ON
BEHALF OF HIS MINOR CHILD AND NEXT
FRIEND, REBECCA RHODES,

By her attorneys,



M. Frederick Pritzker (BBO #406940)
Margaret M. Pinkham (BBO#561920)
Daniel J. Brown (BBO #654459)
BROWN RUDNICK BERLACK ISRAELS LLP
One Financial Center
Boston, MA 02111
(617) 856-8200

DATED: April 2nd 2004

2005